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# Repossession Guidelines



# Contents



<b>Purpose and scope</b>	<b>2</b>
<b>Overview of the repossession rules</b>	<b>3</b>
<b>Contracts that are subject to the repossession rules</b>	<b>5</b>
What is a consumer credit contract?	5
What is a security interest?	5
What are consumer goods?	6
The consumer credit contract must give a right to repossess	6
Restrictions on consumer goods that can be repossessed	7
Lender responsibility principles apply	8
Lenders cannot contract out of the repossession provisions	9
<b>Rules that apply before, during and after repossession</b>	<b>10</b>
<b>Rules that apply before repossession</b>	<b>10</b>
The lender must issue a repossession warning notice	10
Notice not required where goods are considered to be “at risk”	11
Circumstances when the borrower may voluntarily deliver the goods to the lender	12
<b>Rules that apply during repossession</b>	<b>13</b>
Summary of rules that apply to a repossession or entry into premises	13
Only licenced persons can conduct repossessions	14
Timing of repossession	14
Entering premises for repossession purposes	15
<b>Rules that apply after repossession</b>	<b>17</b>
The lender must issue a post-repossession notice	17
Requirements relating to post-repossession notices	17
The borrower has the right to reinstate or settle the contract	18
Rules relating to the sale of goods	19
The lender must issue a statement of account after sale	21
<b>Consequences of breaching repossession laws</b>	<b>22</b>
<b>Penalties and consequences for breach of repossession obligations</b>	<b>22</b>
Licencing offences	22
Repossession offences	22
<b>Infringement offences, notices and fees</b>	<b>24</b>
Infringement notices not available in some circumstances	24
Other consequences	25
Example of a hypothetical timeline for repossession:	26

# Purpose and scope

- 1 The Commerce Commission (the Commission) is responsible for enforcing the Credit Contracts and Consumer Finance Act 2003 (**CCCF Act**), which regulates conduct in New Zealand's credit markets.
- 2 The CCCF Act contains rules relating to repossession which apply to consumer credit contracts (**repossession rules**).
- 3 The repossession rules were introduced by the Credit Contracts and Consumer Finance Amendment Act 2014 (**2014 Amendment Act**). This made a number of changes to the CCCF Act including adopting and updating existing repossession rules previously found in the Credit (Repossession) Act 1997 (**CRA**) and introducing lender responsibility principles (**principles**). Further amendments have been made to the repossession rules since the 2014 Amendment Act.<sup>1</sup> The main change is that the repossession rules now only apply to consumer credit contracts.
- 4 Depending on when the contract was entered into, different rules may apply:
  - 4.1 the CRA applies to **credit contracts** entered into before 6 June 2015<sup>2</sup>;
  - 4.2 the repossession rules apply to **credit contracts** entered into between 6 June 2015 and 12 January 2020;<sup>3</sup> and
  - 4.3 from 13 January 2020 the repossession rules only apply to **consumer credit contracts**.<sup>4</sup>
- 5 We have issued these guidelines to:
  - 5.1 explain the repossession rules; and
  - 5.2 explain how the lender responsibility principles apply to repossession.
- 6 These guidelines focus on the repossession rules set out in the CCCF Act for:
  - 6.1 credit contracts entered into between 6 June 2015 and 12 January 2020; and
  - 6.2 consumer credit contracts that provide for a security interest in consumer goods.
- 7 We have not provided guidance on the CRA, except where comment on the CRA assists in understanding the repossession rules in the CCCF Act.
- 8 These guidelines are a summary and are not intended to be legally binding. Examples are intended to be indicative, and can provide only limited guidance until there is case law on new aspects of the legal framework. Each matter will be considered on its own unique facts.
- 9 Other useful guidance on the repossession rules and responsible repossession practices can be found in the Responsible Lending Code (the **Code**), published by the Minister of Commerce and Consumer Affairs<sup>5</sup>.
- 10 References are to sections of the CCCF Act.<sup>6</sup>
- 11 We may revise these guidelines from time to time in accordance with legal developments and our organisational objectives and priorities.

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1 See the Credit Contracts Legislation Amendment Act 2019 and Regulatory Systems (Economic Development) Amendment Act 2019.

2 See Schedule 1AA, clause 3 and the exceptions in subsections (2) and (3) together with clause 4.

3 'Credit contracts' are defined at s 5.

4 Note that Schedule 1AA, clause 4 provides that creditors may, by notice to debtors, apply Part 3A to existing agreements.

5 Available online at <https://www.mbie.govt.nz/dmsdocument/13325-responsible-lending-code>.

6 The repossession rules are set out in Part 3A of the CCCF Act in ss 83A to 83ZR. Note that although not directly related to repossession, from 1 December 2021 there are new debt collection disclosure requirements under section 132A. What information is required to be disclosed is at regulation 23 of the Credit Contracts and Consumer Finance Regulations 2004.

# Overview of the repossession rules

- 12 The repossession rules explain the rights and responsibilities of lenders and borrowers in relation to goods that can be, or have been, repossessed because of borrower default or the secured goods becoming 'at risk'.
- 13 The rules do not create a right of repossession or a right to enter premises. However, if the consumer credit contract provides for a right of repossession over secured consumer goods and/or a right of entry, then the repossession rules apply before, during, and after the repossession action.
- 14 The repossession rules contain restrictions on the goods that can be repossessed. Only consumer goods specifically identified in the contract can be repossessed. There are also restrictions on taking security over, and repossession of, certain household necessities and some important documents.<sup>7</sup>
- 15 The repossession rules also set out procedural requirements that a lender and its repossession agents must follow before, during and after repossession. These requirements include:
  - 15.1 the types of information and documents that must be provided to borrowers and/or the occupants of premises;
  - 15.2 the timeframes under which lenders can take repossession action; and
  - 15.3 the steps a lender must take when selling or disposing of repossessed goods.
- 16 If the repossession rules are breached, the lender can be convicted and fined under the CCCF Act (companies up to \$600,000 per breach, individuals up to \$200,000), ordered to pay damages or to refund money to borrowers and have their certification under the CCCF Act suspended or cancelled. The Commission can also issue infringement notices, for more minor breaches of the rules, with fines of \$1,000 (including against the repossession agent).<sup>8</sup> The Commission may also apply to have a person banned from acting as a creditor.
- 17 Lenders<sup>9</sup> must also comply with the lender responsibility principles when engaging in repossession. The lender responsibility principles are that a lender must:
  - 17.1 exercise the **care, diligence and skill of a responsible lender**; and
  - 17.2 comply with the **specific lender responsibilities** set out in the CCCF Act, relating to:
    - 17.2.1 the **enquiries** a lender must make before lending money to a borrower;
    - 17.2.2 the **assistance** a lender must give a borrower to reach an informed decision;
    - 17.2.3 the requirement that a lender must treat a borrower and their property reasonably and in an **ethical** manner; and
    - 17.2.4 the lender's obligation to **comply** with all of its legal obligations.

<sup>7</sup> Section 83ZN.

<sup>8</sup> Credit Contracts and Consumer Finance (Infringement Offences) Regulations 2015, Regulation 4 states that the infringement for an infringement fee against section 102A of the CCCF Act is \$1,000.

<sup>9</sup> Lender means a creditor under a consumer credit contract or a transferee under a buy-back transaction, see s 9B(1). To comply with s 9C, the creditor will be responsible for ensuring its agents comply with the responsible lending principles.

