Council of Mortgage Lenders

Mortgages Power of Sale and Residential Property

Response by the Council of Mortgage Lenders
to the Ministry of Justice's consultation paper

Introduction

1. The CML is the representative trade body for the residential mortgage lending industry. Our 110 members currently hold over 95% of the assets of the UK mortgage market.

2. Ministry of Justice (MoJ) issued a consultation following the case of Horsham Properties Limited v Clark and Beech and we responded in detail to that. A copy is attached and we would reiterate all the points made in that response once again.

Executive summary

3. We do not accept that there is any justification for this consultation or the proposed reform. The power of sale and law surrounding it has been in place for many years and there is no evidence of abuse of the power or of consumer detriment.

4. The consultation seems to be based on one case which had a very unusual set of facts. The main point of the Horsham case was that the sale was not with vacant possession. This was a buy-to-let case. It is unheard of for lenders to sell an owner occupied property without vacant possession.

5. This is evidenced by the consultation itself which states:-

"…the practice was never used in residential owner occupier situations. After checking with advice sector stakeholders, the courts, and the media, the MoJ has not found any cases where this has occurred on a non- commercial loan."

6. Lenders have to obtain the best price reasonably obtainable when selling a property. Valuation advice indicates that for owner occupier property vacant possession is needed to achieve this. Other than in exceptional cases (discussed in this response and for reasons of fair treatment to customers) lenders obtain vacant possession and to do this they obtain a court order.

7. The proposals may actually cause consumer detriment. A group of borrowers may face unnecessary court costs. If a lender believes a property to be abandoned the lender will not always obtain an order for possession as this will incur costs that the customer would have to pay. These proposals would take that discretion from the lender and the borrower would always have to meet those costs. Given that the borrower has abandoned the property it is unlikely that the borrower will receive details of the court hearing or attend court so it hard to see what protection this affords to the consumer.

8. We are very concerned that the proposals seem to include a requirement to obtain an order for sale when the original order was a suspended possession order. This seems very unfair to lenders and borrowers. It would also have a significant impact on court capacity.

9. The requirements for a court order permitting sale must not be more onerous than an order for possession.

10. We do not think that the cost benefit is neutral –there will be costs to borrowers who have abandoned properties or hand keys in without entering into an agreement with the lender. The costs set out in Annex A are simplistic and omit important items such as additional interest.

11. The proposals may discourage the use of Law of Property Act receivers in owner occupier situations. This is contrary to government policy.

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12. We are pleased to note that Ministry of Justice has excluded buy to let and commercial loans from these proposals. This does however leave grey areas in terms of definitions.

13. We call upon government to seriously assess whether, at a time of financial constraint, this proposal is a good use of government resources.

Q1 Do you think that legislative change is needed in relation to the exercise of the power of sale by lenders in the residential owner-occupier market?

14. As we understand the proposals in the consultation an order for sale will be needed if there is not an order for possession from the court or if the borrower has not given consent to the sale. There seems to be some confusion about suspended possession orders and what amounts to consent and this is discussed below.

15. We do not believe there is any justification for changes to the power of sale. We, and our members, are of the view that these proposals are completely unnecessary and may actually cause detriment to some borrowers in arrears.

16. As indentified in clause 65 of the consultation there is no evidence of any concern relating to the exercise of the power of sale by our members. We find it difficult to understand why this consultation is therefore taking place.

17. The Horsham case - which seems to have triggered these proposals -.was a one off case with very unusual facts. It was unfortunate that the case report did not explain that the loan had been a buy to let loan and that the customer was in breach of the terms of the mortgage.

18. It is our understanding that in that case one of the borrowers moved into the property. As the loan was a buy-to-let loan this would have been in breach of the terms and conditions of the loan. The borrower was therefore both in arrears and in breach of the terms of the mortgage. The lender appointed a receiver – common practice for buy to let loans- who sold the property as agent for the lender.

19. Crucially the sale was without vacant possession. A subsequent buyer applied for a court order for possession and this was granted. The actual case involved a claim by the borrower that this breached her human rights as s36 of the Administration of Justice powers were not considered.

20. It is worth noting that a court order was still needed – it may not have been obtained in advance of the sale – but the court still had to consider the issue.

21. It is also worth mentioning that had the borrower been a tenant it is likely that the tenancy would form an overriding interest and would therefore bind the buyer.

The relationship between the power of sale, the right to possession and vacant possession

22. The reason that we do not believe that there should be any change to the power of sale is that there is no evidence of consumer detriment and no risk that consumers will be prejudiced in the future. Commercial realities, lender behaviour and legal/regulatory requirements mean that very strong safeguards exist as things stand.

23. The unusual fact in the Horsham case was that the sale was **without vacant possession**. For owner occupier situations it is hard to imagine that any buyer would be willing to buy a property from a lender exercising its power of sale without vacant possession. The same would apply to a sale by a receiver. At the very least the buyer would be faced with bringing a possession action to obtain possession a commercially unacceptable prospect. Buyers want to purchase without such complications and buyers' lenders would be very unlikely to lend to fund such a risky exercise.

24. There is no market for the sale of an owner occupier property without vacant possession and we do not believe that this will change.

25. To achieve vacant possession in most owner occupier cases a possession order will be needed.

26. Therefore in almost all cases where there is an owner occupier mortgage the lender will obtain a possession order before selling the property. (There are a few exceptions and these are discussed later in this response).

27. So because a possession order is obtained in the vast majority of cases the lender's power of sale is already subject to close court scrutiny through the possessions procedure. We cannot therefore see the need for any further court procedure to be introduced.

28. We appreciate that it could be argued that for the few cases where a possession order is not sought then an order for sale could be introduced. However there are very good reasons why orders are not obtained in those very few cases and we will expand on this later on in our response. No consumer detriment is present in these minority cases.

29. In summary, for owner occupier situations the requirement for vacant possession means that the power of sale and the right to possession are inextricably linked. The consumer has the protection of court scrutiny as a lender will obtain an order for possession before exercising the power of sale. That protection will include the s36 Administration of Justice powers where applicable.

Regulatory and common law requirements.

30. A lender exercising its power of sale has a common law duty to obtain the best price reasonably obtainable. As valuation advice indicates that the best price for the sale of an owner occupier property is with vacant possession a lender could be in breach of this duty if it sells without obtaining vacant possession.

31. This common law requirement is backed up by regulation. The Financial Services Authority (FSA) requires first charge lenders to

"obtain the best price that might reasonably be paid, taking account of factors such as market conditions as well as the continuing increase in the amount owed by the customer."

(Mortgage Conduct of Business rules – MCOB 13.6.2).

32. Failure to obtain vacant possession would expose a lender to a claim in breach of the common law duty and put the lender in breach of regulatory requirements. Even if there was a market for buying properties with the borrower in possession it is hard to see that lenders would risk breaching common law and regulatory requirements.

33. First charge lenders are subject to regulation by the Financial Service Authority. They are subject to an overriding principle to treat customers fairly and a set of rules on the treatment of customers in arrears. These include rules at repossession stage such as the rule quoted above.

34. As noted in the consultation the FSA has written to lenders stating that it would be inclined to regard the sale of a property by mortgagee without a court order as unfair. The FSA regulatory framework is backed up by the powers of the Financial Ombudsman. We would have thought that this precautionary step taken by the FSA would add further re-assurance to government that no action is required.

Voluntary statement

35. As identified in the consultation following the Horsham case on behalf of our members we issued a voluntary statement. That statement was given on the basis of existing practice and is further assurance to consumers that lenders in owner occupier situations only sell a property as mortgagee once an order for possession has been made.

Summary

36. We cannot see any case for reform. MoJ itself has not been able to find any evidence of lenders misusing the power of sale. The consumer is protected because the lender will in owner occupier situations seek vacant possession before sale and in most cases a court order will be needed to obtain vacant possession.

37. Consumers also have the comfort of the legal and regulatory landscape – including the FSA's stance set out in its letter- and lenders' voluntary commitments.

Q2 Do you agree that a lender's power of sale in relation to a residential owner occupier mortgage should only be exercisable by agreement with the borrower or by order of the court?

38. Again we do not believe that there is any need for reform in this area.

39. We are not clear what the question means by "order". We think from the narrative that this means an absolute possession order or an order for sale. Our response is given on this understanding.

Exercise of the power of sale

40. We do not believe there should be any new limitations on the exercise of the power of sale. Sufficient limitations already exist.

41. The prime limitation is that set out above – to be able to sell a property that was occupied by a borrower the lender will first need to obtain vacant possession. This is because of market, common law and regulatory requirements. It is also because lenders treat their customers fairly and follow due process to reach a sale position (which they try to avoid if possible). So in practice regardless as to what the terms and conditions say even if the power of sale is exercisable it is not exercised until an order for possession (and possibly a warrant for possession) has/have been obtained.

42. Statute (LPA) limits the exercise as default is required. One concern about the Horsham case was the fact that s103 of the Law of Property Act was relied on. This appears to have been interpreted as meaning that where the loan is a residential mortgage the lender will seek to sell the property after a very short period of time.

