



Cabinet Economic Growth and Infrastructure Committee

EGI Min (12) 20/12

Copy No: 43

Minute of Decision

13 September 2012

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Responsible Lending and Changes to Consumer Credit Law

Portfolio: Consumer Affairs

On 12 September 2012, the Cabinet Economic Growth and Infrastructure Committee:

Background

- 1
 - 1.1 **noted** that in October 2011, Cabinet made a number of decisions to provide for responsible lending in the Credit Contracts and Consumer Finance Act 2003 (CCCFA);
 - 1.2 **noted** that submissions on an Exposure Draft Bill detailing proposed amendments to the CCCFA have indicated overwhelming support for responsible lending

[CAB Min (11) 40/5];
- 2 **noted** the following proposals are particularly directed at bringing in tougher consumer credit laws to target loan sharks and protect unwary consumers, which is one of the key actions in the Economic Development 120 Key Actions Plan;
- 3 **noted** that:
 - 3.1 credit repossession is relevant to the responsible management of credit contracts;
 - 3.2 the Law Commission in its report, "Consumers and Repossession: A Review of the Credit (Repossession) Act 1997" (Review of Credit Report), tabled in the House in April 2012, has made a number of recommendations to improve the workability of credit repossession law;
- 4 note that the recommendations from the Review of Credit Report are attached to EGI (12) 190;

Amendments to the CCCFA from consultation on the Exposure Draft Bill

- 5 **noted** there are two areas where unintended costs with compliance with the CCCFA have been identified, that it would be appropriate to address in the Consumer Credit Law Amendment Bill (the Bill):
- 5.1 Voluntary Targeted Rates – the CCCFA continuing disclosure provisions and early repayment provisions do not fit with the administrative arrangements supporting annual rates notifications;
- 5.2 pawn transactions - complying with both the CCCFA and the Secondhand Dealers and Pawnbrokers Act 2004 is problematic regarding interest and disclosure;
- 6 **agreed** to amend the CCCFA to provide a new regulation-making power that particular classes of consumer credit contracts can be exempted from particular sections of the Act;
- 7 **agreed** to exempt, either by way of amendment to the Act or by progressing regulations:
- 7.1 Voluntary Targeted Rates from the requirements in the CCCFA for six-monthly continuing disclosure and early repayment;
- 7.2 pawn transactions from the CCCFA disclosure, continuing disclosure, and early repayment provisions;

Credit Repossession

- 8 **noted** that the Law Commission has recommended in its Review of Credit Report, that:
- 8.1 repossession law is included in the CCCFA and comes under the new responsible lending regime;
- 8.2 a number of improvements to repossession law be made to improve clarity, efficiency and fairness in the application of credit repossession law;
- 9 **agreed** to add to the Bill provisions covering repossession of consumer goods, including consumer goods used to secure non-consumer credit contracts, as currently set out in the Credit (Repossession) Act, subject to amendments as set out below (Law Commission recommendations 1, 4);
- 10 **agreed** that the Bill repeal the Credit (Repossession) Act;
- 11 **noted** that if credit repossession is included in the CCCFA and is covered by the new lender responsibilities provisions, these new provisions will address the Law Commission's recommendations 18 and 28, including consumers obtaining information in a clear and transparent manner;

Credit repossession and responsible lending

- 12 **agreed** that the new lender responsibilities set out in new Part 1A (clause 7) of the Bill apply to credit repossession and specifically provide that the principles or code of responsible lending must:
- 12.1 require creditors or creditors' agents who repossess consumer goods to act responsibly when dealing with a debtor in a credit repossession matter;
 - 12.2 set out the type of repossession conduct that would not be considered responsible;
 - 12.3 set out how the granting of security and repossession of goods, such as children's toys, that have high sentimental value but little or no economic value, should be approached;
 - 12.4 set out what "commercially reasonable" and "reasonable efforts to obtain the best price" mean in different situations, including that repossessed goods must be sold in a manner that provides for competitive bids (Law Commission recommendations 12, 25, 26, 27, 34, 35 and 36);
- 13 **noted** the lender responsibilities set out in the Bill address the Law Commission's recommendations 18 and 28:
- 13.1 to ensure information is given to consumers in a clear and transparent manner with a view to ensure consumer understanding; and
 - 13.2 the code of responsible lending is prepared in consultation with the credit industry and consumers;

Credit repossession, clarity and disclosure about what can be repossessed

- 14 **noted** an important element of responsible lending is clear disclosure to assist a consumer's understanding before entering into a credit contract and during its administration, and that the Law Commission has made several recommendations regarding repossession consistent with this principle;
- 15 **agreed** to amend the CCCFA in the following ways to provide clarity to consumers regarding what can be repossessed:
- 15.1 include a "checklist" as part of disclosure requirements, setting out when repossession can occur (Law Commission recommendation 2),
 - 15.2 clarify the definition of security interest in the CCCFA and provide for a plain English explanation of security interest and the consequences of giving security in schedule 1 of the CCCFA (Law Commission recommendations 3 and 17);