- 18 The Code (Chapter 13: Repossession) supplies useful guidance to lenders as to how they can comply with the lender responsibility principles. The Code summarises the applicable lender responsibilities as follows:
- 18.1 A lender must, in relation to an agreement with a borrower, treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner)(see s 9C(3)(d)(iii) CCCF Act).
  - 18.2 A lender must, in relation to an agreement with a borrower, meet all the lender’s legal obligations to the borrower, including under this Act, which include obligations in relation to credit repossession (see s 9C(3)(f)(i) CCCF Act).
  - 18.3 A lender must, in relation to a relevant guarantee that is taken by the lender, treat the guarantor reasonably and in an ethical manner, including when breaches of a consumer credit contract to which the guarantee applies have occurred or may occur or when other problems arise.
- 19 If the lender responsibility principles are breached, a lender can be ordered to pay damages, to refund money or to pay compensation. The Commission may also apply to have a person banned from acting as a creditor where they have failed to comply with the principles on more than one occasion. The lender may also have their certification under the CCCF Act suspended or cancelled.
- 20 To assist lenders, repossession agents, borrowers and their respective advisers in understanding the repossession rules, these guidelines discuss:
- 20.1 what contracts are subject to the repossession rules (including restrictions on goods that can be repossessed);
  - 20.2 how the lender responsibility principles apply to lenders who take repossession action;
  - 20.3 the rules that apply before a lender may repossess consumer goods;
  - 20.4 the rules that apply at the time of repossession;
  - 20.5 the rules that apply following repossession; and
  - 20.6 the consequences of breaching repossession laws.
- 21 An example of a timeline for repossession is set out at Appendix One.



# Contracts that are subject to the repossession rules

- 22 The repossession rules apply to **consumer credit contracts**, under which a lender has a security interest giving it a right to repossess **consumer goods**, or a right to enter premises to repossess or inspect secured goods. These terms are explained further below.

## What is a consumer credit contract?

- 23 A **consumer credit contract** is what most people think of as ‘personal lending’. It is defined as a credit contract (a contract under which credit is or may be provided) where all of the following apply:<sup>10</sup>
- The borrower is a natural person.
  - The credit is to be used, or is intended to be used, wholly or predominantly for personal, domestic or household purposes.
  - Fees or interest are or may be charged under the contract or the lender takes or could take a security interest.
  - The lender is in the business of providing credit.
- 24 From 1 June 2020 contracts entered into by mobile traders will also be treated as consumer credit contracts whether or not they meet the criteria set out above. See our mobile trader guidelines for information about what is a mobile trader.<sup>11</sup>
- 25 Note it is important to consider when the contract was entered into as that will determine whether the contract is covered by the repossession rules outlined in these guidelines.<sup>12</sup>

## What is a security interest?

- 26 A security interest is an interest in property that secures payment or performance of an obligation under a credit contract.<sup>13</sup> The definition of property is very wide and includes land, money, goods, goodwill, and every valuable thing, whether real or personal, and whether situated in New Zealand or elsewhere.
- 27 A lender can take a security interest over a particular item, such as a vehicle or a specifically described chattel. The items that are subject to the security interest must be specifically identified in the credit contract. This means that there must be a description of each of the secured goods that is sufficient to enable them to be identified. It is insufficient to merely describe the goods by kind. We discuss below what it means to specifically identify goods.

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10 Section 11(1).

11 A mobile trader is someone who, in person and not at fixed premises, offers or agrees to supply consumer goods to an individual, either under a credit sale or where the goods are partly or fully financed by an associated company under a consumer credit contract. For more information refer to the Mobile Trader Guidelines available at <http://www.comcom.govt.nz/business/dealing-with-typical-situations/selling-goods-and-services/mobile-traders>.

12 As noted at [4.2] above, from 6 June 2015 to 13 January 2020 the repossession rules also applied to “credit contracts” (as defined in section 7).

13 Section 5. A security interest may also apply to a buy-back transaction.

## What are consumer goods?

- 28 The repossession rules apply to the repossession of **consumer goods** under a consumer credit contract.<sup>14</sup> Under the CCCF Act, consumer goods are goods which are used or acquired primarily for personal, domestic or household purposes.<sup>15</sup>
- 29 It is the purpose for which the consumer acquired or purchased the goods rather than the nature of the goods themselves that determines whether they are consumer goods or not.

### Example

James takes out a loan to buy a cell phone for personal use. The lender secures the loan by taking a security interest in the cell phone. This is a consumer credit contract (because the loan is for personal reasons) and the goods are consumer goods.

The repossession rules apply.

### Example

Jono is a taxi driver. Jono sometimes uses his taxi for personal reasons but he primarily uses it for the purposes of his business. Jono takes out a loan secured against his taxi to go overseas to visit a sick relative.

The loan is a consumer credit contract (because the loan is for personal reasons) but the goods used as security are not consumer goods – the car was acquired for use in a business and Jono uses it primarily as a taxi and not for personal purposes.

The repossession rules do not apply.

29.1 Certain kinds of essential consumer goods may not be repossessed (see below).

## The consumer credit contract must give a right to repossess

- 30 The CCCF Act does not create a right to repossess consumer goods, or a right to enter premises.<sup>16</sup> The consumer credit contract must give the lender the right to repossess and/or to enter premises for the purposes of repossession or for any other purpose in connection with consumer goods over which there is a security interest.<sup>17</sup>

14 Section 83C states that Part 3A applies where a consumer credit contract provides that a creditor has a right to (a) repossess consumer goods over which there is a security interest and (b) enter premises to repossess consumers goods over which there is a security interest, or for any other purpose in connection with those consumer goods.

15 Section 5.

16 Section 83D(1).

17 Section 83C(1). These 'other purposes' must be legitimately related to the security interest over the consumer goods, such as the purpose of inspecting the goods to make sure that they still exist.

## Restrictions on consumer goods that can be repossessed

- 31 The repossession rules contain restrictions on the consumer goods that can be repossessed.

### Only specifically identified goods can be repossessed

- 32 A lender can only repossess goods that have been **specifically identified** in the consumer credit contract as being subject to a security interest, or goods that the borrower has acquired as a replacement for the goods that are specifically identified in the contract.<sup>18</sup>
- 33 There must be an adequate description of the secured goods, item by item, that enables them to be identified. It is not sufficient to describe the goods by kind.

#### Example

Describing a television that is being used to secure a loan as “TV” or even “40 inch TV” is insufficient. Good practice would be to include detailed information such as “40 inch Sony Bravia HD TV model W800B with remote control”, as this would avoid any dispute about the identity of the goods and whether they match the security specification. Best practice would also include specifically identifying the goods by the item’s serial number.

- 34 This requirement means that a lender cannot repossess consumer goods in reliance upon an “all present and after-acquired property” (APAAP)<sup>19</sup> security clause.
- 35 APAAP clauses typically purport to secure all present property of the borrower, and any property acquired by the borrower after the loan is entered into. All consumer goods liable to be repossessed must be specifically identified.<sup>20</sup> APAAP clauses fail this requirement because they are general and non-specific.
- 36 Including APAAP clauses in consumer credit contracts, and representing that they are enforceable or that unspecified goods can be repossessed, is also likely to be misleading, deceptive and/or confusing in breach of the Fair Trading Act and/or the CCCF Act. As a result, lenders may wish to consider whether APAAP clauses should be included in consumer credit contracts at all.
- 37 That is not to say that a lender can never obtain a security interest in after acquired property, or repossess it. To enable this to happen, the lender must obtain the borrower’s agreement to amend the agreement so that the after-acquired property is specifically identified as being subject to a security interest.
- 38 In obtaining the borrower’s consent, a lender must act responsibly and in accordance with the lender responsibility principles.