43. However for owner occupier loans lenders will usually amend their terms and conditions so that the power of sale or the right to possession will not become exercisable until default and usually at least two contractual monthly payments have been missed. This would accord with the protection given to borrowers by s103(ii) of the LPA. The time frame also ties in with the FSA's definition of arrears.

44. Even if lenders vary the statutory requirements they are subject to regulatory scrutiny. For example the FSA is a qualifying body for the purposes of the Unfair Terms in Contracts Regulations 1999 and therefore in addition to other regulatory powers can challenge any lender's terms or conditions that it considers unfair.

45. But – as mentioned above - this is irrelevant as lenders wish to reach a solution with their borrowers – not rush to sale. And except in very rare cases such as where there is already vacant possession the lender will obtain an order for possession before exercising the power of sale. We do not therefore believe that there should be any further limitation imposed on the exercise of the power of sale. It is properly controlled at present.

46. It is also worth remembering that until such time as the lender does exercise the power of sale the borrower always has the equity of redemption available. (The equity of redemption is effectively the right for the borrower to repay the mortgage and regain "ownership" of the property).

47. The rules relating to the power of sale have been in place for many years and have worked effectively. We accept that this does not in itself argue against change and again if there was clear

evidence of consumer detriment this may require consideration. However in the absence of such evidence there are real dangers of unintended consequences occurring.

The benefits of overreaching

48. If notwithstanding our views government does proceed with this proposal we think it is very important to allow the power of sale to be exercisable by agreement and without court order. There are many examples, such as mortgage rescue or assisted voluntary sales, where it is advantageous to the borrower for a first charge lender to exercise its power of sale and therefore overreach second charge lenders. Borrowers and lenders would not want to wait for a court order or to go to the expense of obtaining one in these cases. The need for this flexibility was reflected in our voluntary statement where we referred to the fact that:-

"there may be exceptional cases where the sale takes place with the full informed consent of the borrower and the statement would not apply in such circumstances".

So the ability for a lender to exercise its power of sale without a court order in these cases is an important consumer benefit.

Abandonments and voluntary possessions

49. Those cases where a lender would sometimes not obtain a possession order are where the property is vacant or the borrower has handed in the keys. Keys are not always handed in by agreement. These exceptions are recognised in our voluntary statement. Lenders take steps to ensure that there is vacant possession and when satisfied may decide not to obtain a possession order. Obtaining an order would increase the borrower's costs (court costs etc) and indebtedness (which would increase whilst the hearing date was awaited).

50. These proposals would mean that lenders need a court order to be able to exercise the power of sale in cases of abandonment or where the keys are handed in without agreement and borrowers would have to pay litigation costs

51. It seems particularly futile to try to assist borrowers who have abandoned their property in the way proposed. By definition such borrowers are unlikely to attend a hearing if indeed they even receive notice of the hearing taking place.

52. We understand from the advice sector that they are concerned that lenders have on rare occasions considered a property to be abandoned when this is not the case. These instances would be very rare indeed. Lenders do not make this assumption without careful investigation. They have to ensure that peaceable re-entry is obtained. To do otherwise would be to risk criminal proceedings.

53. Lenders will also make many attempts to contact the borrower. Depending on the lender's policy these might include attempts to visit the property. Lenders would only seek to take peaceable repossession where there was no response to such attempts at contact and they have good reason to believe the property is unoccupied.

54. We do not think that the proposals in the consultation would assist borrowers who do not engage and abandon the property and, as indicated above, might involve such borrowers in an additional unnecessary set of costs.

55. The same applies to borrowers who hand in keys but do not sign agreements. Again lenders try hard to engage with such customers and wherever possible to persuade the borrower to try to find a mutually acceptable solution. If this cannot be done lenders do try to persuade the borrower to sign an agreement. We feel that handing in keys without engagement is a very clear indicator of the borrower's position. Again we think it unlikely that many (if any) borrowers of this type will engage with an additional court procedure.

Post order

56. We assume that where there is an order for possession (absolute or suspended) and the borrower hands in the keys but without signing an agreement that would be sufficient and an order for sale not needed.

57. Would an order for sale amount to an order for possession? If the lender obtained an order for sale and the borrower moved back into the property would an order for possession then be needed? What if the borrower put a third party in the property?

58. It must also be made clear that one order per loan is sufficient to encourage forbearance and reduce costs. So if a lender obtains a possession order against a borrower but an arrangement is then made and the borrower entitled to stay in the property the order should still be enough to allow the lender to take possession and sell if the order is breached. Effectively there should be no implication of waiver which would require a lender to obtain an order for sale.

Suspended possession orders

59. We are unclear as to why a suspended possession order would not authorise the power of sale as the consultation seems to imply. We appreciate that whilst the terms of the SPO are being complied with sale would be unfair unless with the agreement of the borrower. However on breach of those terms the SPO has the same status as an absolute order. It would seem illogical to expect a lender to have to obtain an order for sale in SPO situations. To impose this would act as a disincentive for lenders to seek a SPO and would add significantly to costs and have an impact on court time.

Law of Property Act receivers

60. We note that the use of Law of Property Act receivers is not supposed to be affected by these proposals. We assume that this is the case even when the LPA receiver sells the property? If our understanding is not correct this would appear to be contrary to stated government policy which is actively encouraging the use of receivers.

61. What is the position when the lender has appointed an LPA receiver to receive rent but has not extended the LPA receivers powers to sell the property? Whilst appointments are still fairly rare in owner occupier situations lenders are being encouraged to use receivers where a tenant is in situ. Because receivers are not commonly used in owner occupier mortgages we believe that terms and conditions often do not extend receivership powers beyond those in the LPA – so receivers can only collect rent.

62. If sale was the ultimate outcome we assume that the lender would need to obtain a court order (either for sale or possession). However this will discourage the appointment of receivers which appears to be contrary to government policy. (See, for example, John Healy's speech at our annual conference).

Summary

Changes to the rules on the exercise of the power of sale are unnecessary. There are risks associated with changing rules that work well. In addition some customers that are not subject to paying litigation costs would be forced to do so if these proposals were introduced. The proposed reform may affect lenders' decisions on the appointment of LPA receivers.

Q3 Do you consider that this reform should only apply to new mortgages created after the legislation comes into force?

63. Although we do not agree with reform we should argue for it to apply to as few loans as possible and therefore agree with this. However the practical implications of this override that logic and it is probably easier for lenders to adopt a one size fits all approach in this.

64. Treating different sets of customers in differing ways as far as the court is concerned seems unfair.

65. In practical terms the likely result of the proposals will simply be that lenders will obtain an order for possession whether or not it is necessary.

Q4 Do you agree that in the absence of agreement the exercise of the power of sale should only be considered authorised where a possession order has been obtained, or the court makes an order permitting the sale?

66. We think this question rather duplicates question 2. Please see our response to question 2 and treat the response to that question as being the response to this question 4 as well.

67. In summary we do not agree. As explained above there is no evidence of abuse of the power of sale or of consumer detriment and to introduce this proposal would lead to additional costs for borrowers who are unlikely to benefit from court proceedings.

Q5 Do you agree that such an order for sale should be subject to provisions equivalent to those in section 36 of the Administration of Justice Act 1970 as amended?

68. Given that we do not regard change as appropriate or necessary this is difficult to answer. If the government insists on proceeding, and we caution against this, then we would strongly oppose anything that goes beyond the provisions of s36.

69. How will these proposals interplay with the provisions of the Mortgage Repossessions (Protection of Tenants) Bill should that become enacted?

Case law

70. However that in itself presents problems – there is a good deal of case law surrounding section 36 – will that be codified? If so by definition the government is exceeding s36. If there is conflict between an order for possession and an order for sale lenders are likely to opt for the more “lenient” regime. How would this be good law?

71. We think that there may well be human rights issues where an individual is a mortgagee and the power is reduced.

Q6 In relation to abandoned properties as defined above, do you agree that the power of sale should only be exercised where a court order has been obtained because the borrower cannot be found and cannot enter into an agreement?

72. Again we do not agree with this. As explained above given that such borrowers cannot be found to sign an agreement common sense would indicate that they are unlikely to be found (or want to be found) to attend a court hearing.

73. The hearing will simply add to delay and therefore costs and is unlikely to assist the borrower in any way. We do not regard this as fair treatment of customers. Frankly if this is the “harm” that government wishes to rectify it would be more practical and less expensive to taxpayers to simply require lenders to obtain a possession order in these cases. This could easily be done – for example the FSA could suggest this in correspondence.

74. However it will in some cases mean additional costs for those borrowers.

75. Lenders will also need to understand whether the proposed reform, if introduced, would impact on the right to obtain peaceable re-entry. Very often where properties are abandoned urgent repairs or work is needed and lenders take peaceable re-entry to deal with these. A receiver could be appointed but this may lead to delay and unnecessary cost. We do not think the proposed reform would limit a lender’s ability to peaceably re- enter but clarification on this point would be welcome.

Q7 How many cases have consultees encountered where a property is abandoned and the borrower cannot be contacted? How many of these have resulted in an unopposed retaking of peaceable possession and a sale?