- 16 16.1 **noted** the Law Commission has given particular consideration to whether some goods should not be subject to repossession and has concluded that tools of trade and cars should be available for use as security but the following consumer goods should be excluded: medical equipment, bedding, portable heaters, stoves, washing machines and cooking equipment;
- 16.2 **noted** that in October 2011 Cabinet agreed to amend the CCCFA to require that any goods over which security is taken must be specified in the contract and the goods that are protected on bankruptcy under the Insolvency Act 2006 are also protected from secured creditors (e.g. tools of trade, necessary household furniture, and a motor vehicle up to the value of \$5,000), except if the credit contract is for purchase of the item [CAB Min (11) 40/5];
- 16.3 agree to recommend that Cabinet rescind the decision in paragraph 15.2 above, and
- 17 **agreed**, instead, based on Law Commission's recommendations 5, 8, 9, 10, 13 and 14:
- 17.1 to add to the CCCFA that for consumer goods to be repossessed they must be sufficiently identified in the security agreement/credit contract so they may be individually identified at the time of repossession;
- 17.2 agree to add to the CCCFA that the following goods should not be subject to repossession (except when purchased through a purchase money security): medical equipment, bedding, portable heaters, stoves, washing machines, cooking equipment and refrigerators;
- 17.3 agree to specifically restrict the granting of security and the subsequent repossession of passports, identity documents and credit and cash cards;
- 17.4 agree to add to the CCCFA that other goods or classes of goods deemed to be exempted from repossession may be prescribed by regulation;
- 17.5 agree to add to the CCCFA that taking possession of keys that open or provide access to secured property is deemed to be repossession of the secured property;
- 18 **noted** that Part 2 of the Bill amends the Personal Property Securities Act 1999 to prevent the repossession of after-acquired goods unless added by the debtor and the use of power of attorney by the creditor, and that these amendments address the Law Commission's recommendations 6 and 7;

Disclosure before, when and after a repossession occurs

- 19 **noted** that to provide clearer and more meaningful information to debtors, the Law Commission has recommended improved disclosure before, at the time of and after repossession (recommendations 16, 19, 20, 21, 23, 24, 31, 32);

- 20 **agreed** that the new CCCFA repossession provisions require the pre-possession notice:
- 20.1 includes a statement of the amount needed to reinstate the agreement and payment of that amount should forestall repossession;
 - 20.2 sets out the nature and extent of the default and what the debtor needs to do in order to remedy the default and by when;
 - 20.3 states that doing nothing is not an option;
 - 20.4 provides information about where the debtor may go to access help;
 - 20.5 encourages the debtor to contact the creditor;
 - 20.6 provides details about the right to seek relief in circumstances of hardship;
 - 20.7 provides details about dispute resolution processes and what the debtor needs to do if he or she disputes some aspect of the situation;
 - 20.8 advises debtors to retrieve and/or delete personal information stored on computers or other devices before repossession takes place (Law Commission recommendation 11);
- 21 **agreed** that the CCCFA provides the documents that must be produced at the time of repossession additional to those to be carried forward from the Credit (Repossession) Act at sections 17 and 18 include:
- 21.1 a copy of the credit contract;
 - 21.2 a document setting out the debtor's name and property address, the repossession agent's licence number and the reason why the goods are being repossessed; and
 - 21.3 a document outlining the requirements that a creditor or repossession agent must fulfil in order to repossess goods and the debtor's rights if he or she believes that the creditor or agent has not met those requirements;
 - 21.4 a statement that the premises have been entered, the date of entry and an inventory of consumer goods taken;
 - 21.5 a statement why the goods have been repossessed, where the goods will be stored, the creditor's contact details and the debtor's rights under the consumer credit repossession legislation following the repossession of goods, including the right to make a complaint about the creditor's or agent's conduct;
- 22 **agreed** to add to the CCCFA that the form and content of the pre-possession and post-possession notices may be prescribed by regulation;
- 23 **agreed** to provide in the CCCFA and Part 2 of the Schedule to the Electronic Transactions Act 2002 that if the parties agree, the repossession notice requirements may be fulfilled by electronic communication (Law Commission recommendation 24);