18 Section 83F.

19 Section 36 Personal Properties Security Act 1999.

20 Section 83F. Also, note that after-acquired consumer goods may be sufficiently identified if they are “specifically appropriated” by the borrower when they are acquired. The lender may not “specifically appropriate” consumer goods itself as the agent or attorney of the borrower: s 44 Personal Property Securities Act 1999.



## Restriction on taking security over household necessities and important documents

- 39 Lenders cannot take security over or repossess certain household necessities and important documents.
- 40 The **household necessities** that cannot be used as security or be repossessed are:<sup>21</sup>
- Beds and bedding
  - Cooking equipment including stoves
  - Medical equipment
  - Portable heaters
  - Washing machines
  - Refrigerators.
- 41 The only exception to this rule is where the lender has a “purchase money security interest”<sup>22</sup> over the goods. This will occur where the loan is taken out specifically to purchase the consumer good. For example, a bed purchased as a credit sale can be subject to a security interest,<sup>23</sup> and therefore could be subject to repossession and the repossession rules.
- 42 Lenders also cannot take security over or repossess the following kinds of **important documents**:<sup>24</sup>
- Travel documents
  - Identification documents
  - Bank cards.
- 43 There are also rules relating to the repossession of “accessions”, which are goods that are installed in, or affixed to, other goods. A lender looking to repossess accessions must also comply with sections 125 to 131 of the Personal Property Securities Act 1999.
- 44 In future, regulations may be passed which expand the lists of goods or documents that may not be taken as security.

## Lender responsibility principles apply

- 45 Every lender, and its agent(s), must comply with the lender responsibility principles.<sup>25</sup> The principles are that every lender must, at all times:
- 45.1 exercise the care, diligence, and skill of a responsible lender in all dealings with a borrower or a guarantor; and
- 45.2 comply with all the lender responsibilities specified in section 9C(3), (4) and (5) of the CCCF Act.<sup>26</sup>
- 46 The lender responsibilities relevant to repossession include that a lender must:
- 46.1 treat the borrower and their property (or property in their possession) **reasonably and in an ethical manner**, including:
- 46.1.1 when breaches of the agreement have occurred, or may occur, or when other problems arise;
- 46.1.2 when a debtor under a consumer credit contract suffers unforeseen hardship; and
- 46.1.3 during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner).<sup>27</sup>

21 Section 83ZN (1)(a).

22 Section 16(1) Personal Properties Security Register 1999.

23 ‘Credit sales’ are defined at s 5.

24 Section 83ZN(1)(b).

25 Section 9C(1).

26 Section 9C(2).

27 Section 9C(3)(d)(i) to (iii).

- 46.2 **Assist the borrower** to make an informed decision including by ensuring that information is not misleading, deceptive or confusing.<sup>28</sup>
- 46.3 Not exercise any right (including a right of repossession or entry onto premises) in an **oppressive** manner.<sup>29</sup>
- 46.4 Meet all **legal obligations** owed to the borrower (including under the FTA and the CCCF Act).<sup>30</sup>
- 47 The Code provides guidance on making responsible decisions before, during and after repossession and more generally, even when acting in accordance with the requirements of the CCCF Act. For example, the Code says a responsible lender should try to time their repossession to occur when someone is home, even if the lender has the contractual right to enter when no one is home.<sup>31</sup>
- 48 It is important to note that the Code provides guidance as to how a lender may comply with the principles. We note that evidence of compliance with the Code is not conclusive evidence of compliance with the lender responsibility principles. Lenders must have regard to the Code's guidance, but must measure their compliance against the principles.

## Lenders cannot contract out of the repossession provisions

- 49 The CCCF Act contains a general rule that lenders cannot contract out of any of the provisions of the CCCF Act, including the repossession provisions and the lender responsibility principles.<sup>32</sup> But a loan contract can:<sup>33</sup>
- 49.1 49.1 impose a stricter duty on the lender than is imposed by the CCCF Act; or
- 49.2 49.2 provide a remedy more advantageous to the borrower or guarantor than the remedies provided by the CCCF Act.
- 50 A lender who purports to contract out of the CCCF Act commits an offence against section 13(i) of the Fair Trading Act.<sup>34</sup> Section 13(i) of the Fair Trading Act prohibits false or misleading representations as to the existence, exclusion or effect of any right.

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28 Section 9C(3)(b).

29 Section 9C(3)(e).

30 Section 9C(3)(f).

31 Responsible Lending Code at 13.11.a.

32 Section 135(1).

33 Section 135(3).

34 Section 135(2).

# Rules that apply before, during and after repossession

- 51 This section of the guidance provides a summary of the rules that apply before, during and after repossession of consumer goods.
- 52 In this section of the guidance, any reference to a “lender” means the lender or its agent.

## Rules that apply before repossession

- 53 A lender may look to begin the repossession process where:
  - 53.1 the contract provides for the **right** to repossess;<sup>35</sup>
  - 53.2 the consumer goods are subject to a **security interest** and have been specifically identified in the contract; and
  - 53.3 the borrower is in **default** or the goods are “**at risk**” (see paragraph 61 below for definition of “at risk”).
- 54 Where those circumstances exist, there are a number of rules that a lender must then follow before repossessing any consumer goods, including certain information that the lender must give to the borrower. A summary of these rules are set out below.

### The lender must issue a repossession warning notice

- 55 Unless the goods are “at risk” and urgent repossession becomes desirable, a lender must give advance written notice to the borrower and guarantor (and any other person with an interest in the goods)<sup>36</sup> of its intention to repossess consumer goods. This written notice is called a **repossession warning notice**.<sup>37</sup> There are rules on how repossession warning notices, and other documents required or authorised by the repossession rules, should be served on borrowers, guarantors and other interested parties. These rules are set out in section 83ZQ of the CCCF Act.
- 56 The format of a repossession warning notice is not specifically prescribed at present although a prescribed form might be introduced by regulation at some time in the future.
- 57 The repossession warning notice must contain all of the key information relevant to the repossession, as set out in Schedule 3A of the CCCF Act. Lenders should review Schedule 3A closely when preparing a repossession warning notice. A number of other matters to be covered in the notice are also the subject of other provisions of the CCCF Act and so lenders should review those provisions as well.<sup>38</sup> We discuss some of these later in this guidance.

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35 Sections 83B and 83E.

