



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 45

Mortgage Brokers

WORKING PAPER

FEBRUARY 1974

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INTRODUCTION

The Law Reform Commission has been asked "to consider and report on the question whether legislation should be enacted to control the activities of mortgage brokers".

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspects coming within the terms of reference, are invited. The Commission requests that they be submitted by 26 April 1974.

Copies of the paper are being sent to the -

Chief Justice and Judges of the Supreme Court

Judges of the District Court

Law Society of W.A.

Magistrates' Institute

Law School of the University of W.A.

Solicitor General

Under Secretary for Law

State Minister for Housing

Commonwealth Minister for Housing

Associated Banks in W.A.

Australian Society of Accountants (W.A.)

Citizens' Advice Bureau of W.A.

Commissioner of Police

Commissioner of Titles

Estate Agents Association of Australia

Housing Industry Association

Institute of Chartered Accountants in Australia (W.A.)

Land Agents Supervisory Committee

Mortgage Brokers Association of W.A.

Real Estate Institute of W.A.

Urban Development Institute of Australia (W.A. Division)

W.A. Permanent Building Societies Association

Other Interested persons and associations

Law Reform Commissions and Committees in which this Commission is in
correspondence

The Commission may add to this list.

A notice has been placed In *The West Australian* inviting anyone interested to obtain a copy of the paper.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

TERMS OF REFERENCE

1. "To consider and report on the question whether legislation should be enacted to control the activities of mortgage brokers."
2. This project arose out of representations by the Commission to the Attorney General as a result of comments received on the Commission's working paper "Review of the Land Agents Act" (Project No. 37) from the Mortgage Brokers Association of W.A., Mr. E. Reading, and the Institute of Legal Executives (Western Australia) (Incorporated). All these commentators favoured the licensing of mortgage brokers.
3. The Mortgage Brokers Association of W.A. has for some years been making representations to the Government seeking the introduction of a system of licensing. Informal discussions between the Association and the Commission have also taken place.

The Association proposes that-

- (a) persons arranging loans on the security of land on behalf of lenders should be licensed;
- (b) banks, building societies, insurance and trustee companies and persons lending on their own behalf be exempt from licensing;
- (c) either a court of summary jurisdiction or some other appropriate tribunal, such as the proposed supervising authority for land agents, be the licensing authority;
- (d) applicants for a licence should be fit and proper persons and be of a reasonable educational standard;
- (e) licensees be required to maintain a separate trust account which would be subject to annual audit, and be required to take out a bond with an approved surety or to subscribe to a fidelity guarantee fund;

- (f) the fees to be charged by mortgage brokers should be prescribed.

THE LAW AND PRACTICE IN WESTERN AUSTRALIA

4. A number of persons carry on the business of mortgage brokers in this State, either separately or in association with another business, such as that of land agency. Usually they act in the capacity of agents in arranging loans on the security of mortgages over land and in some cases in collecting mortgage debt repayments. Some brokers arrange loans which are unsecured or secured on personal property. Some brokers also borrow funds at fixed rates of interest from various persons for re-investment.

5. The Mortgage Brokers Association of W.A. is an unincorporated association which at present has thirty six members of whom twenty-six are also licensed land agents. It was formed in 1969. In the financial year 1971-1972, members of the Association arranged mortgages in excess of \$30,000,000.

6. The Commission has been advised by the Association that apart from its members, it is estimated that about twenty other businesses operate in this State as mortgage brokers. A number of other persons, including land agents, legal practitioners and accountants, may also arrange finance, although the extent of this practice is not known. From enquiries made by the Commission it is believed that some members of these other businesses and professions make a charge in addition to their normal business or professional charges for arranging finance.

7. The Association has, in association with the Real Estate Institute of W.A., issued a new scale of fees applicable from the 1st of January 1974, which is set out in Appendix I to this paper.

The scale provides that no brokerage fee is payable to a selling agent where -

- (i) the vendor sells on terms or takes a mortgage back (see item (g), Appendix I);
- (ii) that agent offers or advertises a property for sale on terms, unless special finance as distinct from the original terms offer is arranged (see item (h), Appendix I);

- (iii) finance is provided by a building society, bank or insurance company (see item (k), Appendix I).

By way of example, a mortgage broker's fees for procuring a loan of \$10,000 on the security of property within a radius of 15 miles, and on which only one inspection was required, would be \$165. This would include the application fee of \$25 paid in advance. It would not include any valuation fees, legal fees, stamp duty and other out-of-pocket expenses.

8. Mortgage brokers as such are not required to be licensed in this State. However mortgage brokers may be required to comply with a number of statutory provisions, depending on the extent of their activities.

