

**SUBMISSION ON CENTRAL BANK AND FINANCIAL SERVICES
AUTHORITY OF IRELAND BILL 2003**

FREE LEGAL ADVICE CENTRES, FEBRUARY 2004

Introduction

The second IFSRA Bill is generally to be welcomed in terms of its emphasis on consumer protection. However, there are many areas of concern and some points in the legislation that require clarification. It is also of some concern that the Bill is now proceeding from second to Committee stage in a short time period (Committee Stage now being due on February 18th), leaving little time to prepare submissions and potential amendments on what is a complex and weighty piece of legislation.

The points made in this submission come under three general headings as follows:

- **Amendments made to the Consumer Credit Act and other related legislation**
- **Involvement of consumer representatives at various levels of IFSRA**
- **Issues in relation to the Financial Services Ombudsman's Bureau**

1. Amendments to the Consumer Credit Act 1995 and other related legislation

Licensing of certain mortgage lenders

Head 45 of the IFSRA (No 2) Bill proposed that a non-deposit taking financial institution would not issue a loan secured on the principal private residence of a borrower, unless licensed to do so by IFSRA and that IFSRA could lay down the conditions upon which such a licence might be granted.

FLAC welcomed this proposal in its initial submission on the establishment of IFSRA, as it was thought likely that it would place certain non-status lenders involved in the provision of housing loans at high interest and default interest rates and on other onerous terms under the scrutiny of IFSRA. In turn, this could potentially lead to a refusal of a licence where IFSRA felt these terms were unjustified and imbalanced.

On examination of the Bill, there does not appear to be any such provision included in the Bill as published. Why this omission, when it is a recommendation of the McDowell Report and has been consistently called for by the Director of Consumer Affairs and organisations working with people in debt for some time? As it stands, there are a number of operators in this sector of the market and others getting into it, especially given the current rush to provide consolidated housing loans. It is no secret in the money advice sector that this has led to threats of proceedings and some actual repossession cases, where due to cash shortages, the borrower defaults on payment and severe default interest rates lead to high arrears very quickly.

It is submitted that this is a very serious omission in the IFSRA No 2 Bill and that it should be rectified by providing for such a licensing system. Like the licensing system for moneylenders, IFSRA should be in a position to refuse a license under a number of headings including that the proposed charges are excessive.

Power of IFSRA to monitor charges

Section 149 of the Consumer Credit Act 1995 gave the Office of the Director of Consumer Affairs the power to monitor charges levied by credit institutions for the provision of services to customers and to refuse to sanction new charges (or existing charges at the time the Act was initiated).

In the first CBFSAI Act 2003, this power was transferred to the Central Bank. However, the wording of the section still refers to charges in respect of **services** offered by a credit institution or group of institutions. It is unlikely that this right to monitor charges, therefore, extends to surcharges such as default interest and other forms of penalties levied when a borrower fails to honour their obligations under an agreement. Many of the finance houses (who come under the definition of credit institution) involved in the provision of car finance through hire purchase charge default interest of the order of 1.5% or 2% per month.

It is submitted that the Central Bank or perhaps more appropriately IFSRA should have the power to monitor surcharges and where it is felt that the surcharge is not a genuine estimate of the cost of servicing an account in default, should have the power to refuse to sanction it.

The Unfair Terms in Consumer Contracts Regulations 1995

These regulations again give a power to the Director of Consumer Affairs to refer a term in a standard consumer contract to the High Court to have its fairness tested. If the term is considered to be significantly imbalanced against the interests of the consumer contrary to the requirement of good faith, it can be set aside.

In our view, these regulations have potential applicability in financial services contracts offered to consumers, especially in relation to penalties. In our initial submission on the establishment of IFSRA, we asked what plans there were to give jurisdiction to IFSRA/Central bank under the regulations. The answer now appears to be none, as neither the first Act nor the current Bill, despite amending a vast amount of legislation and regulations, make any reference to our knowledge to the Unfair Terms in Consumer Contracts Regulations.

It is submitted that the power to refer terms to the High Court to have their fairness tested in relation to consumer contracts involving the provision of financial services be transferred to IFSRA from the ODCA

Housing Loans

The definition of mortgage lender under the Consumer Credit Act is amended in this bill to include a person whose business includes the making of housing loans. This is welcome in that operators who are not credit institutions will come under the legislation and housing loans made by them will be subject to the requirements of Part IX of that Act.