36 Section 83G(1)(c) and (d).

37 Section 83G.

38 For example, see s 83F regarding the requirement that the lender specifically identifies the consumer goods that are the subject of the security interest, and section 83H regarding the borrower’s right to voluntarily deliver goods to the lender at an agreed place

- 58 The repossession warning notice must be provided to the borrower at least **15 days before the repossession occurs**.<sup>39</sup> The notice must give the borrower 15 days' notice to remedy the default and specify how it can be remedied (if it can be remedied).<sup>40</sup> For example, a notice might state that default could be remedied by:
- paying arrears, or
  - taking some other action which should have been taken, like insuring secured goods where insurance is a requirement under the contract.
- 59 A lender must give a copy of the repossession warning notice to any other party that the lender knows to have a security interest in the consumer goods. This includes any party who has registered a financing statement in respect of the goods on the Personal Property Securities Register.<sup>41</sup>
- 60 While a repossession warning notice must be issued at least 15 days before repossession, it cannot be relied upon more than 60 days after it is served on a borrower.<sup>42</sup> This is because a repossession warning notice expires 60 days after it has been served. After that time, the lender cannot rely on the notice and must issue a new notice before repossession action can be taken. If the borrower makes an application for substantial hardship during the 60 day period, then time stops running while the application is considered and the time taken to consider the application is not counted towards the 60 day expiry period.<sup>43</sup>

### Notice not required where goods are considered to be “at risk”

- 61 If a lender believes, on reasonable grounds, that secured goods are “**at risk**,” the lender can repossess the goods without issuing a repossession warning notice.<sup>44</sup> The burden of proving that the goods are at risk falls on the lender.<sup>45</sup>
- 62 “**At risk**” means that the lender has reasonable grounds to believe that the goods have been or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold or disposed of in a way not provided for in the consumer credit contract.<sup>46</sup> However, consumer goods will not be “at risk” merely because another lender has issued a repossession warning notice in relation to the consumer goods.<sup>47</sup>



39 Section 83G(3)(e). Any reference to a number of days in this guidance is a reference to calendar days, unless working days are specified. Working days are as defined in s 29 of the Interpretation Act 1999.

40 Section 83G(3)(f).

41 Section 83G(1)(d).

42 Section 83G(4).

43 Section 83G(5).

44 Section 83G(2).

45 Section 83E(4).

46 Section 83E(2).

47 Section 83E(3).

- 63 The Code provides further useful guidance on how lenders should assess whether secured goods are at risk:
- 63.1 To comply with the lender responsibilities, lenders who rely on the “at risk” grounds to repossess goods should make and retain a record of the reasonable grounds for their belief that goods were at risk.<sup>48</sup>
- 63.2 The existence of one of following facts is unlikely on its own to provide the lender with reasonable grounds for a belief that goods are at risk:
- (a) the borrower is in default under the agreement;
  - (b) the borrower has changed address without notifying the lender; or
  - (c) insurance over the goods has lapsed.

#### Example

A lender identifies that a vehicle that is security for a loan is being offered for sale online. This would tend to suggest that the borrower who owns the vehicle intends to dispose of it and as a result, the lender is likely to have the right to repossess the vehicle on the basis that it is at risk.

#### Example

A lender receives notice from an insurer that the insurance on secured goods has lapsed. The lender is unlikely to have the right to repossess the goods on the basis that they are at risk solely because they are not insured.

If insurance was a condition of the loan, the lender could contact the borrower or issue a default notice requiring the borrower to remedy the default. Default also provides a basis for repossession and a repossession warning notice could be issued.

## Circumstances when the borrower may voluntarily deliver the goods to the lender

- 64 In certain circumstances, after receiving a repossession warning notice, the borrower may voluntarily deliver to the lender the consumer goods over which the lender has a security interest, instead of waiting for them to be repossessed.
- 64.1 If the contract was entered into **before 6 June 2015** (ie, the CRA applies), the borrower can only voluntarily deliver the goods to the lender if the lender consents to the delivery, or it is in accordance with a term of the contract which permits the borrower to deliver the goods to the lender.
- 64.2 If the contract was entered into on or **after 6 June 2015** and the lender has issued a repossession warning notice, the borrower can choose to deliver the goods to the lender at the place specified in the repossession warning notice.<sup>49</sup> The lender is required to specify a reasonable place to deliver the goods. The Code provides useful guidance on what might be a reasonable place.<sup>50</sup>
- 65 After delivery the lender must treat the goods as if they had been repossessed and the post-repossession rules then apply to the transaction.

48 Responsible Lending Code at 13.5 and 13.6.

49 Section 83H

50 Schedule 3A(h)(iii) and Responsible Lending Code at 13.7.

# Rules that apply during repossession

- 66 A lender may repossess consumer goods, or enter premises for the purposes of repossession, where all of the following preconditions are met:
  - 66.1 The consumer credit contract provides for the right to enter and to repossess.
  - 66.2 The consumer goods are subject to a security interest and have been specifically identified in the contract.
  - 66.3 The borrower is in default (and meets the requirements of paragraph 66) or the goods are at risk (see definition at paragraph 61 above).
  - 66.4 There is no unresolved complaint from the borrower to the lender in relation to any enforcement action, or unresolved hardship application by the borrower.<sup>51</sup>
- 67 Where the borrower is in default,<sup>52</sup> the lender must ensure:
  - 67.1 it has issued a valid repossession warning notice.
  - 67.2 15 days have passed since the repossession warning notice was served on the borrower and it is less than 60 days since the notice was served.

## Summary of rules that apply to a repossession or entry into premises

- 68 If those preconditions for repossession or entry exist, there are a number of rules that the lender (or repossession agent) must follow during the repossession:
  - 68.1 Only licenced lenders or repossession agents can conduct repossessions or enter any premises to inspect or repossess consumer goods.
  - 68.2 There are restrictions on when a right to enter residential premises for repossession purposes can be exercised. There are no restrictions on when the right to enter non-residential premises may be exercised, other than the requirement that all lenders and repossession agents must comply with the lender responsibility principles.
  - 68.3 A lender or repossession agent may enter premises for repossession purposes whether or not anyone is present, although the lender responsibility principles require that the right to enter premises is exercised reasonably, meaning that, where practicable, entry should occur when an occupier is present.<sup>53</sup> Where no one is present, additional requirements apply.<sup>54</sup>
  - 68.4 Where practicable, entry should occur when an occupier is present. Where no one is present, additional requirements apply.<sup>55</sup>
  - 68.5 All repossessions require particular documents to be provided to the borrower, either at the time of entry or, if no occupier is present, when subsequently requested by the borrower.

51 Section 83R.

52 The lender does not have to meet these two requirements if it is repossessing goods on the basis that the goods are at risk, but see paragraph 61.

53 Section 9C(3)(d)(iii).

54 Section 83P. These include leaving a notice in a prominent place specifying the premises have been entered and the date of entry, containing an inventory of repossessed goods and specified documents. The lender or agent must also take reasonably practical steps to ensure the premises are not left obviously open.

55 Section 83P. These include leaving a notice in a prominent place specifying the premises have been entered and the date of entry, containing an inventory of repossessed goods and specified documents. The lender or agent must also take reasonably practical steps to ensure the premises are not left obviously open.

