

**Summary of recommendations from  
SUBMISSION ON THE REVIEW OF CODE OF CONDUCT ON MORTGAGE ARREARS  
CONSULTATION PAPER CP 63**

**FREE LEGAL ADVICE CENTRES, APRIL 2013**

**FLAC's submission to the Central Bank on the Code of Conduct on Mortgage Arrears (Consultation Paper CP63) considered 14 distinct aspects of the Code of Conduct. The following is a summary of the recommendation made in relation to each issue considered.**

**1. Application of the Code to existing arrears cases**

The proposed revised Code says that the code will apply to all existing arrears cases falling within the code. The Code also includes arrangements for a 12 month moratorium on the issue of legal proceedings.

What is not clear is existing cases will be treated in terms of the moratorium on repossession. FLAC submits that the question of the application of the Code to existing arrears cases is a critically important issue to clarify in the context of the moratorium. Literally, the roof over people's heads may depend upon tackling it. Given the very difficult circumstances facing so many borrowers and what should be a clear public policy imperative to avoid repossession of family homes wherever possible, there is a strong case for the moratorium starting afresh for those who have clearly co-operated with their lender up to now and who wish to avail of it.

**2. The admissibility of the Code in legal proceedings**

As far back as July 2010, the Mortgage Arrears and Personal Debt Group (or Cooney group), in which FLAC participated, recommended in its interim report that the CCMA should be admissible in legal proceedings and this recommendation is also reflected in the final report of the group.

This recommendation was not implemented then but FLAC suggests that the Minister for Finance could now to issue a regulation under the Central Bank Acts to convert the Code into a statutory instrument, which expressly provided that the CCMA would be admissible in possession proceedings in the courts.

If the State is really serious about repossession being a last resort, and in a scenario where it is about to reverse the Dunne judgment and reopen the summary procedure for the potential repossession of properties, this must be done. We would then at least have a Code that lenders would have to follow to the letter so that borrowers could rely upon having a real chance of demonstrating their ability to service a sustainable alternative arrangement on their mortgage that would keep them in their homes if they so chose. Failure to allow the borrower this opportunity and to accord the benefit of fair procedures and fair decision making could then be challenged in the courts if necessary.

**3. Rights of appeal for borrowers under the Code**

There is likely to be a rise in the numbers of mortgages to be declared by lenders to be unsustainable in the future. There is also likely to be a rise in proposals for sustainable long term arrangements by lenders that borrowers may find it difficult to accept. It is therefore FLAC's view that in addition to the Code being admissible in legal proceedings before the courts, borrowers should have a genuine right of appeal to an independent third party not just on compliance with the mechanics of the MARP process but also on the substantive decisions made by the lender.

It would be desirable if the government was to set up a distinct body for this purpose. In the alternative, it should set up a fast track appeal to the FSO for this purpose but specific explicit authority would have to be conferred upon it to carry out this function.

#### **4. Co-operation and engagement**

FLAC believes that the Central Bank should send out a strong message to lenders by specifically recognising and addressing the problem of non-co-operation and engagement by lenders (as well as borrowers) under the revised CCMA and penalising them in some tangible way. For example, providing that the moratorium on the issuing of repossession proceedings against a borrower would be extended by a set amount where evidence is provided that demonstrates unreasonable or unexplained delay on the part of the lender in processing MARP negotiations.

#### **5. Time running for the purposes of the moratorium**

The code provides for a 12 month moratorium on repossession proceedings in designated circumstances. The failure to stipulate under Provision 47 in the current code and Provision 57 in the proposed revision that time will not run on this moratorium while the lender is assembling the borrower's financial information or while it is considering whether to offer an alternative repayment arrangement is a substantial flaw. Provision 37 of the proposed code should state that the duration of any temporary arrangement does not count for the purposes of the 12 month moratorium on repossession proceedings. Similarly, proposed Provision 57 should state in relation to the twelve month moratorium that 'the twelve month period does not include any time period where a proposal for an alternative repayment arrangement is being negotiated'.

#### **6. Unsolicited communications with borrowers**

If the Bank is intent on removing limits on communications and visits in this part of the Code, it should commit itself to regularly monitoring by inspections the action of lenders under this heading. The Code should also explicitly allow for a borrower to make a complaint to the Consumer Protection section of the Central Bank (as opposed to the FSO) that the lender has exceeded its authority in terms of communications. It should state that such a complaint may trigger an investigation under the Administrative Sanctions Procedure and that if the complaint is substantiated, penalties may follow for the lender concerned.

In addition, the Bank should immediately prioritise the regulation of debt collection on a statutory basis with a proper licensing system and code of conduct applying to such entities. A suitable vehicle for this might be the Central Bank (Supervision and Enforcement) Bill 2011. Having been referred to the Select Committee on 26<sup>th</sup> October 2011, this Bill seems to have stalled. It is curious that a piece of legislation ostensibly designed to improve the regulation of financial service providers by the Bank should fail to progress in this manner.

Unless these requirements are complied with, FLAC is vehemently opposed to the removal of the limit of three unsolicited communications per calendar month.