76. We do not collect figures for abandonments and cannot comment directly on this. Overall our figures for voluntary possessions have increased in recent years – amounting to 26.1% in 2009.

77. However such figures include cases where borrowers have handed in keys (with or without an agreement) and also include cases where court orders have been obtained so we cannot answer this with any confidence.

Q8 Do you agree with the definition proposed of residential owner occupier mortgages?

78. We are of the view that any such definition has to be very clear and should not be left to court interpretation. The scope of the pre-action protocol – which we regard as unclear- has caused considerable difficulties for lenders and advisers.

79. We agree that business loans should not be included in the definition. We cannot see how second or holiday homes meet the criteria however. That said it may be very difficult for lenders to identify these.

80. There is also the question of those loans which start out as a residential owner occupier loan but which the borrower converts (either with or without the lender's consent) to a buy to let loan. This may not be done formally. These are then effectively commercial loans. We do not therefore think that any legislative change should include such situations although identification is not always easy for lenders and it may be that purpose at the outset is the simplest test.

81. We agree that loans for purposes not related to the property should not be included within any provisions. Likewise mixed purpose loans should not be included. Again however categorisation may not always be simple.

82. We agree that each mortgage should be assessed individually (para114 of the consultation).

Q9 Do you think there is an existing defined category of residential mortgages that could be used to define the scope of these proposals?

83. We are not aware of any. Definitions must be clear to avoid doubt and potential litigation.

Q10 Do you consider that the definition should include homes bought by a person for the occupation of family members?

84. We do not think that that the type of scenarios referred to in paragraph 115 should be included in the definition.

Q11 Do you agree that in cases where there is more than one loan over a property, the proposals should apply to each loan separately, with each assessed according to its own purpose?

85. Yes.

Q12 Do you agree with the initial impact assessment?

86. We do not accept that the law denies a homeowner protection available at court. In practice owner occupier properties are always sold with vacant possession. Given the quite clear statement that there is no evidence of unfair practice now – and no reason to suppose there will be in the future- then we find the proposal to use limited legislative resource an untenable position.

87. We also find that the assessment does not properly reflect the extra costs that will be imposed on borrowers who will not in any way be assisted by the proposals. Those borrowers who

88. In terms of numbers we collate the number of voluntary possessions. In 2009 there were 12,020 voluntary possessions equating to 26.1% of possessions . However we do not distinguish between voluntary possessions by agreement and those where no agreement has been reached. Nor do these figures distinguish between voluntary possessions pre and post court order.

89. We do not accept that there is any lack of consumer confidence in the legal protection available. The legal protection is very strong and has been enhanced by the pre action protocol.

90. We also note the “theoretical possibility of lenders taking possession when a borrower is merely away for example on holiday”. It should be remembered that this will only occur if the borrower is not making payments and ignores attempts at contact – which are regular so the borrower would be on a long holiday without having made appropriate financial arrangements. We do not see that the proposals would assist with this theoretical possibility.

91. It is also rather difficult to assess the impact without seeing detailed proposals. For example as already mentioned we do not understand the reference to a suspended possession order not being sufficient. We are unclear as to the implications of this. If it means that even if the terms of a SPO are breached then the lender must obtain an order for sale then the impact of the proposals will be sizeable – not just for lenders but also for a large number of borrowers and the court system.

92. Similarly our comments on the impact assessment assume that reform would follow the provisions of s36 of the AJA (as amended).

Overall conclusion

93. In conclusion we would refer the MoJ to its own findings:-

“The Ministry of Justice has been unable to find examples of the use of the power of sale as in the Horsham Properties case in a residential owner- occupier case. That it is not used is supported by the industry and the regulator’s attitude to the power of sale“ and

“…the practice was never used in residential owner occupier situations. After checking with advice sector stakeholders, the courts, and the media, the MoJ has not found any cases where this has occurred on a non- commercial loan.”

On this basis we cannot see any justification for taking any action on this issue.

Questions

94. Any questions should be referred to Samantha Barnett - Samantha.barnett@cml.org.uk

26 March 2010

cml Council of Mortgage Lenders

Mortgage Remedies (Possession and Sale) Review

Response by the Council of Mortgage Lenders

to the Ministry of Justice's initial review

14 January 2009

Introduction

1. The Council of Mortgage Lenders (CML) welcomes the opportunity to respond to this preliminary review. The CML is the representative trade body for the residential mortgage lending industry. Its 138 members currently hold over 98% of the assets of the UK mortgage market.

2. We understand that this review follows the decision in the case of Horsham Properties v Clark and Beech. That case has attracted much comment but appears to us to be widely misunderstood for reasons set out below.

3. We have responded to the specific questions raised by the Ministry of Justice but given the importance of the review we have some additional comments to make. We are very concerned that this case should be seen in context and should not lead to changes which could have severe, unintended and far reaching effects for lenders, consumers and the economy.

4. The review seems to be based on concern that lenders in owner occupier situations will seek to enforce by using the power of sale without first obtaining possession. Other than in exceptional situations (fraud, abandonment and voluntary possession) lenders would only seek to sell once an order for possession has been obtained by the lender. This is confirmed in a statement issued by the CML on behalf of its members. The review therefore seems to us to be based on a false premise.

The importance of the Law of Property Act 1925

5. The Horsham case has led to speculation over s101 (and subsequent sections) of the Law of Property Act 1925. Section 101 grants a lender power to sell the secured property in the event of default by the borrower. It applies to loans secured against property (be they buy to let, owner occupier or commercial loans) and can only be exercised in certain circumstances which (subject to amendment in the mortgage) are set out in the statute.

6. The secured lending industry is completely underpinned by the rights and responsibilities granted by the LPA. The industry relies on the right to sell the property to recover arrears or debt. The provisions of the Act are long established law and have worked effectively for all parties for many years now. These rights are fundamental to secured lending of all types including residential loans.

7. We believe that any attempt to restrict these rights would have severe consequences for the lending industry and therefore for borrowers and for the economy as a whole. Our concerns are set out in full below but we want to emphasise that any change should not be considered lightly and its impact should not be underestimated particularly in a time of economic downturn.

The Horsham case

8. The Horsham case was not clearly reported and some important aspects of the case appear to have been overlooked. The Horsham case concerned a buy to let loan (not an owner occupier loan) and we understand there were some pertinent unreported facts surrounding the case. The case has been described as evidencing a legal loophole to obtain possession. This is not so – it appears the lender in question acted perfectly properly in accordance with standard practice for commercial loans and within the confines of law which has been established for many years.

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9. Some commentaries on this case seem to overlook the fact that the proceedings were possession proceedings. The sub purchaser – as opposed to the lender- brought those proceedings but there is no question that a court order was needed for possession to be obtained.

10. The confusion surrounding this case seems to have arisen through a misunderstanding between "possession" and the power of sale. Broadly speaking "possession" is where the lender either takes physical possession of the property from the borrower or – if the property is occupied for example by a tenant- the lender takes receipt of the income from the property.

11. The power of sale is exactly that – i.e. the right to sell the property.

12. Whereas a court order is generally needed if a lender wants to exercise its right to possession it is not needed if the lender wishes to sell to realise the security. Clearly in some cases a lender might wish to do both but there is no obligation to combine these rights. If the lender's right to exercise its power of sale has arisen and is exercisable the lender has the right to sell the security with or without vacant possession.

13. However most sales by residential mortgagees will be with vacant possession. Very few buyers of residential properties are likely to wish to purchase without vacant possession being offered. For vacant possession to be obtained (subject to some very limited exceptions referred to below) a court order would be needed. Accordingly where the loan is an owner occupier loan and is in default the lender would as standard practice obtain a court order for possession before exercising either its power of sale or its right to take possession.

14. In the Horsham case the lender chose to sell without vacant possession. There are circumstances where a sale without vacant possession is entirely appropriate. Where the rental stream is a valuable asset – possession would be inappropriate and to sell with vacant possession is more likely to reduce the value of the property and prejudice the borrower. This happens regularly with commercial loans (there would be no suggestion that a large city office block for example should be emptied before any lender sold the property to realise its security). Buy to let loans are commercial loans and the same principle applies.

15. It is important to remember that any sale by mortgagee has to be for the best price reasonably obtainable. A court would look at any non arms length sale with suspicion i.e. a lender should not be able to avoid its obligations by selling to an associated company or person.

16. There has also apparently been speculation that the facts of this case were in some way influenced by the fact that the lender had appointed a receiver. We think this is false logic. Whether or not a receiver was appointed seems entirely irrelevant.

Other considerations

17. The Law of Property Act 1925 cannot be looked at in isolation. There are many additional protections for borrowers that need to be considered when looking at the Act. These have been introduced through case law, statute, guidance and regulation and are summarised here.

18. Lenders' terms and conditions – one concern about the Horsham case was the fact that s103 of the Law of Property Act was relied on. This appears to have been interpreted as meaning that where the loan is a residential mortgage the lender will seek to sell the property after a very short period of time. However for owner occupier loans lenders will usually amend their terms and conditions so that the power of sale or the right to possession will not become exercisable until default and usually at least two contractual monthly payments have been missed. This would accord with the protection given to borrowers by s103(ii) of the LPA.