## Only licenced persons can conduct repossessions

- 69 Lenders may not take any steps to repossess consumer goods (for example entering residential premises in order to repossess goods) unless they are registered on the Financial Services Providers Register.<sup>56</sup>
- 70 Any person who conducts repossessions, or enters premises for the purposes of inspection or repossession must either:
  - 70.1 be licenced under the Private Security Personnel and Private Investigators Act 2010 (**PSPPI Act**);<sup>57</sup> or
  - 70.2 hold a certificate of approval under the PSPPI Act (a certificate).
- 71 A lender who is not licensed or does not hold a certificate cannot enter residential premises to repossess consumer goods.<sup>58</sup> The licensing of repossession agents is not administered by the Commission.<sup>59</sup> However, the Commission can take action against repossession agents and lenders where the repossession rules are not complied with.
- 72 A lender can use a repossession agent to undertake repossession on its behalf, but a lender must:
  - 72.1 Specifically authorise any repossession agent who undertakes repossession on the lender's behalf and is licensed or holds a certificate of approval.<sup>60</sup>
  - 72.2 Not allow an unlicensed or uncertified repossession agent (or their employee) to repossess consumer goods.<sup>61</sup>
- 73 The Code says a responsible lender should confirm that its repossession agent has in place suitable processes to ensure employee compliance with Part 3A of the CCCF Act.<sup>62</sup>
- 74 The lender must also comply with the lender responsibility principles. The Code provides useful guidance on what a lender should do to comply with the principles when using a repossession agent.<sup>63</sup>

## Timing of repossession

- 75 There are no restrictions on the timing of repossession of consumer goods from commercial premises or from public places.
- 76 However, there are significant restrictions on when **residential premises** can be entered for repossession purposes.
- 77 **Residential premises** includes a house, flat, townhouse, or similar dwelling used primarily and principally as a residence, and includes any land, improvement or appurtenances belonging to the dwelling or usually enjoyed with it.<sup>64</sup> These might include, for example, garages, sheds, and the driveway associated with the dwelling.
- 78 The general rule is that, without the written consent of the borrower, a lender can only enter residential premises to undertake a repossession or for any other purpose in connection with consumer goods between the hours 6.00 am to 9.00 pm Monday to Saturday.<sup>65</sup>

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56 Section 83T(1). The Financial Markets Authority is responsible for the licencing of Financial Services Providers and the Register is administered by the Companies Office. The Register is available at [www.fspr.govt.nz](http://www.fspr.govt.nz). There are some circumstances where lenders do not have to be registered. For information on who must be registered, check the website <https://fsp-register.companiesoffice.govt.nz/help-centre/registering-a-financial-service-provider-fsp/preparing-to-register/>. In addition, there are other consequences for lenders who are required to be registered but who have not registered, for example, they cannot require borrowers to pay most credit fees or interest for the period that they are unregistered.

57 Sections 23 and 44 PSPPI Act.

58 Section 83T(4).

59 Licencing of repossession agents is administered by the Ministry of Justice, see <http://www.justice.govt.nz/tribunals/PSPLA/repossession-agents-information>

60 Section 83T(3).

61 Section 83T(2).

62 The Responsible Lending Code, at 13.9. c and d.

63 The Responsible Lending Code at 13.8 to 13.10.

64 Section 5.

65 Section 83S(1).

- 79 A lender may not repossess goods from residential premises on a Sunday or a public holiday.<sup>66</sup>
- 80 A lender undertaking a repossession that started between 6.00 am and 9.00 pm on a weekday or Saturday must leave the premises by 9.00 pm.<sup>67</sup>
- 81 A **borrower can consent** in writing to a repossession during the prohibited times referred to above. However, lenders must meet certain conditions in order to lawfully obtain the borrower's consent to enter the premises outside the times specified above. The lender may not seek consent:<sup>68</sup>
  - 81.1 before the borrower is in default under the consumer credit contract;
  - 81.2 when the lender or lender's agent is at the premises to repossess the consumer goods;
  - 81.3 outside the hours of 6.00 am and 9.00 pm Monday to Friday, or any time on a Sunday or public holiday.

## Entering premises for repossession purposes

- 82 Where the contract provides that a lender has a right to enter premises for repossession purposes, a lender, or its repossession agent, may enter residential or commercial premises to undertake repossession whether or not the occupant is present.
- 83 However, a lender must comply with the lender responsibility principles during the repossession, including by treating the borrower reasonably and in an ethical manner. This includes taking all reasonable steps to ensure that goods and property are not damaged during the process, and that the right to enter the premises is not exercised in an unreasonable manner.<sup>69</sup> Further helpful guidance as to how repossession should be conducted is set out at paragraph 13.11 of the Code.
- 84 For example, even where the lender has the contractual right to enter when no one is home, the Code says that where practicable, a lender should carry out the repossession at a time when the borrower is home so as to avoid exercising any right to enter by force.<sup>70</sup>

## Entry if the occupier is not present<sup>71</sup>

- 85 If a lender enters premises to repossess goods when the occupier is not present, the lender must leave a notice in a prominent place that:
  - 85.1 specifies that the premises have been entered and the date of entry; and
  - 85.2 contains a list of any consumer goods that have been repossessed.
- 86 With the notice, the lender must also leave the documents required to be produced on entry (see paragraph 89 below).
- 87 If the occupier is not present, the lender must take steps to ensure that the premises are not left obviously open.
- 88 The Code also provides useful guidance that a lender should look over the premises for a method of entry by force that will cause the least amount of damage.<sup>72</sup>

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66 Section 83S(3).

67 Section 83S(2).

68 Section 83S(4)(a) to (e).

69 Section 9C(3)(d)(iii).

70 Responsible Lending Code at 13.11.a.

71 Section 83P.

72 Responsible Lending Code at 13.11.b.



## Documents to be produced on entry<sup>73</sup>

- 89 When the lender or repossession agent enters premises for the purpose of repossession, the lender or repossession agent must produce the following written documents if anyone is present<sup>74</sup> :
- 89.1 a copy of the repossession warning notice, unless the repossession is being undertaken on the basis that the security is at risk and no notice is required;<sup>75</sup>
  - 89.2 a copy of the contract;
  - 89.3 a copy of the lender's licence or certificate of approval;<sup>76</sup>
  - 89.4 evidence to establish an agent's authority to repossess the consumer goods on behalf of the lender (if the repossession is being conducted by an agent);
  - 89.5 a statement that specifies the premises have been entered, the date of entry, and a list of consumer goods to be taken;
  - 89.6 a statement setting out the borrower's rights following repossession of the goods and the borrower's right to make a complaint about the lender's conduct or the conduct of the repossession agent; and
  - 89.7 the borrower's written consent to entry outside the times specified in paragraph 81.



73 Section 830.

74 The documents must be produced both when first entering the premises and if requested, at any subsequent time. The borrower is not entitled to make a further request for the same document if it has already been produced, either on entry or at any other subsequent time: s 830(2).

75 If the repossession is being undertaken on the basis that the security is at risk, the lender must produce a document that lists the borrower's name, address of the repossession, the lender's contact details and the reason why the goods are being repossessed: s 830(1)(e).

76 Section 830(1)(c), as required by the PSPPI Act.

# Rules that apply after repossession

- 90 There are rules about what the lender must do after a repossession and timeframes for steps that are taken following repossession. The lender must provide the borrower with specific information about the repossession, and the consequences of repossession. The borrower also has certain rights in relation to the consumer goods. There are also rules relating to the sale process, and what happens after the sale of repossessed consumer goods.

