

Submission

to the

Ministry of Business, Innovation and Employment

on the

Responsible Lending Code Discussion Document

20 August 2014

Submission by the New Zealand Bankers' Association to the Ministry of Business, Innovation and Employment on the Responsible Lending Code Discussion Document

About NZBA

1. The New Zealand Bankers' Association (NZBA) works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following fourteen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited.

Background

3. Thank you for the opportunity to submit on Responsible Lending Code Discussion Document – July 2014 (Discussion Document).
4. NZBA supports the objectives of the Government in changing the laws that cover consumer credit to:
 - ensure creditors lend responsibly, and
 - provide improved protection for vulnerable consumers.
5. In our submission, we make a number of general observations on matters of key importance to our members. We have also included answers to some of the questions posed in the Discussion Document, primarily as they relate to our key concerns.

6. We look forward to working further with officials during the development of the Code. In the meantime, if you would like to discuss any aspect of the submission further, please contact:

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Executive Summary

7. The key points NZBA seeks to make in response to the Discussion Document are:
- The Responsible Lending Code must reflect the objectives of the Responsible Lending Principles contained in the Credit Contracts and Consumer Finance Amendment Act. These provisions are intended to target unscrupulous lenders. Banks are recognised responsible lenders and set a benchmark for other lenders.
 - The Responsible Lending Code should be principle-based rather than prescriptive. This would allow lenders to develop their own policies and procedures, be consistent with the approach in other financial services legislation, assist with implementation, and help future-proof the Code in a changing environment.
 - In this principle-based approach, we also support scalable guidance that allows riskier products such as payday lending to be targeted. Scalable guidance should also take into account the multi-agency regulatory environment in which banks already operate, and avoid any contradiction or duplication between the Responsible Lending Code and the Financial Advisers Act 2008.
 - The Responsible Lending Code should be “technology neutral” and not differentiate between various delivery channels.
 - The Responsible Lending Code should not require oral disclosure or dictate how lenders communicate with customers. In some cases customers may be better served by receiving information in writing.
 - We agree with the Responsible Lending Advisory Group that the Responsible Lending Code should not address the credit or default fees provisions given precedent litigation currently before the Courts.

General observations

The Code must reflect legislative objectives

8. The Responsible Lending Code (Code) must reflect the objectives of the Responsible Lending Principles contained in the Credit Contracts and Consumer Finance Amendment Act (the Act).
9. To this end, it is important to note that during the development of this legislation it was widely acknowledged that the principles are aimed at improving the practices of unscrupulous lenders who exploit vulnerable consumers. The September 2012 Cabinet Paper on Responsible Lending and Changes to Consumer Credit Law noted that the responsible lending provisions in the Act:

‘are particularly directed at bringing in tougher consumer credit laws to target loan sharks and protect unwary consumers.’¹

10. It was also recognised that the provisions were not intended to place any additional obligations on those already acting responsibly.² In this context, banks were recognised as having good responsible lending practices, which set a benchmark other lenders should work towards.

Overall, the Code should be principled rather than prescriptive.

11. Generally, NZBA supports a principles-based approach to the drafting of the Code. Responsible mainstream lenders already have systems in place to ensure they lend responsibly and a prescriptive approach could result in substantial additional compliance costs to change those systems in circumstances which would not provide any additional benefit for borrowers. Guidance should allow lenders to structure their own policies and procedures in a way which works best for them. A principles-based approach would, in our view, facilitate innovation, competition and access to credit.
12. A principles-based approach would also be consistent with the approach taken in other financial services legislation. For example, the care, diligence and skill requirements and the Code of Professional Conduct for Authorised Financial

¹ September 2012 Cabinet Paper on Responsible Lending and Changes to Consumer Credit Law, at page 3.

