



COUNCIL of MORTGAGE
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Sale and rent back code of practice

Response by the Council of Mortgage Lenders

to the National Landlords Association consultation paper

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Introduction

1. The Council of Mortgage Lenders (CML) is pleased to respond to the National Landlords Association (NLA) consultation paper *Sale and rent back code of practice*.
2. The CML is the representative trade body for the residential mortgage lending industry. Its 158 members currently hold over 98% of the assets of the UK mortgage market. In addition to lending for owner-occupation, the CML members have also c. 1,103,000 buy-to-let (BTL) loans outstanding with a value of over £132.5 billion.
3. This response has been prepared following consultation with the CML BTL Panel and Lending Strategy Panel.

General remarks

4. The CML has long recognised that sale and rent-back schemes, while offering an appropriate solution for some customers, also carry significant risks for sellers/customers when operated outside of a regulated environment:
 - There is an imbalance in power between the (distressed) seller and the buyer in such transactions.
 - The seller may not be able to give the matter proper consideration due to the pressures that they may find themselves under as a result of their inability to service their mortgage and associated financial difficulties.
 - The seller may be tempted to avoid taking independent advice or engaging professional assistance on grounds of cost.
 - The protections for the seller in terms of remaining in their home under an assured shorthold tenancy agreement will be limited, should a buyer decide to take possession of a property.
 - There have already been reports of abuses by buyers and the Office of Fair Trading (OFT) has announced that it will investigate this area.
5. In the light of the risks of abuse in relation to these schemes, the CML has called on the government to introduce compulsory regulation. So far, the government has not responded positively to this call. The CML does not believe that in the longer term self-regulation will be sufficient to overcome actual and potential problems with these schemes. There is the risk that the unscrupulous will avoid such regulation, which then acts as an additional burden on those already acting properly. In addition, self-regulation can throw up

difficulties of enforcement and in imposing strong sanctions against those who do not meet agreed standards. In an area where new organisations without a reputation or track record are active and where customers are particularly vulnerable, these problems are magnified.

6. In the absence of external regulation, however, the CML does see the introduction of a Code of Practice such as that produced by the NLA as a potential step forward. If such a code is adequate, it can provide a useful benchmark in terms of acceptable standards, though it is likely that the majority of sale and rent back landlords will not be NLA members and thus will not be directly subject to the scheme.

7. The CML has, therefore, focussed on the Code to see whether it does, in fact, provide an adequate set of enforceable standards in respect of NLA members. In overall terms, the CML sees merit in the NLA scheme, but remains concerned about significant weaknesses, notably in the areas of enforcement and the provision of independent advice and professional assistance (including independent valuation). These are set out in the detailed comments below.

8. While welcoming the NLA initiative in developing the Code, the CML would need further reassurance as to how perceived deficiencies were to be overcome before it could endorse the Code as an interim measure in the absence of compulsory regulation. The CML would be prepared to discuss further with the NLA how the concerns set out below can be met.

The Code (references are to the draft Code)

General provisions (1)

9. The NLA should specify what “appropriate training” (1.3) might mean in terms of content for types of employee. Similarly “relevant legislation” should be specified. This might be done in an appendix to the Code.

Advertising and promotion (2)

10. The requirements do not appear to make provision for advertising on radio and television, which are covered in guidance and regulations administered by other regulators such as the OFT in relation to consumer credit. Radio, in particular, could well figure in promotional strategies by sale and rent back landlords.

Entering the transaction

11. The CML members have commented on the lack of provision for independent valuation in the Code. Paragraph 3.1.3 does not specify independence or indeed that the valuation should be undertaken by an appropriately qualified professional. It can be argued that unless the valuation is commissioned by the seller, that seller is not fully protected against possible collusion between valuer and buyer or against any aberrant “low” valuation. Sellers may be tempted to avoid the expense of a valuer so the Code should specify that the customer **MUST** obtain an independent valuation.

12. Similarly, it is not enough to inform customers that they can seek independent legal advice (3.1.5). They should be required to provide evidence that they have a legal adviser.