## The lender must issue a post-repossession notice

- 91 A lender must give the borrower (and any guarantor and other interested party) a notice after the repossession of consumer goods. This is called a **post-repossession notice**.<sup>77</sup>
- 92 The CCCF Act specifies what information must be contained in the post-repossession notice. The notice must be:
- 92.1 provided within **14 days** of the repossession;<sup>78</sup>
  - 92.2 in writing;<sup>79</sup> and
  - 92.3 contain information about the repossession and how the borrower can reinstate or settle the contract which is specified in Schedule 3B.<sup>80</sup>

## Requirements relating to post-repossession notices

- 93 The format of a post-repossession notice is not specifically prescribed at present, although a prescribed form might be introduced by regulation at some time in the future.
- 94 With this said, Schedule 3B of the CCCF Act sets out the key information which **must** be included in the post-repossession notice.<sup>81</sup> In addition, many of the borrower's rights – that set out in Schedule 3B – are set out in other provisions of the CCCF Act relating to repossession. This is especially the case for provisions concerning what happens after repossession. Lenders should therefore also refer to applicable provisions of the CCCF Act when preparing the post-repossession notice and not solely on Schedule 3B.
- 95 In summary, the primary information that must be included is:<sup>82</sup>
- 95.1 the full name and address of the borrower;
  - 95.2 the full name and contact details of the lender;
  - 95.3 the date of the credit contract;
  - 95.4 the date of the repossession;
  - 95.5 a list of the goods repossessed and the lender's estimate of value of each of them;
- 96 It must also include statements:
- 96.1 about reinstating or settling the contract, including a description of the process and consequences of both, and what the borrower needs to do to reinstate or settle the contract including some particular information contained in Schedule 3B(h)(i) and (ii);
  - 96.2 that if the contract is not reinstated or settled then the repossessed goods will be sold and the borrower will be liable for the difference between the borrower's liability and the net proceeds of sale (or that the borrower will be entitled to a refund if the proceeds of sale exceed the borrower's liability);

77 Section 83V.

78 Section 83V(1).

79 Section 83V(2)(a).

80 Section 83V(2)(b).

81 See sections 83U-83ZM for post repossession provisions, for example rules relating to sale by creditor (sections 83W-83Z), borrower's rights to reinstate or settle the credit contract (83ZB and 83ZE).

82 Schedule 3B, s 83V(2).

- 96.3 that the repossessed goods may not be sold until 15 days after the date of service of the notice (unless the borrower agrees to or requires a shorter timeframe);
  - 96.4 that the borrower is entitled to obtain a valuation at their own expense and that their valuer will be allowed access to the goods to conduct the valuation;
  - 96.5 that the borrower has a right to require the lender to sell the goods to a person introduced by the borrower on the terms set out in Schedule 3B(m); and
  - 96.6 that if the goods have not been sold within 30 working days after the date of the repossession, the borrower is entitled to require lender to put the goods up for auction on the terms set out in Schedule 3B(n).
- 97 It must also include details about the borrower’s right to seek relief in circumstances of unforeseen hardship.
  - 98 If the notice is provided to a guarantor, additional information set out in Schedule 3B(o) must also be included.

## The borrower has the right to reinstate or settle the contract

- 99 At any time after repossession, and before the lender sells or agrees to sell the repossessed goods, the borrower may **reinstate** or **settle**<sup>83</sup> the credit contract.

### Reinstating the contract

- 100 **Reinstating** the credit contract involves paying any outstanding amounts and meeting any outstanding obligations so that the contract is no longer in default.
- 101 If a borrower is in default because payments are outstanding, a lender can require payment of the outstanding payments only. A lender cannot require payment for any part of the unpaid balance that is not in default and would not otherwise be payable earlier if there had not been a default.
- 102 If a borrower is in default for some reason other than a missed payment, the contract can be reinstated by meeting that outstanding obligation. For example, a borrower may have failed to insure the secured consumer goods as required by the contract. If the borrower subsequently insures the goods, this would be action to reinstate the contract.
- 103 A lender can require payment of the reasonable costs of repossession, return of goods to the borrower and action by the borrower to remedy the default before the contract is reinstated.<sup>84</sup> All charges imposed by the lender for reinstatement must be reasonable.<sup>85</sup>
- 104 Once the contract is reinstated, the lender must return the repossessed goods to the borrower and the contract continues as if the default and repossession had never occurred.

### Settling the contract

- 105 **Settling** the contract involves repaying the balance of the advance and meeting any outstanding obligations so that the rights and obligations of the parties are satisfied.
- 106 A borrower can settle the contract at any time before the repossessed goods are sold.
- 107 If the repossessed goods are being sold on an online auction site, there is no “sale” until the reserve price is met, or a fixed-price offer has been accepted.

83 Sections 83ZB and 83ZE.

84 Section 83ZB(2)(b)

85 Section 41.

- 108 A lender can require payment of the reasonable costs of repossession, return of goods to the borrower and action by the lender to remedy the default before settling the contract. All charges imposed by the lender for settling the contract must be reasonable.<sup>86</sup>
- 109 On receipt of payment and performance of all obligations, the rights and obligations of the lender and borrower are satisfied and the contract terminates. The lender must immediately return the repossessed goods to the borrower if the contract is settled.

## Rules relating to the sale of goods

### Timing of the sale

- 110 After the post-repossession notice has been served on the borrower, the lender must allow 15 days to pass before the lender may dispose of the goods or offer them for sale.<sup>87</sup> This must be explained in the post-repossession notice and the 15 day period enables the borrower and lender to negotiate the return of the goods (if appropriate).
- 111 The consequences to the lender of selling repossessed goods before the 15 day period has expired are significant:<sup>88</sup>
  - 111.1 The amount the lender can recover under the contract is limited to the advance under the contract. The lender cannot recover any accrued fees, charges or interest.
  - 111.2 If the lender receives extra money from the borrower or any other person on behalf of the borrower, the lender must repay any extra amount that the borrower is not liable for under the credit contract.
- 112 After the expiry of 15 days, the lender must offer the consumer goods for sale as soon as is reasonably practicable,<sup>89</sup> unless any of the following applies:<sup>90</sup>
  - 112.1 112.1 The borrower has made a written complaint in relation to any enforcement action.<sup>91</sup> The requirement to sell as soon as is reasonably practicable takes effect after the complaint is resolved (in compliance with s83J(5)) and the 15 day period does not run during the period in which that complaint is being considered.<sup>92</sup>
  - 112.2 112.2 The borrower reinstates or settles the contract under sections 83ZB and 83ZE.
  - 112.3 112.3 The borrower introduces a buyer and the buyer completes the purchase of the goods.<sup>93</sup>

### Borrower's right to force a sale

- 113 If the goods have not been sold within 30 working days of the repossession, the borrower may require the lender to sell the goods by auction.<sup>94</sup>
- 114 The borrower must notify the lender, in writing, of this requirement, and the auction must take place within two months of the date that the notice is given<sup>95</sup>.
- 115 The lender must give the borrower and other interested parties (as set out in section 83G(1)) reasonable notice of the time and place of the auction, or if the sale is by internet auction, of the times at which the auction will begin and end, or the circumstances in which the auction may end before the time given.

86 Section 41.

87 Section 83W.

88 Section 83X.

89 Section 83Y.

90 Section 83Y(2).

91 'Enforcement action' is defined at s 83J(6).

92 Section 83J(2).

93 Section 83ZD.

94 Section 83ZF(1).

95 Section 83ZF(3)(a), (b) and (c).

- 116 The auction must have no reserve and both the borrower and lender may bid at the auction.<sup>96</sup>

### The borrower may request a valuation

- 117 The borrower is entitled to obtain a valuation of the consumer goods at any time after the lender repossesses the goods up until the lender sells or agrees to sell the goods.<sup>97</sup>
- 118 The borrower can only obtain one valuation and is responsible for paying for the valuation. The valuation must be carried out at a reasonable time and the borrower must ask for access to the goods by giving reasonable notice to the lender. The lender must permit the valuer reasonable access but the valuer is not entitled to remove the consumer goods unless the lender agrees. The borrower may accompany the valuer when the valuation is taking place.<sup>98</sup>

### The borrower may introduce a buyer

- 119 The borrower has a right to introduce a buyer to the lender.<sup>99</sup> If that buyer will purchase the goods for a price not less than the estimated value of the goods set out in the post-repossession notice, then the lender must sell the goods to that buyer. The borrower can introduce a buyer at any time from the date of repossession up until the date the lender sells or agrees to sell the goods. If the borrower wishes to exercise this right, they must give written notice to the lender, and the notice must be signed by the borrower or their agent.