² For example, the Regulatory Impact Statement which accompanied the October 2011 Cabinet Paper on Responsible Lending Requirements for Consumer Credit Providers stated at paragraph 8:

‘The favoured option imposes responsible lending obligations on all lenders but is unlikely to result in significant added costs for those already behaving responsibly. These lenders already have processes and systems in place to ensure their lending is appropriate to meet the needs of consumers. For example, they have well-documented credit application processes in accordance with good business practice.’

Advisers under the Financial Advisers Act 2008 (FAA) and the fair dealings provisions in the Financial Markets Conduct Act 2013 are principles-based.

13. In addition, if a prescriptive approach is taken to the Code, compliance will be difficult to effect before the Code becomes operative in June 2015. This is because the Code is not expected to be issued before March 2015. It will be challenging for material changes to systems to be made in a three-month timeframe, and this challenge would be magnified if a prescriptive approach requires more changes to systems and processes, particularly where these would require a larger IT and training component.
14. Finally, an overly prescriptive approach is likely to require more regular rewrites of the Code as lessons are learnt and the credit environment changes. Principles-based drafting would future-proof the Code to ensure it is adaptable to a changing environment.

However, we support scalable guidance

15. While we support a principles-based approach in general, where there are clear market failures, in particular in relation to particular borrowers or particular products, more prescription may be warranted. Riskier products warrant an increased level of guidance as there is a greater need in those cases to ensure adequate protection for borrowers. For example, NZBA would support more prescription covering payday lending products.
16. Scalable guidance would also appropriately recognise that registered banks are prudentially regulated by the Reserve Bank of New Zealand and subject to licensing, oversight and supervision from other market regulators such as the Financial Markets Authority and the Commerce Commission. For the banking industry, legal and regulatory requirements are already in place to protect borrower interests. Any duplication of these requirements should be avoided where possible. We also note that members of NZBA also agree to comply with the Code of Banking Practice, which can ultimately be enforced through an independent dispute resolution provider (the Banking Ombudsman Scheme).
17. In this context, we are especially concerned to ensure that there is no contradiction between requirements in the Code and requirements under the FAA. In our view, the interaction between the Code and the FAA must be carefully considered before the Code is developed. In particular, we are strongly of the view that the Code should not have the effect of requiring lenders to provide personalised advice to borrowers. We are also concerned to ensure that the Code does not duplicate compliance requirements already in place under the FAA, which already requires that qualifying financial entities (QFEs) must have in place procedures to ensure retail clients have “adequate consumer protection”.³

³ See section 66(1)(c)(iii) of the FAA.

The Code must be “technology neutral”

18. The industry considers the Code should not differentiate between delivery channels, whether lending takes place over the telephone, through online or other electronic channels or through face-to-face interaction.

We do not support any requirements for oral disclosure

19. In particular, NZBA does not support a requirement for oral disclosure. We consider the Code should not dictate how lenders communicate with customers. Furthermore, for lending which takes place face-to-face or over the telephone, oral disclosure may not always be the best method of disclosure. In some cases, customers may be better served by receiving certain information in writing, so they may have the opportunity to take this information away and reflect on it.

The Code should not address credit or default fees given precedent litigation currently before the Courts

20. NZBA considers the Code should not include guidance on credit or default fees as the associated law is currently under consideration by the Courts. As the assessment of whether fees are unreasonable is a matter for the Courts, it is important any guidance in the Code reflects the approach adopted there. Accordingly, we consider it best to wait for the relevant decisions before proceeding.
21. We note that this position reflects the view of members of the Responsible Lending Advisory Group, the expert group convened by officials to provide advice on the development of the Code. For that reason, we have not answered any of the questions relating to fees in the Discussion Document.

More enforcement activity by the Commerce Commission

22. As we have previously submitted, we continue to believe that enforcement of consumer law is vital. Once the Code is in place, we hope it will enable more activity by the Commerce Commission in targeting the behaviour of unscrupulous lenders.