19. Even if the power of sale becomes exercisable it does not mean that lenders will exercise the power. See our comments on forbearance and timing below. Until such time as the lender does exercise that power the borrower always has the equity of redemption available. The equity of redemption is effectively the right for the borrower to repay the mortgage and regain "ownership" of the property.

20. If the lender does exercise its power there are safeguards for the borrower as the lender has to obtain the best price reasonably available and must account to the borrower for any surplus (after redeeming other financial charges).

21. In terms of possession lenders must take this through peaceable means and if there are occupants a court order is needed unless the occupants volunteer to leave. Additional protection is given to some occupants through the provisions of the Protection from Eviction Act 1977.

22. Regulation - It is also important to note that much of the residential mortgage industry is highly regulated. We comment on this in greater detail in our response to question 1 but this is of great importance and should carry considerable weight in this review.

23. The Financial Services Authority is a qualifying body for the purposes of the Unfair Terms in Contracts Regulations 1999 and therefore in addition to other regulatory powers can challenge any lender's term or condition that is considers unfair.

24. In addition to regulation, protection is offered to consumers through the Financial Ombudsman Service. FOS has a broad jurisdiction and does not only cover regulated loans. Any firm which undertakes any Financial Services and Markets Act lending falls within Ombudsman's compulsory jurisdiction which allows the FOS to look at complaints concerning arrears and possessions handling.

25. To complement the Financial Services Regulatory regime and the treating customers fairly initiative CML members have voluntarily implemented guidance on handling arrears and possessions. Although this does not deal with possession in great detail (as we believe protection is already in place) it does deal with how lenders should deal with borrowers in arrears where the loan is an owner occupied loan. It takes into account the findings from the FSA's thematic review (see below) and, in particular, the good and bad practice guidance published alongside the thematic. It also takes into account issues raised by the Financial Ombudsman, advice agencies and the court service.

26. Guidance - We are also in the process of preparing guidance for members dealing with arrears and possessions in buy to let cases. This should be available shortly and focuses strongly on the position of tenants/occupiers.

27. In addition many lenders have made commitments not to seek possession within specified time frames and are actively engaged in mortgage rescue schemes.

28. Court process- Where an order for possession is sought s 36 of the Administration of Justice Act 1970 (as amended) gives the court wide discretion to protect the borrower.

29. This section gives the court power to adjourn possession proceedings, stay a possession order or suspend the possession date if the court considers that the borrower is likely, within a reasonable period of time, to be able to pay any sums due under the mortgage or (where appropriate) to remedy a default. The court has wide discretion on the terms on which it can adjourn, stay or suspend.

30. The section provides fair balance between the parties. It gives the lender some certainty but also gives protection to the borrower. The section is backed up with case law such as Norgan.

31. As with s101 any attempt to amend this section could have serious implications for secured lending and therefore for borrowers and the economy. In particular we have seen proposed amendments which we understand were introduced by Shelter to the Banking Bill. The amendment purports to give further discretion to county court judges in mortgage possession cases. These amendments would be unacceptable to lenders as the powers are not linked to the borrower's ability to pay the contractual payment agreed at the time the mortgage was entered into. They would create uncertainty and therefore enhance risk for lenders. The industry strongly objects to this. S36 effectively acts as a baseline for lenders and that underpins secured lending. If lenders wish to agree to accept less than the contractual monthly payment they may do so and consistent refusal may lead to action by the FSA. It should not however be within the court's discretion to alter contractual terms for first charge lending.

32. Suspended possession orders - are a particularly effective fairness tool for lenders, borrowers and the courts– they provide a very fair balance between lender and borrower as they give the borrower the chance to remedy the situation. They also allow the court to scrutinise the arrangement made.

33. The court process is now backed up with the mortgage pre-action protocol which links regulation with the possessions process. The pre-action protocol also effectively extends MCOB to many pre 2004 loans. Its introduction has put a strong evidentiary burden on lenders to show that they have treated customers fairly during the arrears process and that they have acted properly before commencing possession proceedings. It enhances the court's role as supervisor of the process. The sale provision in particular gives protection to the borrower.

34. Therefore safeguards for borrowers are in place through two different jurisdictions - the courts and the Ombudsman.

35. Very closely linked with the power of sale is the lender's ability to overreach. If there is a first charge lender and a second charge lender where the first charge lender exercises the power of sale it "overreaches" the second charge lender's registered charge. This effectively makes any monies secured under the second charge unsecured. It gives both the first charge lender and the borrower a considerable amount of protection. It allows the sale of the property without the consent of all registered chargees. This is a valuable tool to borrowers in situations where a sale is agreed but the sale proceeds would not be sufficient to repay all registered chargees.

36. So, for example, if the borrower owes the first charge lender £100,000 and the second charge lender £20,000 but despite best efforts at marketing the property can only find a purchaser willing to pay £100,000 if the borrower was to sell he would almost certainly need consent and co-operation from the second charge lender. If that consent was not forthcoming the first charge lender may agree to sell as mortgagee and overreach the second charge. This would remove the second charge from the Land Registry and the buyer would take free from both the first and second charges. The second charge lender's debt would become unsecured. Had the first charge lender not been able to do this the sale might not have proceeded and the borrower's position worsened.

Call for full consultation

37. Any change to existing statute law relating to mortgages would be fundamental to the lending industry and the economy. We cannot underestimate the impact this would have. Any change should not be undertaken lightly and should be subject to a full and detailed consultation with a full impact assessment.

Specific questions raised by the Ministry of Justice

1 How many mortgages are there? a) first charges b) second and further charges? Are there important differences between them?

1.1 Statistical information is provided in the appendices. Since the CML represents first charge residential lenders and buy to let lending our statistics cover that sector and only that sector. There are ongoing discussions between the CML and government departments about data and because of this we will not deal with the first part of this question in detail. However as at 18 December there were 11.7 million first charge mortgages held by CML members in the UK, and we understand that the Bank of England estimates that secured lending (all loans) is worth over £1.2 trillion.

1.2 One of the fundamental points to note about first charge owner occupier loans granted since October 2004 is that they are regulated by the Financial Services Authority. Most lenders treat owner occupier first charge loans which pre-date October 2004 in the same way i.e. as if they are regulated- (see also the comments about the pre-action protocol above).

1.3 As MoJ is aware the FSA has a set of rules that relate to such loans (the Mortgage and Home Finance: Conduct of Business sourcebook). First charge owner occupier loans and the way in which

lenders conduct themselves in relation to such loans are therefore subject to regulation by a state regulator.

1.4 The FSA has an overarching principle that lenders should treat customers fairly. To help ensure fair treatment of customers in arrears or facing possession MCOB 13 sets out how lenders are expected to deal fairly with customers. This requires that lenders have a policy and procedures in place for dealing with customers in arrears.

1.5 MCOB 13 also requires a lender to adopt a reasonable approach to the time during which a payment shortfall should be repaid and to establish where feasible a payment plan which is practical in terms of the borrower's circumstances.

1.6 In the guidance notes MCOB suggests ways in which a lender can assist the borrower when seeking to reach agreement on payment of arrears.

1.7 Most importantly MCOB 13 requires a lender to only repossess the property where all other reasonable attempts to resolve the position have failed and in selling to "obtain the best price that might reasonably be paid".

1.8 In 2008 the FSA carried out a thematic review into arrears and possessions. It concluded that:-

"Mainstream lenders were largely complying with FSA requirements and have policies and practices that should ensure that customers are generally treated fairly."

Therefore for owner occupier loans we assume that if there is any evidence of poor practice in the arrears and possessions process by lenders this will be dealt with by the regulator.

1.9 As far as Horsham is concerned the FSA has recently written to all lenders stating:-

"If a firm were to opt to appoint a receiver (under the Law of Property Act 1925) and any powers in its mortgage deed in respect of an owner-occupied residential property, with a view to the sale of that property in circumstances where they would not have succeeded in getting a court order for possession, we would have serious concerns over whether that firm was acting fairly."

1.10 Consumer Credit Act

Borrowers of second charge loans who have signed the CCA agreement are accorded various protections under the CCA 1974 in the event of default. These include:

- S.86 - setting out requirements in relation to arrears notices,
- S. 87 - requiring the issue of default action before recovery action can commence,
- S. 93 - which provides protection in relation to interest payments when in default,
- S. 129 - giving courts the right to grant time orders in relation to enforcement orders
- S. 131 - which gives courts the power to make protection orders on the property in the borrowers interest pending enforcement proceedings.
- S.135 and 136 - which give courts the right to suspend an enforcement order and even to vary the terms of an agreement in the interests of a borrower in default.

Second charge borrowers (who have signed CCA agreements and are thus afforded protection under the CCA 1974) therefore receive considerable protection from the courts under the law at present. Arguably these go beyond MCOB requirements for first charge loans.

1.11 Despite apparent regulatory differences the common law principles about sales by mortgagees apply to all secured loans.

2. How many mortgages are in arrears?

2.1 We only capture first charge residential lending statistics (and buy-to-let) but please see appendices. Please note the definition of arrears used in our statistics.