### The method of sale

- 120 Unless the borrower introduces a buyer, or forces the sale of the goods, the sale of goods can be by any method, including auction, public tender or private sale.<sup>100</sup> The lender must ensure that every aspect of the sale – including the manner, time, place and terms – is commercially reasonable. The lender must take reasonable care to obtain the best price reasonably obtainable at the time of sale.<sup>101</sup>
- 121 The lender must give the borrower, the guarantor and any other interested party reasonable notice of the proposed sale. This includes details of how, when and where the goods will be sold, and the reserve price (if there is one).<sup>102</sup>
- 122 If the sale is by auction or tender, the lender, borrower, guarantor and any other interested party are all entitled to bid or submit tenders.<sup>103</sup>
- 123 The lender has the responsibility to prove that goods have been sold in accordance with these requirements.<sup>104</sup> For example, the lender may be asked to provide evidence that no better alternative price could reasonably have been obtained at the time of the sale.

### Clear title is provided

- 124 Consumer goods sold in the repossession process are sold with clear title. All security interests of the lender selling the goods, and all subordinate security interests are extinguished on sale.<sup>105</sup>

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96 Section 83ZF(d) and (e).

97 Section 83ZA.

98 The rules relating to valuations are set out at s 83ZA(2).

99 Section 83ZD.

100 Section 83Z(1).

101 Section 83Z(1)(b).

102 Section 83Z(2).

103 Section 83Z(3).

104 Section 83Z(4).

105 Section 83ZH.

## The lender must issue a statement of account after sale

### Statement of account after sale

- 125** If the repossessed consumer goods are sold (other than to a purchaser introduced by the borrower), the lender must account to the borrower (and any guarantor and other interested parties) for the proceeds. The lender does this by issuing a **statement of account after sale**. The statement must be provided within **seven days** after the sale of the goods.<sup>106</sup>
- 126** There is no prescribed format for the statement of account, but it must be in writing, and contain the following information:<sup>107</sup>
- 126.1** The amount of the gross proceeds of sale. If more than one item has been sold the gross proceeds should be shown by item, if possible, as well as with a total amount.
  - 126.2** The amount of any sale costs.
  - 126.3** The amount required to settle the credit contract as at the date of the sale, including any of the sale costs.
  - 126.4** The balance owing by the borrower to the lender, or the lender to the borrower, as the case may be.
- 127** If more than one item of consumer goods has been sold separately, the statement of account must, if practicable, show the amount of the gross proceeds of sale of each item (as well as the total amount).<sup>108</sup>

### Any residual debt is frozen when the goods are sold

- 128** If any repossessed consumer goods are sold and the proceeds of sale are less than the amount required to settle the contract, the borrower still has a debt to the lender.<sup>109</sup> However, the borrower's liability to the lender under the credit contract is frozen at that point and no further interest or fees can be added. This is the case even where the lender has not repossessed all of the goods it is entitled to, or has not sold all of the goods that it has repossessed.<sup>110</sup>
- 129** The amount the lender can recover is limited to the balance set out in the statement of account after the sale of any repossessed consumer goods. In other words, after the sale the lender is not entitled to any costs additional to that amount.<sup>111</sup>
- 130** Prohibited additional costs include any costs incurred by the lender when attempting to recover the outstanding balance of the debt, such as court costs, further repossession costs, or the cost of taking over another debt so as to take an interest in another secured asset.<sup>112</sup>

### Any surplus after sale must be distributed in a prescribed manner

- 131** If there is a surplus after sale, the lender is required to distribute it in the following order:<sup>113</sup>
- 131.1** to any party who has registered a financing statement over the consumer goods (but where the security interest was subordinate to the lender's interest);
  - 131.2** to any other party who has notified the lender of an interest in the goods, and who the lender is satisfied has a legally enforceable interest; and lastly
  - 131.3** to the borrower.
- 132** If there is any dispute, the surplus should be paid into court and those claiming an entitlement to the surplus can apply to the court for payment.<sup>114</sup>

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<sup>106</sup> Section 83ZI.

<sup>107</sup> Section 83ZI(1)(a) to (d).

<sup>108</sup> Section 83ZI(2).

<sup>109</sup> Section 83ZM.

<sup>110</sup> Section 83ZM(3)(b).

<sup>111</sup> Section 83ZM(3)(c).

<sup>112</sup> Section 83ZM.

<sup>113</sup> Section 83ZI.

<sup>114</sup> Section 83ZK.

# Consequences of breaching repossession laws

- 133 Repossession agents need to be licenced under the PSPPI Act.<sup>115</sup> Repossession agents must ensure that repossession employees hold a certificate of approval.<sup>116</sup>
- 134 There are significant and wide-ranging consequences for lenders and repossession agents or employees who breach the repossession laws.

## Penalties and consequences for breach of repossession obligations

### Licensing offences

Any breach of the following licensing rules is an offence, and on conviction, individuals are liable for fines of up to \$200,000 and companies of up to \$600,000.

- 135 Lenders may not:
  - 135.1 Take any steps to repossess consumer goods (for example entering residential premises in order to repossess goods) unless they are registered on the Financial Services Providers Register.<sup>117</sup>
  - 135.2 Authorise, allow or permit a repossession agent or repossession employee to repossess consumer goods unless that agent or employee is licenced or holds a certificate of approval.<sup>118</sup>
  - 135.3 Personally enter premises for the purpose of repossessing consumer goods unless they are licenced or hold a certificate of approval.<sup>119</sup>
- 136 Repossession agents and repossession employees must not take repossession action (for example, by entering residential premises in order to repossess goods) unless they are:<sup>120</sup>
  - 136.1 specifically authorised to do so by the lender; and
  - 136.2 licenced or have a certificate of approval.

### Repossession offences

Any breach of the following repossession rules is an offence and on conviction, individuals are liable for fines of up to \$200,000 and companies of up to \$600,000.

115 Section 23(1)(da) PSPPI Act.

116 Section 45(1A) PSPPI Act.

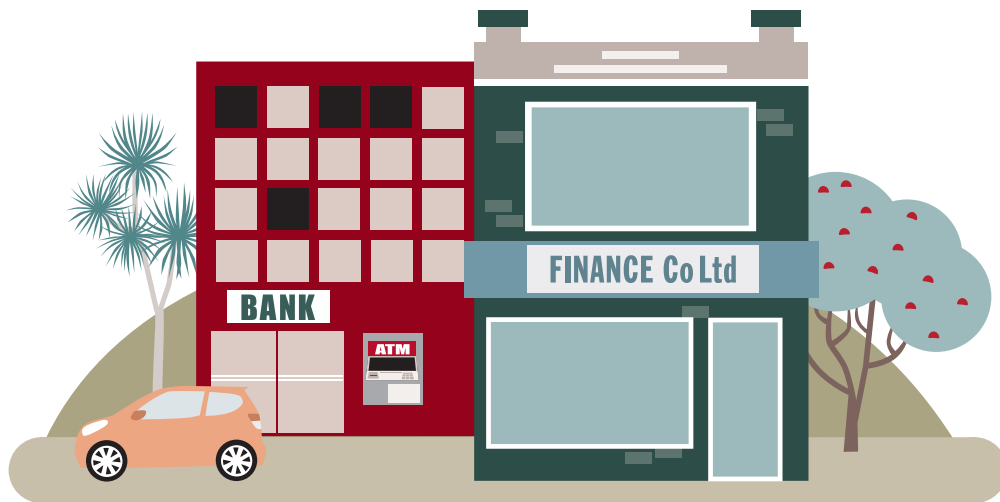
117 Section 83T(1).