Responses to Questions in Discussion Document

Question 1

Do you agree with the proposed criteria for assessing what guidance should be set out in the Code as set out in paragraph 18?

1. Overall, NZBA supports the proposed criteria. Creating certainty for all lenders is important.

Should retaining sufficient flexibility to allow lenders to adapt the guidance to different products and business models be another criterion?

2. Yes.

Are there any other key criteria to be considered?

3. Yes. In our view, the Code must recognise that the borrower has a right to choose the product they think best meets their needs and objectives. The Code should balance the duty of a lender to lend responsibly with the right of a borrower to make their own decisions about credit.

Question 2

Are there any particular features of the New Zealand market which would differentiate our approach from international approaches?

4. Yes.
5. In particular, we note that in New Zealand, there has been no evidence of a problem affecting the whole industry. Lenders in New Zealand also operate in an environment where there are already strong statutory consumer protections.

Question 3

We consider that the structure of the Code should reflect the lifecycle of a consumer credit contract, do you agree?

6. In principle, NZBA supports structuring the Code around the lifecycle of a consumer credit contract.

Question 4

Are there lenders/borrowers/agreements or classes of lenders/borrowers/agreements that should be treated differently under the Code? If so, why, in what way and how should any such lenders/borrowers/agreements be defined?

7. NZBA supports a flexible approach in general, and would support more prescription where there is clear evidence of market failure.
8. As noted above, as well as differentiating between classes of lenders, the Code could also distinguish between types of product. Pay-day lending is an example of a product which should require different treatment under the Code.

Question 5

Should the concept of “scalable” guidance apply to the Code? If so, which principles or responsibilities should be scalable?

9. NZBA supports the Code including scalable requirements. Lenders should have fewer responsibilities where a borrower is experienced, including where the borrower has held that type of product in the past or receives legal advice about that product. Likewise, fewer responsibilities are needed for vanilla credit products, like overdrafts or personal loans, or products that a borrower can use for a range of purposes, like a credit card.
10. In our view, scalability is particularly necessary for the principle relating to reasonable inquiries in section 9C(3)(a) of the Act.

Question 6

How prescriptive should the guidance in the Code be?

11. For the reasons noted above, NZBA submits that the Code should be principled, not prescriptive.

Question 15

Apart from complying with disclosure obligations, how do/should responsible lenders assist borrowers to understand the terms of the credit agreement? How should any guidance cover different modes of providing credit? (e.g. online applications) Should certain information be required to be given orally for face-to-face or telephone interactions with customers?

12. The Code should recognise that lenders can only assist borrowers to understand the terms of the credit agreement by taking all reasonable steps required by the circumstances.
13. As noted above, the Code should not dictate how lenders must interact with customers. Instead the Code should be flexible and allow lenders to take different approaches depending on the type of product, the borrower's profile, and credit risk factors.

14. We reiterate that we do not support a requirement for mandatory oral disclosure. In particular, we do not support inclusion of the CONC requirements referred to in paragraphs 68 – 76 of the Discussion Document. We understand those provisions are based on a specific statutory duty for oral disclosure. We do not believe there is any equivalent of this in New Zealand law.
15. It's important to recognise that banks also provide a range of services to customers to assist borrowers to make informed decisions. These include services such as financial literacy community workshops, online tutorials and budget planning apps.

Question 16

What are/should be responsible lenders' practices where English is not a borrower's first language?

16. NZBA fully supports the principle that a responsible lender should communicate effectively and take reasonable steps to ensure that the borrower understands the communication.⁴
17. Practical issues arise for lenders in determining whether a borrower requires assistance where English is not their first language. This assessment is by necessity subjective.
18. On this basis, NZBA submits that the Code should not prescribe specific requirements to translate documents into multiple languages or to have interpreters available. Adequate protection is provided through agreements that are in a plain English, clear, concise and intelligible, or access to frequently asked questions.
19. A principles-based approach in the Code that focuses on ensuring a consumer is informed is more appropriate.