3. What proportion of arrears situations are resolved without the need for any legal action by the lenders (i.e. a solution is agreed between lender and borrower, which brings the borrower out of default)?

3.1 We do not have any formal data on this and it would be very difficult to compile such data. We understand that the FSA may have data on the number of loans which have agreements in place but we do not believe that this captures information as to whether or not the agreement was with or without legal action.

3.2 One lender has indicated that some 33% of accounts in arrears situations are resolved without the requirement for legal action and another has indicated that the figure is also in the 30% region for post formal notice of default cases. This is not to say that all others proceed to litigation – quite the reverse- very often the threat of action triggers agreement.

3.3 To begin with much depends on the definition of arrears. Many borrowers technically go into arrears but the situation is resolved very quickly. An example of this would be where there is a problem with a direct debit.

3.4 Other situations very much depend on the borrower's circumstances and the borrower's willingness to engage with the lender. As explained above under MCOB 13 lenders are obliged to adopt a reasonable approach as to the time over which payment shortfall should be repaid and if a payment plan is feasible it should be practical in terms of the circumstances of the borrower.

3.5 The House of Lords case of Norgan states that repayment can be over the balance of the term.

3.6 Our members try to agree an arrangement to pay with a borrower who is in arrears. Very often engagement with the borrower is very difficult because the borrower fails to respond to communication from the lender.

3.7 Equally there can be a series of agreements which are made and then broken by the borrower. Again this makes it very difficult to assess the proportion of arrears situations which are resolved without the need for legal action.

3.8 Likewise legal action can be commenced but then abandoned because commencement of the action has led the borrower to make contact with the lender.

3.9 Also it is not clear what is meant by "legal action". Often a letter before action will be a wake up call to a borrower who had previously been ignoring attempts at contact by the lender. Is a letter before action "legal action"?

3.10 It might be worth noting that it is possible in some buy to let arrears cases where there is a rental income for the borrower to not be paying anything to the lender but to not be in arrears as the rental stream is being paid to the lender or its receiver and is covering the mortgage payments.

3.11 Some lenders report a better "cure rate" for loans where legal action is taken and particularly if taken early. Legal action means that the borrower takes the situation more seriously and lenders have noted that often legal action at an early stage can have a higher cure rate than where long term forbearance is applied. The logic behind this seems to be that borrowers can cope with repaying small amounts of arrears but cannot deal with larger sums.

4 How many arrears situations lead to debt-only actions (ie not to realise the security)?

4.1 Much depends again on definitions and we are not clear what "debt only actions" means.

4.2 If this means that the lender and borrower seek to resolve the arrears through arrangements to pay see our comments above. Although we do not have any figures on this we believe that a reasonable proportion of arrears situations are dealt with through arrangements. If a suspended possession order is sought then the suitability of the agreement is subject to court scrutiny.

4.3 If this question is intended to ask whether secured lenders would effectively treat the debt as unsecured then the answer is that this would almost never be done. It would be pointless to sue on the covenant to pay as the borrower is already not paying the mortgage. It is probable that the only asset worth pursuing would be the property in any event and if there are other assets, the logical approach would be for the borrower to realise those assets himself to allow payment of the mortgage.

4.4 In addition there are likely to be other unsecured creditors involved.

4.5 If judgement for a money debt is obtained it is difficult to see how it could be enforced. An attachment of earnings order is problematic. Often borrowers experiencing difficulties with meeting mortgage payments are in employment difficulties. Lenders report that it will often be the case that a borrower changes employment regularly and that this type of enforcement is not appropriate. Likewise appointment of a bailiff to seize goods would be unattractive and in most cases only a short term solution. If enforcement is through a money judgement does this mean that a borrower could avoid a mortgage debt by declaring bankruptcy?

4.6 Action does not necessarily lead to enforcement of the security. The difference between the MoJ possession order figures and actual possession figures demonstrates this.

4.7 It does not make sense for a secured lender not to rely on its security (unless security is defective). Secured lending is priced on the fact that security is given. Borrowers are aware of the position and in reality borrowers will have no other assets available to satisfy the amount of the mortgage debt.

5 Where the lender does take action to realise security on the loan, what proportion of those actions are remedies not expressly authorised by the courts (ie power of sale exercised without vacant possession, peaceable possession taken without court order)?

5.1 This depends on circumstances and the type of loan. Again we do not have statistical information on this.

5.2 If the property is vacant and has been abandoned then a lender would not always obtain an order for possession. To obtain a court order would add costs for the borrower and delay the property being marketed for sale . However the lender has to consider the risk of criminal proceedings, civil claims for compensation based on the loss of property and the Protection from Eviction Act and would generally err on the side of caution and obtain a court order if there was any doubt on this.

5.3 In some cases a borrower will seek to hand the keys over to a lender. A lender will try to deter the borrower from doing this but if the borrower is persistent then the lender will usually obtain a form of waiver and proceed without a court order.

5.4 Voluntary possessions of this nature usually increase in troubled economic times and lenders are reporting an uplift at present. Lenders need to protect assets and have to be able to act to do this in some cases as a matter of urgency. Voluntary possessions peaked at over 40%of possessions in the early 1990's. Whilst recent years have seen a much lower share there has been a modest rise over the last four years, with these cases accounting for 19% of possession cases in Q3 2008 – a share that has risen steadily from just under 10% in 2004.

5.5 Lenders can help borrowers in arrears is through assisted voluntary sales. This allows the borrower to sell the property to assist with the arrears situation - in some cases even when there is negative equity. Such sales would not usually include an order for possession and would not be treated as the lender having taken action through the court.

5.6 Generally the borrower will be the seller in assisted voluntary sale cases. In some circumstances to assist the borrower the lender may take over the sale to assist the borrower further.

An example of this is where there is a second charge on the property and the second charge will not release its charge if the borrower sells. By exercising its power of sale the first charge lender can overreach the second charge lender and assist the borrower. In shared ownership situations if the lender sells it can rely on the mortgage protection clause in the lease. As there is co-operation with the borrower it is unlikely that a court order will be sought in these circumstances.

Owner occupier loans

5.7 Subject to these two exceptions (and also that of fraud) as far as owner occupier loans are concerned the lender would generally only seek to enforce if it has first obtained a court order. We are not aware of any cases where this is not done and following the Horsham case our Arrears and Possession panel confirmed that this as standard practice.

5.8 As mentioned above following the Horsham decision CML members have issued a voluntary statement confirming this. This is not a change of practice – it merely confirms what CML lenders are doing at present and will continue to do.

Buy to let

5.9 Buy to let loans are commercial loans. The borrower will not lose his home should possession take place. However there may well be a tenant or tenants in situ who do risk losing their home and it is consideration for those tenants that is paramount with buy to let loans. In some cases there is also a rental stream which is part of the value of the property.

510 If a lender has a buy to let loan it can follow the court order route and obtain possession. It is however important to remember that an order for possession against the borrower is just that – it is not an order for possession against the tenant. Where there is a tenancy which is binding on the lender the lender will need to decide how best to proceed both for itself and the tenant(s).

5.11 Assuming that the tenancy has lender consent (and most buy to let loans imply consent so long as the tenancy complies with terms and conditions – usually an assured shorthold) if the lender has a court order against the borrower and wants to sell with vacant possession it can only do what the borrower as landlord could have done to remove the tenant from the premises. In most cases this would be by serving a notice ending the tenancy or proving a ground for possession. Once the property is vacant because the tenancies have been brought to an end in accordance with legislation it is not always worthwhile the lender obtaining a court order against the borrower – it will only add to the borrower's costs for the lender to do so. The lender does not acquire better rights than the borrower.

5.12 However in many buy to let cases the lender may choose to sell without vacant possession. The rental stream from the tenancies may actually be the main value attaching to the property so to sell with vacant possession would adversely affect the borrower. In these cases the lender may choose not to obtain an order for possession against the borrower at court and, following sale, the tenants simply have a new landlord . S101 affords protection to the borrower as it gives the borrower notice that he is in breach. The lender will either sell to a buyer directly or if its terms and conditions allow it to do so may appoint a receiver (see below) to do this.

5.13 Again it is important to remember that the equity of redemption applies until exchange of contracts and that the common law duty to obtain the best price reasonably available in an arms' length transaction applies.

5.14 The LPA allows the lender to appoint a receiver. The receiver is the agent of the borrower and its main duties under the LPA are to collect rent and manage the security. A receiver's powers can be extended by the lender in its terms and conditions. Receivers appointed by lenders are often surveyors, lawyers, managing agents, asset managers or other professionals experienced in property management. Property management is now a very complex area and the use of professionals in this way affords protection to tenants.

Commercial loans

5.15 As mentioned above we represent first charge mortgage lenders. However we suspect that many commercial loans would not follow the court order route and would suggest that any review into this area should assess impact on commercial lending.

6. When and why are the various remedies preferred by lenders?

6.1 This seems to some extent to duplicate 4 and 5 above. For all loans an agreement to pay made with the borrower that is acceptable to both parties is the preferred remedy. In seeking to reach agreement lenders will consider all the options recommended by MCOB – possession is the remedy of last resort.