118 Section 83T(2).

119 Section 83T(4).

120 Section 83T(3).

- 137** An offence is committed if a lender (or repossession agent):
- 137.1** repossesses consumer goods when the borrower is not in default;<sup>121</sup>
  - 137.2** repossesses consumer goods when the goods are not at risk;<sup>122</sup>
  - 137.3** fails to specifically identify the goods to be repossessed in the consumer credit contract before:<sup>123</sup>
    - 137.3.1** repossessing those goods;
    - 137.3.2** entering premises in order to repossess those goods; and
    - 137.3.3** entering premises for any other purpose in connection with those goods.
  - 137.4** fails to issue the correct repossession warning notice;<sup>124</sup>
  - 137.5** fails to produce the correct documents if someone is present when they enter residential premises for the purpose of repossession;<sup>125</sup>
  - 137.6** fails to leave a notice and secure the premises if there is no-one present when they enter residential premises for the purpose of repossession;<sup>126</sup>
  - 137.7** enters residential premises for the purpose of repossession outside the permitted hours;<sup>127</sup> and
  - 137.8** takes a security interest over, or takes steps to repossess, any prohibited consumer goods or documents.<sup>128</sup>



121 Section 83E(1)(a)(i).  
122 Section 83E(1)(a)(ii).  
123 Section 83F.  
124 Section 83G.  
125 Section 83O.  
126 Section 83P.  
127 Section 83S.  
128 Section 83ZN.



# Infringement offences, notices and fees

- 138** The Commerce Commission can issue infringement notices requiring lenders to pay an infringement fee for some of the more straight-forward or minor breaches of the disclosure and repossession provisions.<sup>129</sup>
- 139** Lenders or their repossession agents commit an infringement offence if they fail to:
- 139.1** include one or more of the required pieces of information in a repossession notice;<sup>130</sup>
  - 139.2** produce a document or information on entering premises for the purposes of repossessing goods.<sup>131</sup>
- 140** An infringement notice will impose an infringement fee where:
- 140.1** the Commission considers, on reasonable grounds, that a person is committing or has committed an infringement offence;<sup>132</sup> and
  - 140.2** no criminal proceedings or infringement notices have already been issued for the offence.
- 141** The infringement fee is currently \$1,000 for any one infringement offence and can be changed by regulation.<sup>133</sup> The recipient of an infringement notice must either pay the fee or challenge the notice within 28 days of receiving the infringement notice.
- 142** If a notice is challenged, and we do not accept that the challenge is valid, the matter will proceed to a court hearing.<sup>134</sup>
- 143** Instead of issuing an infringement notice, the Commission can choose to prosecute a lender for committing an infringement offence. The kinds of factors that the Commission would consider include whether the alleged offence was part of a pattern of offending by that lender or whether infringement notices had been issued to that lender previously. If convicted of an infringement offence, an individual is liable for a fine not exceeding \$10,000 and for a company, a fine not exceeding \$30,000.<sup>135</sup>

## Infringement notices not available in some circumstances

- 144** Infringement notices are not available where there is a complete failure to:
- 144.1** serve a repossession warning notice; or to
  - 144.2** produce the required documents on entry to premises for the purpose of repossessing goods when there is someone present.<sup>136</sup>
- Anyone who commits any of these offences is liable on conviction to fines of up to \$200,000 for an individual and up to \$600,000 for companies.<sup>137</sup>

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129 Sections 105A to 105F.

130 Section 102A(5). But note that s 102A(7) provides that a complete failure to serve a repossession notice in accordance with s 83G or a complete failure to comply with s 830(1) (documents to be produced on entry) is an offence under s 103.

131 Section 102A(6).

132 Section 105C.

133 Section 105A.

134 Section 21 Summary Proceedings Act 1957.

135 Section 102A(8).

136 Sections 102A(2) and 102A(7).

137 Section 103.

## Other consequences

### Banning orders

- 145 A District Court may make an order restricting or banning a lender if they have failed more than once to comply with any of the provisions of this Act, including the lender responsibility principles.<sup>138</sup>

### Impact on certification

- 146 Lenders who breach their repossession obligations may have their certification under the CCCF Act suspended or cancelled by the Commission.

### Failing to comply with other repossession requirements

- 147 Other consequences are also specified for some failures to comply with repossession requirements. We outline some of these below:
- 147.1 If the lender fails to issue a post-repossession notice, the costs of the repossession must be borne by the lender and cannot be recovered from the borrower.<sup>139</sup>
  - 147.2 If the lender sells the goods within 15 days after repossession, the borrower's liability is limited to the original advance made under the credit contract. The lender cannot add any costs of borrowing (interest or fees). If the borrower has paid more than the original advance, the lender must refund the balance to the borrower.<sup>140</sup>
  - 147.3 Other breaches of the repossession provisions of the CCCF Act are civil matters. This means that the Commission can take civil action against a lender to seek damages for a group of borrowers. Any party can also take their own action.
  - 147.4 The Commission can also prosecute a lender under the Fair Trading Act, if a lender makes a false or misleading representation or engages in misleading or deceptive conduct in relation to repossession.
- 148 For more details on the exercise of the Commission's enforcement discretion, please see our Enforcement Response Guidelines, which provide guidance on the Commission's general approach to enforcement.<sup>141</sup> The Criminal Prosecution Guidelines, which form part of that document, give guidance on when we are more likely to take criminal proceedings.

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138 Section 108(1)(v).

139 Section 83V(3).

140 Section 83X.

141 For further information see our Enforcement Response Guidelines at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>.

**Example of a hypothetical timeline for repossession:**

<b>7 June 2015</b>	Date of consumer credit contract.
<b>1 September 2015</b>	Repossession warning notice served
<b>16 September 2015</b>	Period to remedy the default expires (15 days from date of repossession warning notice). Lender can repossess assuming it is not a Sunday or public holiday.
<b>30 September 2015</b>	Post-repossession notice must be served (14 days from date of repossession)
<b>15 October 2015</b>	Period to hold goods expires (15 days from post-repossession notice). Lender can sell the goods assuming that the borrower has not reinstated the agreement or introduced a buyer.
<b>22 October 2015</b>	Assumed sale date (7 days after period to hold goods expire)
<b>29 October 2015</b>	Statement of account must be provided (7 days after sale)
<b>30 October 2015</b>	Borrower has right to force sale if goods have not been sold (30 working days from date of repossession)
<b>30 October 2015</b>	Repossession warning notice expires if repossession has not taken place (60 days after repossession warning notice served)
<b>30 December 2015</b>	Sale must have been completed if borrower has forced sale (2 months after notice of forced sale provided)

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This is a guideline only and reflects the Commission's view. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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