Question 17

What opportunities do/should responsible lenders provide to borrowers to ask questions about the agreement? Would providing access to frequently asked questions be sufficient?

20. Customers should be encouraged to ask questions about a credit contract. This may be achieved through providing a frequently asked questions document or an 'ask a question' feature on a website, with the lender's staff available to assist with factual queries and further information where requested.

⁴ A similar requirement is contained in the Financial Markets Authority's Code of Professional Conduct for Authorised Financial Advisers in Standard 6:

An Authorised Financial Adviser must behave professionally in all dealings with a client, and communicate clearly, concisely and effectively.

21. However, while recommending legal advice or financial advice may be appropriate in some circumstances, it is in the best interests of the borrower that this advice is provided by an independent third party.

Question 18

What practices do/should responsible lenders undertake to ensure that credit agreements are in plain English, clear, concise and intelligible?

22. Legal documents must strike an appropriate balance between being legally accurate and enforceable and the requirement that they are clear, concise and intelligible. We believe the Code should recognise that some types of credit contracts will need to meet other legislative and common law obligations around their content. For example, mortgages are subject to Part 6 of the Land Transfer Act 1952 and to the Property Law Act 2007 and credit agreements secured by personal property are subject to the Personal Property Securities Act 1999.
23. The Financial Markets Authority *Guidance Note: Effective Disclosure*⁵ may be useful in informing the development of the Code. However, care is required to ensure obligations are not imposed on lenders that were designed for other purposes and audiences.
24. On this basis, we submit that the Code should not be prescriptive in relation to the use of plain English in credit agreements.

Question 19

How do/should responsible lenders assist borrowers to understand the implications of the credit agreement? E.g. if technical or legal concepts are referred to, should the agreement explain the implications of those concepts?

25. The Code should not require lenders to explain certain terms or concepts in certain ways as the assistance required will vary for different contracts and for different borrowers.
26. Credit agreements are binding and additional material may alter their legal interpretation and effect. In addition, too much prescribed content will work against the principle that credit agreements should be clear and concise.

Question 20

Can you point to good examples of credit agreements that are in plain English, clear, concise and intelligible?

27. Examples of plain English drafting should only be included as guidance to how the principles may be met.

⁵ June 2012

Question 21

What are/should be responsible lenders' processes in relation to independent budgeting or legal advice for borrowers and guarantors? In which circumstances should the lender require or recommend independent legal advice?

28. Lenders should not have specific obligations to refer borrowers for budgeting advice.
29. Lenders can only provide financial advice within their scope of service and cannot provide any legal advice to borrowers, as discussed above.
30. Recommending a customer get independent legal advice in all situations is not always appropriate. For example, for most loan top-ups, the lender and the customer deal directly with each other, without the need to involve an external party.

Question 22

What do/should responsible lenders do to assist guarantors to make informed decisions?

31. Lenders should provide initial disclosure as required by the Credit Contracts and Consumer Finance Act (CCCFA) and should encourage independent legal advice where new collateral is being provided for home loans (including by guarantors) or where there is a third party guarantee arrangement (i.e. the guarantor is not also a borrower).

Question 23

What information do/should responsible lenders give a borrower to assist them to make an informed decision on credit related insurance?

32. Lenders already follow strict legislative requirements in relation to the promotion and sale of insurance products. In light of these obligations, we do not consider the Code should include additional requirements.

Question 24

How do/should responsible lenders ensure that any advertising of credit-related insurance products distributed by the lender is not misleading, deceptive or confusing?

33. There are already legislative requirements for advertising and promoting insurance products. We do not believe the Code should include additional requirements.

Question 25

How do/should responsible lenders ensure that borrowers have sufficient time to make informed decisions?

34. A responsible lender will provide sufficient time to allow a borrower to make an informed decision. The Code should not prescribe any requirements as to time frames.