6.2 However if agreement cannot be reached and/or forbearance is exhausted then the lender will usually take action either through the courts or in the case of buy to let sometimes through the appointment of a receiver. These are not preferred routes as such – lenders would prefer borrowers to work with them to agree repayment plans.

6.3 It should also be noted that commencement of court action does not necessarily mean that possession will take place. There is a wide discrepancy between the number of court orders granted for possession and the actual number of possessions.

7. Which of lenders' potential remedies are preferable for borrowers?

7.1 Again we would have thought that the remedy preferable to the borrower is an agreement to pay arrears that is acceptable to both parties.

7.2 Much will also depend on the individual circumstances of the borrower. This is recognised in MCOB. For example where there is a low loan to value ratio and the borrower only had short term arrears problem capitalisation might be appropriate (after the requisite qualifying period is satisfied). However this would not apply in all cases. 7.2 seems to be missing "problems" on the last line after arrears?

7.3 Equally whilst recognising that possession is not likely to be favoured by borrowers and the consequences are severe there are cases where it is the only appropriate remedy. This was recognised by the FSA - In his speech at the CML's Annual Conference December 2007 Clive Briault, the then Managing Director, Retail Markets, of the Financial Services Authority stated

"There will be cases where the borrower has no realistic prospect of getting back on track, so dealing with the inevitable sooner rather than later will be in everyone's best interests."

7.4 Some lenders offer facilities such as assisted voluntary sales and we understand that where these are appropriate they are well regarded by borrowers.

8. Are there significant differences in the approach taken by lenders when a) the borrower is/is not in occupation of a residence, and b) the loan is for the purchase of a home for the borrower, as opposed to being for some other purpose (car purchase, business finance)?

a) This is already covered.

b) We would suggest that the Finance and Leasing Association is better placed to reply to this query.

9. What would be the cost to the lending industry if self-help remedies such as the power of sale were not available in owner-occupier situations?

9.1 We are assuming this question refers to the legal power of sale under s101. Is that correct? The reference to self help has caused confusion. The power of sale is not a self help remedy. Some

lenders have interpreted this question as meaning the sale of the property by the borrower when in arrears. We are therefore answering this question using both interpretations.

S101

9.2 If the question relates to the lender's power of sale under the LPA then the cost to the industry would be considerable and we do not think we can overstress the impact this would have. Restrictions on the power of sale could, at their worst, effectively convert secured lending into unsecured lending. Secured lending is predicated on the basis that if the borrower does not pay then ultimately once all other reasonable attempts have failed the money is recovered through the asset.

9.3 The power of sale is not a self help remedy. It is the fundamental principle on which secured lending is based. The ability of lenders to realise their security is essential and any removal or watering down of this ability could have severe repercussions for the mortgage market. The lender's power of sale must not be removed or watered down.

9.4 Change would have a major impact on borrowers. Without the power of sale a lender would effectively be looking solely at the borrower's ability to pay rather than the situation in the round ie the asset involved. This will severely limit lenders' risk and underwriting appetites. In turn this would mean that any lending would only be to those borrowers able to provide the safest of covenants to pay. Loans are priced on the basis that they are secured and any threat to that security would add to the cost of credit. It would severely limit availability of credit to a very large number of potential borrowers.

9.5 This would be very extremely damaging to consumers and the economy in any economic climate but at a time when lending is already restricted and government aspirations are for lenders to increase that lending it would seem highly inadvisable for any limitation on the power of sale to be introduced. We are not sure how this matches the government's desire for a return to 2007 lending levels and for a high level of owner occupation.

9.6 The level of the amount loaned for mortgage finance is far greater than in most unsecured situations. It would be far more difficult for lenders to absorb any unpaid debt and again this would act as a major barrier to lending.

9.7 Removal of the power of would presumably prevent any future funding through securitisation etc.

9.8 There is also the question of moral hazard. We understand that experiences with the water industry have shown that once an ultimate sanction is removed (in that case the supply of water) then there is far less impetus on a debtor to meet commitments.

9.9 For individual loans i.e. where the mortgagee is an individual (such as inter family loans) there may be human rights considerations.

9.10 Securitisation – in a securitisation a lender will be generally be required to give warranties which will include representations that a power of sale subsists in the mortgages that are securitised. These representations have been given in securitisations that have already taken place and, depending on terms, lenders would be placed in breach of warranty.

9.11 The additional items listed above in the introductory section give the borrower great protection. In particular MCOB and the newly introduced pre-action protocol ensure fair treatment of customers.

9.12 If the current statutory powers were changed or revised there would be a considerable administrative impact on the industry and we think that a full impact assessment would need to be conducted.

9.13 As well as securitisation contracts referred to in 9.10 any change could impact on other existing contracts and lenders' terms and conditions and the effect of this would need to be reviewed carefully.

Voluntary sale

9.14 If this question relates to sale of the property by the borrower, lenders recognise that there may be cases where the borrower is in arrears but the sale of the property without court action is in the best interests of both parties provided that there is co-operation and liaison. This is also covered by the pre action protocol. As already mentioned some lenders offer assisted voluntary sales schemes and some lenders have schemes that extend to situations where negative equity applies. 9.15 We assume that the MoJ is not suggesting that these schemes are withdrawn. As set out above there are cases where the borrower wants to sell but this cannot be achieved without the first charge lender selling – for example to overreach a second charge.

10 To what extent are the parties willing to negotiate? Do both sides usually make a genuine attempt to find a solution out of court?

10.1 Our members are willing to negotiate with borrowers. In association with Communities and Local Government we have carried out some research on the number of loans where agreements are in place and the nature of those agreements which provides strong evidence in support of this. The findings of that research will be shared separately with government outside of this response.

10.2 Members spend a considerable amount of time and resource in seeking to contact borrowers so that negotiation can take place. MCOB and the pre-action protocol underline this.

10.3 Our members report that borrowers are often reluctant to get in touch and this unwillingness to engage is one of the biggest problems faced by lenders. Many lenders send a representative to the borrower's property to try to negotiate with the borrower and report a good success rate. However sadly very often the borrower takes a "head in the sand" approach. The threat of litigation often leads to negotiation.

10.4 To some extent ability to negotiate depends on the customer's circumstances. As already mentioned MCOB 13 lists possible measures a lender could consider and requires lenders with regulated loans to only seek possession when all other reasonable attempts to resolve the position have failed. If there was any suggestion lenders were not acting properly presumably this would be acted upon by the FSA?

11 What is the cost of a borrower losing a home a) to the borrower, b) to the local authorities, c) in state benefits?

11.1 We do not believe we have the information to comment on this. It should be noted that this question relates to owner occupier loans. Buy to let loans are commercial loans.

11.2 Sale of the property crystallises the debt (subject to any arrangement on shortfall). Sale can also stop the erosion of equity in the property caused by the increasing debt.

11.3 Lenders do not underestimate the social and economic cost to a borrower losing a home and as stated above will do their best to avoid this position. However a balance has to be struck and lenders are commercial entities.

12 What is the connection between repossession and homelessness/rehousing?

12.1 Again we do not think this is within our expertise to comment. We presume that Communities and Local Government would be best placed to provide statistics on this. Government initiatives to help those in financial difficulty remain in their homes have of course been introduced.

13 What are the most common causes of mortgage arrears? To what extent are different demographic categories affected?

13.1 We do not collect data of this type. The White Horse Mortgage Services Limited data may be a helpful indicator. You will note that illness, unemployment and separation are major factors. However lenders report that increasing levels of unsecured debt also play a part.

13.2 One lender has suggested that in its experience the following are the major causes:-

- Financial mismanagement – 31%
- Borrower unemployed/business failure – 25%
- Change in family circumstance – 20%
- Illness affecting ability to pay – 10%

13.3 Others have confirmed that most common causes are unemployment, relationship breakdown and loss of or reduction in income.

14 What are the timelines when lenders obtain the security and what are they where some agreement is reached which keeps the borrower in possession? How much time passes before any legal action is taken by lenders, and how long does it take for the matter to be finally resolved in either of the above scenarios?

14.1 Again this is very difficult to answer as much depends on individual situations. In cases of fraud or suspected fraud a lender may act very swiftly.

14.2 Equally in buy to let case particularly where there are tenants whose interests need to be protected a lender may act swiftly once default occurs.

14.3 However as far as owner occupier situations are concerned the following timelines are very broad indicators although much depends on the individual circumstances and these are not definitive. They reflect a minimum timeline and generally the timeline from initial default to actual possession will be much longer than this.

14.4 Most lenders will seek to contact the borrower once a payment has been missed. Where MCOB applies a lender must do this within 15 business days of becoming aware of the borrower falling into arrears (using the FSA's definition of arrears).

14.5 Once arrears occur lenders will seek to come to an arrangement with the borrower if the borrower can be contacted. If there is no contact or no arrangement the lender will not usually consider referring the loan for litigation before two contractual monthly payments have been missed and depending on circumstances and terms and conditions this may be longer. As referred to above many lenders have voluntarily agreed longer timelines than this.

14.6 If court action is to be taken a letter before action must be written and also the protocol now requires that the borrower is given 15 business days' notice.