The definition of housing loan remains the same and includes any agreement for credit on the security of a mortgage where the house is to be used or to continue to be used as the principal private residence of the borrower. This definition does not specify that the borrower must be a consumer to enter into a housing loan, although given that this is the Consumer Credit Act, it is undoubtedly implied.

The definition of consumer under the Consumer Credit Act 1995 is amended in the new Bill to allow the Minister by regulation to extend the classes of persons who might be regarded as consumers. However, it does not change alter the definition; it only allows it to be altered. It still remains as 'a natural person acting outside their trade, business or profession'.

This has created a difficulty which the McDowell Committee noted in relation to loans where the principal private residence is offered as security for a loan by a person who may be acting outside their capacity as a consumer, for example using the loan for the purposes of a small business or for farm machinery or stock. The question remains, is this type of housing loan covered by the (limited) protections afforded by the Consumer Credit Act 1995 or not after the passage of this legislation?

It is submitted that the definition of a housing loan should be amended to include any loan regardless of its purpose where the home is given as security for the loan and continues to be used as the principal private residence of the borrower.

Definition of a Mortgage Intermediary

The definition of a mortgage intermediary is amended in Schedule 12, Part 1 of the Bill. The intention of the amendment is to include in the mortgage intermediaries licensing system so called mortgage introducers or mortgage brokers, as long as they receive a commission or other form of consideration for arranging or offering to arrange a loan. It is conceivable that this amended definition will cover commission from any source, i.e. not just from the institution but also from the customer but it is not expressly stated.

It is submitted that if the intention of the amendment is to bring mortgage brokers who charge a consumer a fee but do not receive a commission from the institution into the definition and licensing system, then this should be expressly provided for.

2. Involvement of consumer representatives at various levels of IFSRA

Board of the Regulatory Authority

The current board of the Authority does not appear to have any member who has direct specific experience of consumer protection in the financial services area, apart from the Consumer Director herself who can be said to be on the board by virtue of her office. One of the Regulatory Authority's key roles is the protection of the consumer.

It is submitted that this should be reflected in the appointment of an independent member to the Board who will represent the consumer perspective in addition to the Consumer Director.

Ombudsman's Council

Equally, the potential involvement of consumer representatives in the Financial Services Ombudsman's council seems limited. At present, the Bill specifies that the Council should contain 5-10 persons, at least one of whom must have *'knowledge or experience of consumer issues relating to the provision of financial services'*. Equally, the Chairperson must have such knowledge. However, it is not specified that the Chair and the member with such knowledge or experience must not be the same person. Is this intended? In addition, at least one member *'must have knowledge or experience of the financial services industry'*. What background is envisaged for the other members?

It is submitted that more than one member and the Chair (who under one reading of the current Bill could be one and the same person) should have a consumer background, given the role of the Council, amongst other things, *'to keep under review the efficiency and effectiveness of the (Financial Services Ombudsman's) Bureau'*.

Finally, it is arguable that the wording here is far too weak. On a broad interpretation, almost any citizen in the State can lay claim to having knowledge or experience of consumer issues relating to the provision of financial services.

It is submitted that this wording should be strengthened, that any such member should *'have a track record of working on consumer protection issues in relation to the provision of financial services'*

Composition of the Consumer Consultative Panel

Despite indications that an interim panel was being considered as far back as summer 2003, no such panel has been established by the Minister for Finance. Therefore, the Consumer Director has been operating for some time without a consumer panel to consult with. This does not bode well for the consumer focus of the Authority.

The decisive criterion for appointment to the panel is extremely vague. The Minister *'shall ensure as far as possible that those persons have knowledge or experience of or as consumers'*. This leaves the way open for persons to be appointed without any specific experience of financial services or the protection of the consumer in relation to provision of such services. Whilst it may be useful to have actual consumers in their capacity as consumers on such a panel, there is also a specific need for persons with a particular expertise and consumer focus in the areas under the Authority's remit – insurance policies, consumer credit agreements, mortgages, savings and investment products etc.

At present, the wording is so wide that, again, almost any person could legitimately serve on the consumer panel. It is submitted that this wording be changed to reflect the need for specific consumer protection expertise.