Question 26

What processes and practices do/should responsible lenders undertake to assist informed decision for agreements when the application and approval is undertaken remotely?

35. The Code should not prescribe particular processes and practices for when applications and approvals are undertaken remotely.

Question 27

What other matters should the Code address in relation to assisting informed decisions?

36. None. As noted above, a principles-based approach will allow lenders to structure their own policies and procedures in a way which works best for them and their customers.

Question 28

What information do/should responsible lenders require from a borrower when they apply for credit? How much reliance should a lender place on a credit check?

37. The information lenders require to make a responsible lending decision differs according to the type of lending and differs depending on whether the lending is to new or existing customers.
38. Each individual lender will have its own internal credit policies. Accordingly, we do not think that it is appropriate for the Code to set out highly prescriptive guidance on what information a responsible lender should obtain from a borrower.

Question 30

How do/should responsible lenders assess whether the information a consumer has provided is correct? In what circumstances do/should responsible lenders be able to rely on information provided by a borrower?

39. Lenders should be entitled to rely on the information provided by the borrower in accordance with section 9C(7) of the Act. A principles-based approach is appropriate and allows flexibility and scalability. Verification of information will depend on the individual circumstances.
40. NZBA would not support any requirement that relevant information be provided to a lender in hard copy. In our view, this will prevent borrowers and lenders from realising the benefits of future innovation and changes that will arise from the increased use of online and digital enhancements.

Question 32

How do/should responsible lenders consider whether credit does/does not meet the requirements and objectives of the borrower?

41. The Code must recognise that a customer has the freedom to choose what credit they get and how that credit is ultimately utilised.
42. Any assessment of whether proposed credit meets the requirement and objectives of the borrower is inevitably highly subjective and will depend on the information given by the borrower.
43. We believe responsible lenders will collect information to help them meet their obligations and manage credit risk. We see no additional benefit in prescribing the information required. In addition, we consider customers may be reluctant to disclose some ASIC requirements in RG 209.32, listed in paragraph 89 of the Discussion Document. The requirements appear unduly intrusive for consumers.

Question 33

How should the lender responsibility to be satisfied that it is likely that the credit will meet the borrower's requirements and objectives be balanced against not unduly restricting consumer choice?

44. NZBA does not support the ASIC guidance in RG 209.117 as they appear unduly intrusive for consumers.
45. We consider that the Code should recognise that, provided the lender has complied with the lender responsibility principles (in particular the requirements to make reasonable enquiries and to assist the borrower to reach an informed decision and made reasonable enquiries), the consumer has a right to choose the product that they think most appropriately meets their requirements and objectives. In our view, this will help a customer make their own decision to borrow without placing undue compliance burden on lenders.

Question 34

What proportion of credit applications are processed without the involvement of financial advisers permitted to give personalised advice in relation to category 2 products under the Financial Advisers Act 2008? Will regulation under both the lender responsibilities and the Financial Advisers Act impose significant costs for lenders?

46. Different banks have different processes for credit applications received. Some of our individual members have submitted on this point and we defer to those submissions on this point.
47. However, NZBA strongly submits that the Code should not impose greater regulation on lenders than is set out in legislation. For example, the FAA allows lenders to structure their business so not all staff need to be trained as a QFE advisor or AFA so they can give 'financial advice' and 'personalised financial

advice'. It is unduly onerous for the Code to impose an obligation on lenders to provide 'personalised financial advice' to all borrowers whenever they get credit. This goes beyond what is required in both the Financial Advisers Act and the Credit Contracts and Consumer Finance Act, and would impose significant burden and cost on lenders.

Question 35

How do/should responsible lenders deal with the potential conflicting incentives posed by payments of commission/bonuses and the need to be satisfied that it is likely the credit agreement meets the requirements and objectives of the borrower and will be repaid without substantial hardship?

48. NZBA does not believe the Code needs to address this issue. This is a matter which is the subject of specific prescription through rules for financial advisers under the FAA.