The repossession process

- 24 **noted** the Law Commission has recommended clarifying the rules about “goods at risk”, whether repossession must be completed before 9.00pm and allowing repossession on Sundays (Law Commission recommendations 29, 30 and 43);
- 25 **noted** allowing repossession on Sundays could be controversial as Sunday is the day of worship and day for family for many people;
- 26 **agreed** to provide in the Bill that:
- 26.1 repossession is allowed on Sundays; and
- 26.2 repossession must finish by 9.00pm;
- 27 **invited** the Minister of Consumer Affairs to draw the proposal to allow Sunday repossessions to the attention of the Select Committee examining the Bill and ask for the Committee’s particular consideration of whether it should proceed;
- 28 **agreed** the definition of “goods at risk” includes where the creditor has reasonable grounds to consider the consumer is offering to sell the goods;
- 29 **noted** the Law Commission considered the various timeframes for pre-possession, repossession and post-possession requirements and have recommended some changes to achieve a level of consistency where possible, and have recommended prepossession notices have a clear expiry date (Law Commission recommendations 22, 37, 38 and 39);
- 30 **agreed** that the following timeframes carried forward from the Credit (Repossession) Act to the CCCFA are amended:
- 30.1 the requirement at section 23 becomes that following service of a post-possession notice, but before the 15 day period has expired, the debtor may request the creditor to sell consumer goods immediately after the request;
- 30.2 the minimum 14 days specified in section 29(2)(b) of the Credit (Repossession) Act 1997 concerning failure by debtor to remedy fault becomes a minimum of 15 days;
- 30.3 the 10 days specified in section 33 to give the debtor and others a written statement of account becomes within five working days after the sale of goods;
- 31 **agreed** to prepossession notices having an expiry period of 28 days;
- Selling of repossessed goods and debtor’s liability post repossession**
- 32 **noted** the Law Commission has identified that credit repossession law is not clear regarding debtor’s liability after the sale of repossessed items;
- 33 **agreed** to provide in the CCCFA that a debtor’s obligations are frozen at the time of the sale of the secured property;

Remedies and penalties

- 34 **noted** the Law Commission has concluded there should be criminal offences for breaches of pre-possession and repossession requirements given they provide protection to debtors, for example, concerning entry of a property, and has made several recommendations to strengthen repossession penalties (recommendations 40 and 41);
- 35 **agreed** that the CCCFA include criminal offences and penalties for breaches of the protections regarding entry of residential premises and provision of documents on entry of premises to apply to repossession agents and creditors who are complicit in the breach (sections 15, 17 and 18 of the Credit (Repossession) Act);
- 36 **agreed** that the CCCFA include orders for civil remedies against creditors and repossession agents with respect to breaches of the repossession requirements and statutory damages for breaches of prepossession disclosure requirements;
- 37 **noted** the Law Commission has recommended aligning the offences and penalties regime and the relief provisions for repossession with the penalties and offences regime and the relief provisions in the CCCFA (recommendations 45, 46, 47 and 48);
- 38 **agreed** that:
- 38.1 the maximum penalty level for obstructing a creditor or agent is \$10,000 (as in the Credit (Repossession) Act);
- 38.2 the maximum penalty is \$30,000 for all other credit repossession offences (as in the CCCFA);
- 38.3 the statutory damages available for breaches of repossession disclosure requirements are the same as those currently available for breaches of the CCCFA disclosure requirements;
- 38.4 the relief provision for breaches of consumer credit repossession requirements match the relief provisions of the CCCFA to the extent possible (Law Commission recommendations 45, 42 and 48);
- 39 **noted** the Law Commission has identified an anomaly between the new Criminal Procedure Act 2011 limitation periods and those in the CCCFA and the Credit (Repossession) Act;
- 40 **agreed** that:
- 40.1 section 105 of the CCCFA is repealed;
- 40.2 the limitation periods in section 25 of the Criminal Procedure Act 2011 apply to offences in the CCCFA including new credit repossession offences (Law Commission recommendation 44);

Dispute resolution

- 41 **noted** the Law Commission:
- 41.1 considers financial sector dispute resolution schemes, which all financial service providers including credit providers must belong to, can provide the appropriate forum to deal with many complaints about credit repossession practices, including oppressive exercising of powers;
 - 41.2 has recommended that section 63 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 require scheme providers to have rules to cover repossession matters (recommendations 49, 50);
- 42 **agreed** to amend section 63 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 to:
- 42.1 cover repossession matters, including oppressive exercising of powers;
 - 42.2 provide for adequate compensation to be awarded to complainants for non-financial loss, humiliation, stress, and inconvenience suffered as a result of the financial service providers' actions, as well as financial loss or damage, where the complaint relates to a credit repossession matter;
- 43 **invited** the Minister of Consumer Affairs to invite the financial sector dispute resolution schemes to consider amending their rules to provide for credit repossession complaints;
- 44 **agreed** to provide in the CCCFA a mechanism for halting repossession when a repossession matter is the subject of a complaint to a creditor or to a dispute resolution scheme (made within 14 days of the creditor's decision on the complaint) (Law Commission recommendations 51 and 52);