14.7 Court rules then state that a hearing cannot be less than 28 days nor more than 56 days from the date of issue. This means that the minimum timeline would be 3 and a half months before a court hearing. However this assumes a straight timeline which is not likely to be the case. In most cases the timeline would be far longer. Often there will be ongoing discussions with the borrower and a series of arrangements to pay before litigation is brought.

14.8 Once an order is granted its enforcement may be suspended upon repayment terms which extends the timeline unless and until there is breach. Should possession be necessary the lender will usually have to seek a warrant for possession and an eviction date from the court bailiff and again this adds to the timeline. An application can be challenged by the borrower.

14.9 Assuming no contact or no cooperation from the borrower the minimum timeline before actual possession is obtained is 6 months – however most lenders indicate that time taken is usually much longer than this- often in the region of 18 months. The borrower always has the equity of redemption during this process and as mentioned above the commencement of action does not automatically mean possession.

15 Is the possession procedure in need of improvement? Does it have the suitable checks and balances? If not, why not?

15.1 As outlined above we do not believe that the possession procedure is in need of improvement. There are many checks and balances both statutory, regulatory and through the common law which are listed above which ensure fairness to borrowers. The FSA's thematic findings would appear to bear this out. The mortgage pre- action protocol in particular has provided comfort to borrowers - allowing judges to ensure that borrowers are treated fairly.

15.2 Although we think it unnecessary given lenders' practice, the CML's voluntary statement and the FSA's regulatory position if MoJ is really concerned about the position of an owner occupier and the power of sale it may be that the voluntary statement should be given statutory force. However this should only apply to owner occupier situations and should make the same exclusions as the voluntary statement does.

16 How does the situation differ when tenants are in occupation of the property?

16.1 This is discussed in some detail above.

16.2 The reply to question 5 deals with tenancies and assumes that the borrower has complied with the mortgage terms in granting tenancies.

16.3 One point not covered under question 5 is the issue of occupiers or licensees where the "tenancy" is not binding on the lender. This will usually be when the lender has not consented to the tenancy. (It should be noted that most buy to let agreements give consent so long as the borrower complies with the terms and conditions in the loan.) Consent is a necessary requirement for lenders. Otherwise unscrupulous borrowers in arrears could effectively negate the security – for example by granting a long leasehold interest to a third party.

16.4 The occupant is given notice of the possession proceedings and that notice period is being extended. Following discussions with Communities and Local Government many members already give occupiers a much longer notice period that that currently prescribed by court rules. Members also report that they effectively treat any such occupant in the same way as a tenant – giving appropriate notice under the Housing Act legislation.

Contact

If you have any queries on the above please contact:- Samantha Barnett - Senior policy adviser – samantha.barnett@cml.org.uk

Appendices

Table 1: Arrears on mortgages, by number of months in arrears

Period		1	2	3	4	5	6	7	8	9
		Mortgages outstanding, end period	Mortgages >3-6 months in arrears, end period	Mortgages >3-6 months in arrears, end period	Mortgages >6-12 months in arrears, end period	Mortgages >6-12 months in arrears, end period	Mortgages >12 months in arrears, end period	Mortgages >12 months in arrears, end period	Mortgages >3 months in arrears, end period	Mortgages >3 months in arrears, end period
		number	number	% all loans	number	% % all loans	number	% all loans	number	% all loans
1982		6,518,000	.	.	27,400	0.42	5,500	0.08	.	.
1983		6,846,000	.	.	29,400	0.43	7,500	0.11	.	.
1984		7,313,000	.	.	48,300	0.66	9,500	0.13	.	.
1985		7,717,000	.	.	57,100	0.74	13,100	0.17	.	.
1986		8,138,000	.	.	52,100	0.64	13,000	0.16	.	.
1987		8,283,000	.	.	55,500	0.67	15,000	0.18	.	.
1988		8,564,000	.	.	42,800	0.50	10,300	0.12	.	.
1989		9,125,000	.	.	66,800	0.73	13,800	0.15	.	.
1990		9,415,000	.	.	123,100	1.31	36,100	0.38	.	.
1991		9,815,000	.	.	183,600	1.87	91,700	0.93	.	.
1992		9,922,000	.	.	205,000	2.07	147,000	1.48	.	.
1993		10,137,000	.	.	164,600	1.62	151,800	1.50	.	.
1994		10,410,000	169,100	1.62	133,700	1.28	117,100	1.12	.	.
1995		10,521,000	177,900	1.69	126,700	1.20	85,200	0.81	389,800	3.70
1996		10,637,000	139,300	1.31	101,000	0.95	67,000	0.63	307,300	2.89
1997		10,738,000	117,800	1.10	73,800	0.69	45,200	0.42	236,800	2.21
1998		10,821,000	129,100	1.19	74,000	0.68	34,900	0.32	238,000	2.20
1999		10,982,000	96,700	0.88	57,100	0.52	29,500	0.27	183,300	1.67
2000		11,173,000	95,300	0.85	47,800	0.43	20,800	0.19	163,900	1.47
2001		11,247,000	81,400	0.72	43,100	0.38	19,700	0.18	144,200	1.28
2002		11,364,000	66,600	0.59	34,000	0.30	16,500	0.15	117,100	1.03
2003		11,448,000	55,800	0.49	31,000	0.27	12,600	0.11	99,400	0.87
2004		11,511,000	60,500	0.53	29,900	0.26	11,000	0.10	101,400	0.88
2005		11,604,000	69,300	0.60	38,600	0.33	15,000	0.13	122,900	1.06
2006		11,742,000	64,900	0.55	34,900	0.30	15,700	0.13	115,500	0.98
2007		11,822,000	72,900	0.62	41,100	0.35	15,600	0.13	129,600	1.10
Half yearly										
1994	H1	10,375,000	189300	1.82	153,300	1.48	142,200	1.37	484,800	4.67
	H2	10,410,000	169100	1.62	133,700	1.28	117,100	1.12	419,900	4.03
1995	H1	10,443,000	177800	1.70	126,900	1.22	94,700	0.91	399,400	3.82
	H2	10,521,000	177900	1.69	126,700	1.20	85,200	0.81	389,800	3.70
1996	H1	10,591,000	159800	1.51	114,700	1.08	74,100	0.70	348,600	3.29
	H2	10,637,000	139,300	1.31	101,000	0.95	67,000	0.63	307,300	2.89
1997	H1	10,718,000	128,200	1.20	88,700	0.83	55,500	0.52	272,400	2.54
	H2	10,738,000	117,800	1.10	73,800	0.69	45,200	0.42	236,800	2.21
1998	H1	10,787,000	126,700	1.17	70,300	0.65	35,600	0.33	232,600	2.16
	H2	10,821,000	129,100	1.19	74,000	0.68	34,900	0.32	238,000	2.20
1999	H1	10,901,000	116,300	1.07	68,700	0.63	34,500	0.32	219,500	2.01
	H2	10,982,000	96,700	0.88	57,100	0.52	29,500	0.27	183,300	1.67
2000	H1	11,148,000	96,700	0.87	48,000	0.43	22,700	0.20	167,400	1.50

	H2	11,173,000	95,300	0.85	47,800	0.43	20,800	0.19	163,900	1.47
2001	H1	11,199,000	90,500	0.81	43,600	0.39	19,300	0.17	153,400	1.37
	H2	11,247,000	81,400	0.72	43,100	0.38	19,700	0.18	144,200	1.28
2002	H1	11,270,000	74,100	0.66	41,500	0.37	18,200	0.16	133,800	1.19
	H2	11,364,000	66,600	0.59	34,000	0.30	16,500	0.15	117,100	1.03
2003	H1	11,418,000	64,100	0.56	35,400	0.31	14,300	0.13	113,800	1.00
	H2	11,448,000	55,800	0.49	31,000	0.27	12,600	0.11	99,400	0.87
2004	H1	11,529,000	56,600	0.49	29,900	0.26	11,400	0.10	97,900	0.85
	H2	11,511,000	60,500	0.53	29,900	0.26	11,000	0.10	101,400	0.88
2005	H1	11,547,000	65,900	0.57	35,500	0.31	12,600	0.11	114,000	0.99
	H2	11,604,000	69,300	0.60	38,600	0.33	15,000	0.13	122,900	1.06
2006	H1	11,671,000	67,900	0.58	39,400	0.34	16,800	0.14	124,100	1.06
	H2	11,742,000	64,900	0.55	34,900	0.30	15,700	0.13	115,500	0.98
2007	H1	11,836,000	69,500	0.59	36,900	0.31	14,400	0.12	120,800	1.02
	H2	11,822,000	72,900	0.62	41,100	0.35	15,600	0.13	129,600	1.10
2008	H1	11,737,000	87,700	0.75	49,600	0.42	18,300	0.16	155,600	1.33
Quarterly										
2008	Q1	11,769,000	80,600	0.68	45,000	0.38	16,400	0.14	142,000	1.21
	Q2	11,737,000	87,700	0.75	49,600	0.42	18,300	0.16	155,600	1.33
	Q3	11,692,000	93,700	0.80	54,100	0.46	20,200	0.17	168,000	1.44

Notes:

1. Figures are estimates of arrears on all first charge loans held by CML members, both regulated and unregulated, and include buy-to-let. They do not include arrears relating to other secured lending or to firms that are not CML members. As our figures also relate to the number of borrowers rather than individual loan accounts, they will be materially lower than, and not strictly comparable with, the aggregate MLAR figures published by the FSA.