Question 37

Should substantial hardship be assessed by reference to any particular indicators or reference budgets?

49. No. Given the wide variety of circumstances under which substantial hardship can occur, a principles-based approach is more appropriate.

Question 38

Should the Code specify a threshold for substantial hardship? If so, what is an appropriate threshold?

50. No. A principles-based approach is more appropriate.

Question 39

To what extent do/should responsible lenders take into account likely future market conditions (e.g. interest rate rises) when assessing affordability for the borrower (particularly for long term credit agreements such as mortgages)?

51. Responsible lenders will assess a borrower's capacity to service a loan at both prevailing market level and on likely future rates (likely to be through adversity test, sensitivity margin or system default rate settings). However, it will not be possible to predict all future market conditions.

Question 40

Do/should responsible lenders engage in lending that relies primarily or solely on the value of any security provided by the borrower?

52. All secured lending relies in some way on the value of the security provided by a borrower or guarantor. We note that a customer's ability to repay any lending is often a more important part of any credit decision than the overall level of security they hold.

53. It is important to note that lending based on security value not servicing ability can still be done responsibly and in particular circumstances will be a valid transaction to meet a specific borrower need. For example, an open ended bridging loan to assist an elderly person to trade down a property - enabling buying before selling.

Question 41

Are there circumstances in which it should be presumed that the consumer will only be able to make repayments with substantial hardship?

54. Creating a presumption of substantial hardship may have unintended consequences.
55. NZBA understands that the Australian approach is to presume hardship where repayments can only be made by selling the home secured by the lending. If a similar guidance is considered for New Zealand, we believe this should be by way of example and a presumption only. The Code should not prevent legitimate lending options like reverse equity mortgages, provided a customer is given appropriate information to help them understand and accept the risks of that type of product.
56. We do, however, support the Australian approach for payday lending. We understand there is a presumption of substantial hardship where the customer is already in default under an existing payday lending contract and has two or more of those types of contracts in the last 90 days. As above, there should be a presumption of hardship only. It should not prevent legitimate lending options like debt consolidation loans which may be designed to help move a customer from higher interest/higher fee lending to a more stable long term repayment plan.

Question 42

What policies do/should responsible lenders have in place to assess whether the security taken is excessive relative to the size and length of the credit provided?

57. NZBA submits that an assessment of whether security is “excessive” is unnecessary. It is not appropriate for the Code to limit or restrict the security a lender needs or asks for.
58. The Code must recognise the benefits of accessible credit, which means lenders can take the security they believe is needed. We note that Part 3A of the Act contains specific provisions to protect consumers from punitive exercise of security over personal property in a much more certain manner than can be achieved by a Code.

Question 43

What other matters should the Code address in relation to making reasonable inquiries to assess whether the credit agreement meets the borrower's requirements and objectives and can be repaid without substantial hardship?

59. None.

Question 44

What practices and processes do/should responsible lenders have in place to assist borrower decision-making in relation to variations to a contract (e.g. credit card limit increases) or refinancing? What types of variations do/should such practices apply to?

60. NZBA submits that high level, scalable guidance is appropriate in relation to the assistance a responsible lender should provide a borrower in relation to variations that materially increase either the amount or term of a loan. Any guidance should reflect the fact that practices and processes will differ by product and should not place any restriction on a lender's ability to change an interest rate, other than an obligation to communicate such a change to the customer.

Question 45

What practices and processes do/should responsible lenders have in place in relation to whether a credit agreement would likely meet the borrower's requirements and objectives and can be repaid without substantial hardship following a variation or refinancing? What types of variations do/should such practices apply to?

61. NZBA submits that section 9C(3)(c) of the Act does not impose an obligation on lenders to ensure variations or refinancing will meet the borrower's requirements or objectives.