Licensing

- 45 **noted** the Law Commission has recommended licensing of credit repossession agents to provide greater protection to debtors and creditors from repossession agents who act illegally and unreasonably (recommendation 56);
- 46 46.1 **agreed** to licensing of credit repossession agents;
- 46.2 **invited** the Ministers of Consumer Affairs and Justice to determine whether this is best achieved through the Private Security Personnel and Private Investigators Act or other appropriate legislation;

Other recommendations

- 47 **noted** that the Law Commission's recommendations 54 and 55 concerning banning a person from being a creditor will be addressed by credit repossession being incorporated into the CCCFA;
- 48 **noted** that the Law Commission's recommendation 53 concerning access to dispute resolution when a credit contract is sold, is dealt with in existing law by the CCCFA and the Financial Service Providers (Registration and Dispute Resolution) Act 2008;

- 49 **invited** the Minister of Consumer Affairs to discuss with the Commerce Commission the appropriate mechanism for addressing the Law Commission's recommendation 58 to require creditors to report 6 monthly to the regulator the number of repossessions undertaken;

Car disabling devices

- 50 **noted** that the Law Commission's report included discussion on whether car disabling devices should be considered a form of repossession;
- 51 **agreed** that disabling devices are not deemed a form of repossession but that because they are a form of interference with property rights:
- 51.1 the CCCFA provide that creditors may only disable a car (or other good) if a loan is in default and after the debtor has been given reasonable warning;
 - 51.2 that there must be disclosure about how the device system works and how to obtain use of a disabled car in emergencies;

Responsible Regulator

- 52 **noted** that in October 2011 Cabinet directed Ministry for Consumer Affairs to consult the Treasury, the Ministry of Economic Development, the Commerce Commission, and the FMA on the proposal that the FMA [rather than the Commerce Commission] have regulatory responsibility for the CCCFA and the Credit (Repossession) Act 1997, any transitional arrangements and financial implications [CAB Min (11) 40/5];
- 53 **noted** that the investigation found that either party would be well placed to be the responsible regulator but there are beneficial alignments in the status quo (Commerce Commission) particularly monitoring and enforcement of credit law alongside the Fair Trading Act 1986;
- 54 **agreed** that the Commerce Commission remain the responsible regulator for monitoring and enforcement of the CCCFA, including repossession (also addresses Law Commission recommendation 57);

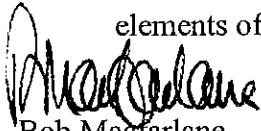
Legislation

- 55 **noted** a Consumer Credit Law Amendment Bill has a category 4 priority (to be referred to a select committee in 2012) on the 2012 Legislative Programme;
- 56 **invited** the Minister of Consumer Affairs to issue further drafting instructions to the Parliamentary Counsel Office for the Consumer Credit Law Amendment Bill covering the above decisions;

Publicity

57 **noted** that the paper under EGI (12) 190, the corresponding Minute and the Regulatory Impact Statement will be posted on the Consumer Affairs website, at an appropriate time;

58 **noted** that the Minister of Consumer Affairs may release a press statement on the main elements of the above proposals



Bob Macfarlane
Committee Secretary

Reference: EGI (12) 190

Present:

Hon Bill English (Chair)
Hon Gerry Brownlee
Hon Steven Joyce
Hon David Carter
Hon Phil Heatley
Hon Kate Wilkinson
Hon Nathan Guy
Hon Craig Foss
Hon Amy Adams
Hon Maurice Williamson
Hon Simon Bridges
Hon Peter Dunne
Hon John Banks

Officials present from:

Office of the Prime Minister
Officials Committee for EGI

Distribution:

Cabinet Economic Growth and Infrastructure Committee
Office of the Prime Minister
Chief Executive, DPMC
Director, PAG, DPMC
PAG Subject Advisor, DPMC
Deborah Roche, PAG, DPMC
Secretary to the Treasury
Peter Martin, Treasury
Chief Executive, MBIE
Chief Executive, MBIE (Economic Development)
Kirstie Hewlett, MBIE
Minister of Justice
Secretary for Justice
Minister of Pacific Island Affairs
Chief Executive, Ministry of Pacific Island Affairs
Minister for Social Development
Chief Executive, MSD
Paul Stocks, MPI
Liz Sinclair, SSC
Chief Executive, MBIE (Consumer Affairs)
Chief Executive, Te Puni Kokiri
Chief Parliamentary Counsel
Legislation Coordinator