For example, *'In appointing persons as members to the Consultative Consumer panel, the Minister shall ensure that at least 50% of the members of the panel have experience in the provision of advice and information to consumers in relation to the core financial services areas under the Regulatory Authority's remit'*

3. Issues in relation to the Financial Services Ombudsman's Bureau

Introduction

The powers of the Ombudsman are fairly comprehensive and the establishment of such an office is welcome and long overdue as the current industry ombudsman in the credit and insurance sectors, although a useful alternative to potentially expensive litigation, is limited in scope and funded by the industries it seeks to regulate.

It is noted that in Section 57BX (1) (c), the Ombudsman has the power to investigate complaints by consumers relating to the failure by a regulated financial service provider to provide a particular financial service, for example a refusal to extend a loan. This is not a power the current industry ombudsman's offices have and in its initial submission, FLAC called for such powers to be provided. It is welcome that this has been done as it appears to recognise that access to credit may be an issue which a third party can rule upon.

Regulated Financial Service Providers

A question we would raise here is whether there are any gaps in the definition of a 'regulated financial service provider' that would enable some outfits to escape the Ombudsman's jurisdiction. The definition includes any business subject to regulation by the Bank or Regulatory Authority. Does this, for example, cover all finance companies and non deposit taking lenders? This might be clarified.

Legal Proceedings

Section 57BX(3)(a) provides that a consumer will not be entitled to make a complaint if the conduct complained of is or has been the subject of legal proceedings before a court or tribunal. This is obviously necessary for an alternative dispute mechanism to function properly. However, we are slightly concerned about the wording here. Is it intended that a complaint will be precluded if the consumer has brought legal proceedings or if either party has?

If it is the former, it should explicitly say so. If it is the latter, than it is possible that a well resourced provider could embroil a complainant in legal proceedings that the complainant can ill afford in order to avoid his/her complaint being dealt with by the Ombudsman. A second point here is what is meant 'by the conduct complained of'. Do the legal proceedings in question have to explicitly relate to that conduct or will proceedings on the general subject matter of that financial service preclude a complaint?

An example might be useful here. If a borrower/consumer defaults on a loan due to inability to pay, s/he might be sued by that credit provider. However, that consumer might be very unhappy about aspects of the loan such as customer service, payment protection insurance or default interest. Will the Ombudsman be able to simultaneously deal with these complaints?

It is submitted that the words 'brought by the consumer' be inserted between legal proceedings and before a court or tribunal in Section 57BX (3) (a)

Frivolous or vexatious complaints

Section 57BZ allows the Ombudsman to decide not to investigate a complaint or to discontinue such an investigation on a number of grounds including that the complaint is vexatious or frivolous, that it was not made in good faith or that it is trivial. Whilst this is normal and necessary, we would be concerned as to how these exclusions might operate. What is frivolous or trivial to one person may not be so to another and it is important that an unhappy consumer should be able to vindicate their position.

A further exclusion in this section allows the Ombudsman to decline to hear a complaint where *'there is or was available to the complainant an alternative and satisfactory means of redress in relation to the conduct complained of'*. Again, it is unclear what the rationale behind this provision is. Given that a consumer (under S.57BX (6)) is already obliged in advance of making a complaint to the Ombudsman to give the provider concerned a reasonable opportunity to deal with it, is this measure intended to preclude complaints where such reasonable opportunity has not been provided or does it allow for a wider basis for the exclusion, for example, the availability of the courts as a remedy.

It is submitted that greater clarity as to how the potential exclusions in Section 57BZ are intended to operate should be provided.

Appeals from Ombudsman to the High Court

We note that under Section 57CL, an appeal lies to the High Court from a decision of the Ombudsman for either party (as well as cases stated on a question of law). It can be safely assumed that the provider of financial services is more likely to use this avenue than the consumer. Who will represent the consumer in these appeals proceedings? Given the current crisis in civil legal aid funding, it is highly unlikely to be the state Legal Aid Board and it is equally unlikely that an individual consumer will be able to afford their own representation.

What is the rationale behind choosing the High Court as the forum of appeal? Could this lead to a situation where a provider of financial services can overturn a perfectly rational decision by the Ombudsman simply by lodging an appeal which the complainant consumer is unlikely to respond to, given the stakes involved?

It is submitted that the appeals mechanism from a decision of the Financial Services Ombudsman be revisited to provide a less intimidating and costly option. For example, could the District Court not deal with these appeals?

**FOR FURTHER INFORMATION IN RELATION TO THIS SUBMISSION,
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