Question 46

Other than complying with disclosure requirements, what information do/should responsible lenders provide to borrowers in relation to the credit agreement during the life of the agreement? For example, should lenders provide certain information to borrowers to enable borrowers to make decisions as to whether to exercise their rights under the agreement?

62. NZBA acknowledges that the purpose of the Code is to elaborate on the lender responsibility principles and offer guidance on how those principles may be implemented by lenders.⁶ In this regard, we would caution against providing additional information or disclosure requirements in the Code that is appropriately prescribed by primary legislation.

⁶ New section 9E(1) of the Act.

Question 47

What practices do/should responsible lenders refrain from during the life of the credit agreement? (For example, should responsible lenders refrain from the practice of holding multiple direct debit forms so that one can be re-submitted if a form is cancelled?)

63. NZBA understands that some truck shop lenders have been engaging in a practice that requires a borrower to provide multiple direct debit forms, effectively giving the lender the ability to overrule a borrower's desire to amend the specifics of repayment where this is allowed by the credit contract. In our view this is an unacceptable practice for a responsible lender and should be addressed in the Code.

Question 57

How do/should responsible lenders monitor whether the borrower may be facing actual or possible repayment difficulties? Is it practical to check for possible repayment difficulties?

64. Lenders do not and should not monitor for 'possible' repayment difficulties.
65. It is important to recognise that, as a general rule, it is in banks' best interests to encourage customers to contact them when experiencing financial difficulty and banks put in significant time and effort to support those customers to help them recover from financial difficulty.

Question 58

What policies or procedures do/should responsible lenders have in place for dealing reasonably with borrowers who have or may breach the agreement or when other problems arise? (e.g., in relation to assistance to be provided to the borrower)

66. NZBA submits that responsible lenders should have policies, in line with the nature and size of the lender's business, that cover customers who are having repayment difficulties.

Question 59

What do/should responsible lenders do to assist borrowers to be informed of their rights? (e.g., in relation to unforeseen hardship relief and access to dispute resolution schemes.)

67. The NZBA Code of Banking Practice contains information at clause 5.1(j)(iv) about what consumers should do if they experience financial difficulty.
68. Lenders that are financial advisers are required to provide disclosure under the FAA and associated regulations. This includes information regarding complaints and dispute resolution processes.

Question 60

How do/should responsible lenders communicate with borrowers in relation to breaches or potential breaches of the agreement to ensure that they treat borrowers reasonably and in an ethical manner? (e.g. in relation to staff training and policies and enforcement of those policies)

69. The method of communication will depend on the context.
70. To ensure communication is both ethical and appropriate, lenders should have in place staff training and internal procedures.

Question 61

What do/should responsible lenders take into account when considering repayment plans proposed by a borrower (in connection with an application for unforeseen hardship relief)?

71. Information about borrower rights in relation to unforeseen hardship relief and access to dispute resolution schemes should be easily accessible to the public. Responsible lenders could have this information on their website.
72. Lenders should assess possible repayment plans in accordance with established policies and procedures, taking into account the type of credit agreement and the position of the borrower.
73. Lenders will require enough information to evaluate the repayment plan and enable them to develop possible alternatives if necessary.

Question 62

What are the elements of a good internal complaints process?

74. An effective internal complaints process is easily accessible by all customers and is timely, fair, and transparent.
75. Members of dispute resolution schemes usually agree to standards for their internal complaints procedures, for example members of the Banking Ombudsman Scheme comply with the NZBA Code of Banking Practice, see clause 1.3(a) – (d).
76. The Code should not include detailed provisions on internal complaints processes because this would duplicate existing obligations and simply create an unnecessary compliance burden.

Question 63

What other matters should the Code address in relation to borrowers facing repayment difficulties or other problems?

77. Code provisions relating to substantial hardship should not be so prescriptive as to limit the range of options available to a borrower facing repayment difficulties. It may

be in a borrower's long term interest to avoid default by restricting credit in a manner which may cause some change to the borrower's lifestyle.