#### **7. Treatment of borrowers who separate**

FLAC would suggest that in the current crippling recession, where sometimes separation follows debt and sometimes debt follows separation, and where compromised earning capacity is often part of the mix, a legislative initiative to navigate the tricky waters of relationship breakdown/breakup and over-indebtedness would be timely. In the meantime, we would suggest that the Central Bank, within the parameters of what it is capable of providing for in this area, might consider encouraging the sympathetic treatment of a now single borrower trying to

hold onto her (or his) home. For example, a short addition to the above might be considered, such as:

"Lenders are reminded that the capacity of a borrower or borrowers to service a mortgage may be seriously affected by relationship breakdown and are encouraged to enter into negotiations with such borrowers to facilitate insofar as is possible the retention of the family home".

#### **8. Use of the Standard Financial Statement (SFS)**

Where the SFS can be simplified, this should be done but the same statement should apply in all cases.

Provision 29 in the revised Code which states that the lender must use the SFS to obtain financial information should provide that 'a lender must only use the SFS and failure to use it in relation to a borrower in arrears or in pre-arrears will be considered to be a contravention of the Code.

Provision 30 (b) of the Code obliging a lender to offer to assist the borrower with completing the SFS should add that 'lenders must ensure that the information contained in the SFS is accurate insofar as is possible and that any deliberate omission of information or deliberate inclusion of inaccurate information by a lender will be considered to be a breach of the Code'.

#### **9. Reasonable living expenses**

Neither the current nor the proposed revised CCMA addresses the question of the minimum income that the household must be allowed to retain to live on, before the question of what remains to pay the mortgage (and other creditors) is addressed. Whilst not suggesting that the Insolvency Service's guidelines be incorporated into the CCMA, given that they are only appropriate for insolvency as opposed to mortgage arrears alone, FLAC does submit that its concept of minimum income be referenced by the Central Bank in the document and that lenders should be obliged to take cognisance of the right of borrowers in arrears to have sufficient income to meet the full range of living costs

#### **10. The treatment of unsecured creditors**

FLAC submits that what is needed is a Code of Conduct on Debt Arrears rather than just on mortgage arrears.

At the very least, the Central Bank should ensure that the revised CCMA addresses in a meaningful way the difficulties that multiple debt causes for a borrower in mortgage arrears and obliges the mortgage lender to take this into account.

For example, a statement such as the following might act as some sort of guide: 'Borrowers in arrears must in principle prioritise their mortgage payments under this Code. However, it is recognised that there may be situations where it may be necessary to prioritise unsecured debts. Lenders are encouraged to adopt a flexible approach to negotiations on repayments with a view to finding the most practical way of making the mortgage sustainable and are obliged to take into account the existence of unsecured debts as set out in the Standard Financial Statement (SFS)'

#### **11. The link between the Code and the Personal Insolvency Act 2012**

The stated aim of ensuring that the process for insolvent borrowers who have been through the MARP and wish to enter a Personal Insolvency Arrangement is as smooth as possible seems to contain a critical flaw.

Where either the borrower declines the alternative repayment arrangement on offer, or where the lender declines to offer one because the mortgage is deemed unsustainable, the prospects of a PIA application including the retention of the family home getting any traction with the lender, particularly if the borrower exercises his or her right of appeal under the MARP to no avail, appear extremely poor.

Therefore, as it stands, the proposed transition from MARP to PIA is likely to be fraught and as a result, the PIA is unlikely to be of assistance to borrowers in arrears who have exhausted the MARP process. What is now proposed may result in borrowers short circuiting the CCMA/MARP and go straight to a PIA application.

On the proposed time limits, FLAC recommends that the 30 day ban on lenders taking legal action is too short a window for a borrower to consult a PIP about a PIA application. The Code should also specify when any expanded time limit would cease.

In addition, a borrower who has declined an alternative repayment arrangement proposed by a lender should continue to receive the protection of the 12 month moratorium period.

## **12. Reviews of alternative repayment arrangements**

Provision 43 should be revised to suggest that in the event of the borrower's financial circumstances improving, that the borrower shall be entitled to retain a portion of that improvement for his or her own use and that of his or her dependants.

## **13. Tracker mortgages**

In the absence of a third party that would properly and objectively assess whether the borrower got sufficient value for giving up their tracker, there is a serious danger that a customer in arrears and already under considerable pressure and stress would be coerced into giving up their rate. FLAC therefore opposes any change in the Code in this regard.

## **14. Assistance for borrowers in arrears**

It is clear that what has been provided by the State by way of assistance for borrowers in arrears falls lamentably short of what is needed. MABS is the obvious body to which a more specialist support service in the area of mortgage arrears should be attached. In addition, the Legal Aid Board is similarly situated country wide, with a wide legal expertise. Therefore substantially increased resources could be made available to MABS and the Legal Aid Board to meet this need.

An alternative solution is to build on an existing scheme and require lenders to make suitable financial assistance available to all those engaged in negotiations with their lenders under the MARP by covering the reasonable fees of all licensed accountancy and legal practitioners. With on-going financial, legal and debt advice for borrowers to help in negotiations, proposals for so called sustainable arrangements may indeed become sustainable.