2. These estimates are based on reporting by a sample of CML members, which are then grossed up to be representative of the lending undertaken by CML members as a whole. In H1 2008 these accounted for over 95% of first charge mortgages.

3. Figures are subject to revision as we get better information about rates of growth and performance in different parts of the market, lenders report to us for the first time or re-submit earlier figures.

4. Care should be taken when looking at changes over time as lenders newly reporting figures may distort comparisons.

5. Trends in the number of months arrears data may also be distorted by changes in mortgage rates. When rates change this may alter the contractual mortgage repayments due and so affect the number of months that a given arrears amount represents. In the case of variable rate products, with lower mortgage rates a given amount of arrears represents a higher number of monthly payments.

6. Properties in possession are not counted as arrears. Buy-to-let mortgages, where a receiver of rent has been appointed, also are not counted as arrears.

7. Arrears and possession figures are rounded to the nearest hundred.

Table 2: Mortgage possessions

		1	2	3	4	5	6
		Mortgages outstanding, end period	Properties taken into possession in period	Properties taken into possession in period	Properties in possession at end period	Properties in possession at end period	Possessed properties sold in period
		number	number	% all loans	number	% all loans	number
1990		9,415,000	43,900	0.47	36,200	0.38	.
1991		9,815,000	75,500	0.77	67,400	0.69	.
1992		9,922,000	68,600	0.69	65,000	0.66	.
1993		10,137,000	58,600	0.58	39,900	0.39	.
1994		10,410,000	49,200	0.47	29,400	0.28	.
1995		10,521,000	49,400	0.47	27,200	0.26	.
1996		10,637,000	42,600	0.40	16,200	0.15	.
1997		10,738,000	32,800	0.31	13,900	0.13	34,500
1998		10,821,000	33,900	0.31	13,900	0.13	33,200
1999		10,982,000	30,000	0.27	10,800	0.10	33,700
2000		11,173,000	22,900	0.20	7,900	0.07	25,900
2001		11,247,000	18,300	0.16	5,600	0.05	20,600
2002		11,364,000	12,000	0.11	2,800	0.02	14,700
2003		11,448,000	8,900	0.08	2,700	0.02	9,200
2004		11,511,000	8,200	0.07	3,600	0.03	7,000
2005		11,604,000	14,600	0.13	5,900	0.05	10,300
2006		11,742,000	20,900	0.18	8,500	0.07	18,400
2007		11,822,000	26,200	0.22	12,300	0.10	22,900
Half yearly							
1994	H1	10,375,000	25000	0.24	33200	0.32	.
	H2	10,410,000	24200	0.23	29400	0.28	.
1995	H1	10,443,000	25200	0.24	29800	0.29	.
	H2	10,521,000	24200	0.23	27200	0.26	.
1996	H1	10,591,000	24100	0.23	24000	0.23	.
	H2	10,637,000	18500	0.17	16200	0.15	.
1997	H1	10,718,000	17000	0.16	14100	0.13	18300
	H2	10,738,000	15800	0.15	13,900	0.13	16,200
1998	H1	10,787,000	17300	0.16	15,200	0.14	16,100
	H2	10,821,000	16600	0.15	13,900	0.13	17,100
1999	H1	10,901,000	16,400	0.15	13,100	0.12	17,100
	H2	10,982,000	13,600	0.12	10,800	0.10	16,600
2000	H1	11,148,000	12,300	0.11	9,200	0.08	14,000
	H2	11,173,000	10,600	0.09	7,900	0.07	11,900
2001	H1	11,199,000	10,500	0.09	7,300	0.07	11,100
	H2	11,247,000	7,800	0.07	5,600	0.05	9,500
2002	H1	11,270,000	6,900	0.06	4,100	0.04	8,300
	H2	11,364,000	5,100	0.04	2,800	0.02	6,400
2003	H1	11,418,000	4,600	0.04	2,700	0.02	4,900
	H2	11,448,000	4,300	0.04	2,700	0.02	4,300
2004	H1	11,529,000	3,900	0.03	2,600	0.02	3,800
	H2	11,511,000	4,300	0.04	3,600	0.03	3,200
2005	H1	11,547,000	7,100	0.06	6,000	0.05	4,400
	H2	11,604,000	7,500	0.06	5,900	0.05	5,900
2006	H1	11,671,000	10,000	0.09	8,100	0.07	8,400
	H2	11,742,000	10,900	0.09	8,500	0.07	10,000

2007	H1	11,836,000	12,800	0.11	9,900	0.08	11,700
	H2	11,822,000	13,400	0.11	12,300	0.10	11,200
2008	H1	11,737,000	18,900	0.16	18,900	0.16	11,700
Quarterly							
2008	Q1	11,769,000	8,800	0.07	15,700	0.13	5,300
	Q2	11,737,000	10,100	0.09	18,900	0.16	6,400
	Q3	11,692,000	11,300	0.10	22,900	0.20	6,900

Notes:
1. Figures are estimates of arrears on all first charge loans held by CML members, both regulated and unregulated, and include buy-to-let. They do not include arrears relating to other secured lending or to firms that are not CML members. As our figures also relate to the number of borrowers rather than individual loan accounts, they will be materially lower than, and not strictly comparable with, the aggregate MLAR figures published by the FSA.

2. These estimates are based on reporting by a sample of CML members, which are then grossed up to be representative of the lending undertaken by CML members as a whole. In H1 2008 these accounted for over 95% of first charge mortgages.

3. Figures are subject to revision as we get better information about rates of growth and performance in different parts of the market, lenders report to us for the first time or re-submit earlier figures.

4. Care should be taken when looking at changes over time as lenders newly reporting figures may distort comparisons.

5. Properties in possession are not counted as arrears. Buy-to-let mortgages, where a receiver of rent has been appointed, also are not counted as arrears.

6. Arrears and possession figures are rounded to the nearest hundred.

Table 3: Buy-to-let mortgage arrears and possessions

Period		Mortgages outstanding at end of period	Mortgages >3 months in arrears at end period		Mortgages >3 months in arrears, with LPA receiver of rent newly appointed in period		Mortgages >3 months in arrears, with LPA receiver of rent acting on lender's behalf, at end period		BTL-mortgaged properties taken into possession in period		BTL-mortgaged properties in possession at end period	
		Number	Number	%	Number	%	Number	%	Number	%	Number	%
1998		28,700	200	0.70	.	.	.	.	.	.	.	.
1999		73,200	400	0.50	.	.	.	.	.	.	.	.
2000		120,300	600	0.47	.	.	.	.	.	.	.	.
2001		185,000	1,000	0.55	.	.	.	.	.	.	.	.
2002		275,500	1,100	0.40	.	.	.	.	.	.	.	.
2003		417,500	1,400	0.33	.	.	.	.	.	.	.	.
2004		526,300	2,800	0.54	.	.	.	.	.	.	.	.
2005		699,400	4,600	0.65	.	.	300	0.05	.	.	400	0.06
2006		835,900	4,900	0.58	500	0.06	400	0.05	1,100	0.13	500	0.06
2007		1,025,700	7,500	0.73	500	0.05	500	0.05	2,000	0.20	1,300	0.12
Half yearly												
2006	H1	755,000	4,800	0.64	200	0.03	400	0.05	500	0.07	400	0.06
	H2	835,900	4,900	0.58	300	0.03	400	0.05	600	0.07	500	0.06
2007	H1	926,500	5,800	0.63	200	0.03	500	0.05	900	0.10	700	0.08
	H2	1,025,700	7,500	0.73	300	0.03	500	0.05	1,100	0.11	1,300	0.12
2008	H1	1,103,600	12,100	1.10	400	0.04	1,000	0.09	1,800	0.16	2,400	0.21
Quarterly												
2007	Q1	887,100	5,300	0.60	100	0.01	400	0.05	400	0.05	600	0.07
	Q2	926,500	5,800	0.63	100	0.01	500	0.05	500	0.05	700	0.08
	Q3	978,900	6,000	0.61	200	0.02	500	0.05	500	0.05	900	0.10
	Q4	1,025,700	7,500	0.73	100	0.01	500	0.05	600	0.06	1,300	0.12
2008	Q1	1,073,700	9,600	0.90	300	0.03	900	0.08	900	0.08	1,600	0.15
	Q2	1,103,600	12,100	1.10	100	0.01	1,000	0.09	900	0.08	2,400	0.21
	Q3	1,134,600	18,000	1.58	600	0.05	1,500	0.13	900	0.08	2,500	0.22

Notes:
1. CML has estimated lending data where a lender has not reported figures in a particular period.
2. Receiver of Rent (RoR) cases are excluded from arrears and possessions figures and reported separately.
3. From Q3 07 onwards, the series mortgages >3 months in arrears with a RoR in place was reclassified to only cases where arrears were OVER (but not including) 3 months whereas in previous periods figures also include those in 3 months arrears.