78. The Code should recognise that lenders cannot always provide remedies. In particular, the Code should distinguish between borrowers that are facing problems as a result of choices they have made (for example by taking on subsequent, additional debts or omitting information from their application) and borrowers that are facing problems as a result of an unforeseen event (for example loss of employment, ill health, relationship problems or death). A lender will often find it difficult to provide a remedy where the borrower is facing problems with multiple lenders (in particular where only some lenders can be said to have complied with the lender responsibly principles).

Question 64

What is the range of enforcement responses that lenders take in response to default by the borrower?

79. Enforcement responses will vary according to the nature of the lending and the circumstances of the borrower.
80. Where circumstances allow, responsible lenders will take a proportionate approach to enforcement using the least intrusive method. Responsible lenders will attempt to preserve their underlying relationship with the borrower prior to exercising any formal legal powers to enforce the credit agreement. In most cases, this will involve a focus on getting a customer's agreement to repay the amount, with enforcement action seen as a last resort.

Question 65

What policies or procedures do/should responsible lenders have in place for considering whether their enforcement response is proportionate?

81. NZBA strongly submits that the Code cannot fetter the legal rights of lenders to take enforcement action where that is deemed appropriate (noting, as outlined above, that this is a backstop measure for lenders). For this principle, it is best to provide guidance about ethical behaviour, taking into account the protection provided in the section 9C(3)(d) of the Amended Act requirement that lenders act "reasonably and in an ethical manner". The NZBA Code of Banking Practice provides a good example of general guidance on a proportionate approach to enforcement:

5.1(j)vii) *If you act in good faith, keep us informed about developments, keep your agreements with us, heed what your own and any independent advisers say and are prepared to make the changes needed early enough to preserve the underlying business, we will not normally seek the immediate appointment of a receiver or start other recovery proceedings.*

Question 66

What steps do/should responsible lenders go through before taking enforcement action? For example, before sending debts to a debt collection agency?

82. Again, the Code should not be overly prescriptive on this point so as to qualify a lender's statutory rights of recovery by specifying particular steps that must be taken before taking an enforcement action.
83. On this basis, guidance is preferred. We consider that open communication with the customer about what they need to do and why and what happens if they don't is key to any enforcement action. The lender should explain any consequences to the customer before commencing any debt recovery procedure.

Question 67

What are/should be responsible lenders' practices in relation to charging interest and/or fees once they have started enforcement action? (For example, once a debt has been sent to a collection agency.)

84. If allowed under the terms of the contract with a customer, a lender should be able to collect interest or fees during enforcement.
85. The drafting of the Code should recognise that the timing and nature of enforcement action may vary significantly according to the type of loan and security and reasonable lender practices will vary according to the circumstances.

Question 68

What steps do/should responsible lenders take to ensure that they treat borrowers and their property reasonably and in an ethical manner during the course of any enforcement action (including the manner in which the lender or their agents communicate with the borrower)?

86. Communications about enforcement action convey difficult messages, but this must be balanced with treating customers reasonably and with courtesy and respect. On this basis, communications are likely to strike this balance if they are professional, clear, concise, and effective. The priority is that the borrower is aware of the process, what is at risk, the potential outcome and their rights so that they can make informed decisions throughout this process.

Question 69

What other matters should the Code address in relation to enforcement action?

87. The Code should acknowledge that lenders will need to act differently depending on the reasonableness of the behaviour of the borrower. For example, in the event that a borrower attempts to hide or destroy security, this will change the nature of the enforcement options available to lenders.

Question 70

What do/should responsible lenders do once they have been fully repaid? (For example, arranging release of securities.)

88. Lenders should take all the actions that are lawfully required at the discharge of the credit agreement. This will vary according to the type of credit and security taken. In some circumstances borrowers may have an interest in a lender retaining a security arrangement in place to support any future credit needs they may have, with a release of the security available at the customer's request.