13. The Code does not require that the customer has sought or received independent financial advice. Such advice is most important in enabling the customers to assess whether

sale and rent back is the most appropriate course of action given their personal circumstances. The Code should require the customer to provide evidence that such advice has been obtained

14. The NLA should consider whether the Code should specify a maximum discount below market value that can be offered in terms of purchase price (3.1.6). Arguably, such a maximum might place an overall limit on the scope for abuse and alert customers to discounts that might be excessive. Discounts above a certain percentage could automatically be referred to an independent adjudicator or even to the NLA Disciplinary Board for adjudication.

15. The provision for a cooling off period (3.1.7.f) is unclear. If this applies after the contract has been signed, then it will be unacceptable to mortgage lenders (if the buyer has a mortgage) since the lender will very likely have made funding and swap arrangements that can only be unravelled at significant cost. Mortgage transactions are not normally subject to “cooling off periods” in this sense for the above reason. If the “cooling off period” is a period for reflection before completing the contract, then it is too short to enable the customer to consult family, friends, lender and advisers and to give the offer proper consideration. The offer should be open for at least 28 days.

Business leads (3.2)

16. While it is right that leads should only be sold to NLA members, it is not clear how membership can be verified by either party. If the NLA will provide such a service the Code should say so.

Creating the tenancy (3.3)

17. It is not clear whether the written statement in 3.3.2 is the tenancy agreement itself. There seems no reason not to offer a draft lease at this stage to enable customers to familiarise themselves and/or to take advice.

18. Paragraph 3.3.9 states that “increases in rent levels must not significantly exceed RPI figures.” To avoid ambiguity around “significantly” it would be preferable to remove the word and place a requirement on the landlord to refer any rent above RPI to the NLA Disciplinary Board or independent body for adjudication. This requirement might also be made in relation to heavily discounted sale prices (c.f. 3.1.6).

Maintaining a tenancy (4)

19. The provisions for a maximum of three days for dealing with urgent repairs in 4.2.f are not adequate in respect of matters such as lack of water, electricity or serious sewerage issues.

20. The requirement in 4.4 that a landlord should not use Section 21 except in very restricted circumstances is welcome, but should be qualified to allow a landlord to gain possession if it is necessary to sell the property to pay off mortgage arrears or to stop arrears accumulating. A lender in possession or receiver of rent would also not be bound by such a restriction and this should be made clear in the Code.

Complaints (7)

21. 7.1.2 should be clarified to state that the complaints procedures must exist in written form in plain English and that they should be given in writing to the customer for reference.

Policing and enforcement (8)

22. While the Code sets out clearly the disciplinary process in respect of non-compliance (8-8.7) there are no details on the level of resources that the NLA will devote to policing and enforcement. There is also no indication of how such resources will be organised; will such action be undertaken by designated NLA staff or via external agencies or consultants? What safeguards will operate to ensure that regulatory and representative functions within the NLA are properly separated? These questions are key to the effectiveness and external credibility of the Code.

23. While the disciplinary procedure sets out the actions that may be taken against non-compliant members (8.6) only the reference to compensation for the customers would appear to have the potential to be a significant deterrent. Warnings and suspension from NLA RentBack for instance will have little impact on an unscrupulous operator. Unfortunately, the maximum level of compensation is not specified. Specification would provide assurance to customers and to external observers. The NLA should also check that the various sanctions are fully enforceable on members without their explicit acceptance of their obligations under the Code.

Glossary

24. The definition of a sale and rent back transaction states that the owner must have been in occupation for at least three months prior to the transaction. This is too short; an occupier whose mortgage was only three months old should very likely be talking to their lender and reaching an accommodation rather than discussing sale and rent back. There may be an opportunity for abuse by customers here or, alternatively for inappropriate transactions that disadvantage the customer. Nine months would be a more suitable requirement.

25. The above definition also excludes occupation by spouses/partners of the owner instead of the owner himself. Is this intentional? There could be circumstances where such occupation might be allowable such as a periods immediately following relationship breakdown.

Further strengthening needed

26. As already indicated, the CML believes that the Code, if suitably strengthened, could make a useful contribution to the establishment of standards in the area of sale and rent back in the absence of full regulation. The CML would be please to discuss further the proposals to strengthen the Code made above.

Contact

27. This response has been prepared by the CML in consultation with its members. Comments or queries should be addressed in the first instance to Andrew Heywood, Deputy Head of Policy:

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