These provisions require that -

- (a) in so far as a mortgage broker collects repayments he may have to be licensed under the *Debt Collectors Licensing Act 1964-1966*, unless he is otherwise exempt (see s.4 and Regulation 14 (1)) ;
- (b) in so far as a mortgage broker deals in or advises on investment in governmental, municipal or corporate securities, he may have to be licensed under the *Securities Industry Act 1970*;
- (c) in so far as the business of a mortgage broker includes letting, hiring or agreeing to sell goods under a hire purchase agreement, he may have to be a licensed credit provider (*Hire Purchase Act 1959*, as amended by the *Hire Purchase Act Amendment Act, 1973*, ss.2 and 23K);
- (d) a mortgage broker operating under a business name that is registered or required to be registered under the *Business Names Act 1962* must not make reference to that name in any invitation to the public to deposit or lend money to that person or business (s.26);

- (e) a mortgage broker, being a proprietary company, must not invite the public to purchase shares in or debentures of or deposit money with the Company and, being any other Company, must comply with the prospectus and other provisions of the *Companies Act 1961-1973*;
- (f) a mortgage broker shall not publish any statement which is intended or apparently intended to induce any person to make use, on payment of a fee, of any services, and which is to his knowledge false or misleading in a material particular (*Trade Descriptions and False Advertisements Act 1936-1973*, s.8).

9. With certain exceptions, a person whose business is that of money lending, or who lends money at a rate of interest exceeding 12½% per annum, is required to be a registered moneylender (*Money Lenders Act 1912-1970*, ss.3, 5). Except for ss.16 and 20A (see paragraphs 10 & 11 below), this Act would appear to apply only to those who lend money on their own behalf, and not to those who arrange for the lending of money as agents only. It may apply to mortgage brokers who, as a business, borrow funds at fixed rates of interest from various persons for re-investment (see paragraph 4 above).

It is to be noted that a moneylender may not charge more than \$1 for services or enquiries prior to a loan (s.15).

10. Sections 16 and 20A of the *Money Lenders Act* also impose restrictions which do not appear to be limited to "moneylenders" as defined in s.3 -

- (a) Section 16(1) fixes a maximum fee of 5% of the amount of any loan (excluding solicitors' or valuers' or out-of-pocket fees) which may be charged for the procuring, negotiating or obtaining of the loan or for guaranteeing or securing its payment.

Section 16 (2) makes it unlawful for the lender or his agent or certain other associated persons to charge or receive any remuneration in connection with or preliminary to the negotiating or obtaining of a loan or the guaranteeing or securing its repayment.

Section 16(3) provides that any money paid in contravention of the section is recoverable. A breach of s.16 may also involve a penalty under s.21.

- (b) Section 20A makes it an offence for any person by means of advertising or canvassing from place to place, to advertise or hold out that he is willing to borrow money at a rate of interest exceeding 12½% per annum or to invite any person to lend him money at a rate of interest exceeding 12½%.

11. As far as the Commission is aware, it has not been judicially determined whether ss.16 and 20A of the *Money Lenders Act* apply to mortgage broking. However, in *The Law of Money Lenders in Australia and New Zealand*" (The Law Book Co. Ltd., 1965 ed.), C.L. Pannam expresses the view at pages 241-2 that s.16(2) only applies to the fees charged by moneylenders and not to those charged by independent third persons; whereas s.16(1) is applicable to commission agents and finance brokers.

12. It could be argued that in so far as mortgage brokers arrange loans secured by mortgages over land and mortgage interest payments on behalf of principals, they and their activities come within the definitions of "land agent" and the "land transaction" in s.2 of the *Land Agents Act 1922*, and are therefore subject to the provisions of that Act. These provisions include the requirement that land agents must be licensed and maintain separate trust accounts which must be audited annually and the requirement that they contribute to a fidelity guarantee fund.

However, as far as the Commission is aware, it has never been suggested that persons acting as mortgage brokers must be licensed under the *Land Agents Act* (and see s.8 of that Act).

13. Apart from the statutory provisions mentioned in paragraphs 8 to 10 above, the law governing mortgage broking is the general law of contract and principal and agent (see *Capital Management Corporation Ltd. v. Hackett Development Pty. Ltd.* (1971) 18 F.L.R. 362).

LAW IN OTHER JURISDICTIONS

14. Victoria is the only Australian jurisdiction which has legislation directly controlling mortgage brokers (in that jurisdiction known as finance brokers). Some other Australian jurisdictions have legislation which applies in some respects to mortgage brokers.

Victoria

15. The relevant legislation is the *Finance Brokers Act 1969*. A finance broker is defined in s.2 as a person whose business is to negotiate loans or credit for persons other than himself or his employer or principal, or who advertises or holds himself out as carrying on such business. Although this definition would appear to exclude a person acting on behalf of his principal, the Commission is informed that finance brokers acting in the capacity of agents are nevertheless required to comply with the legislation. The definition does not include a person who, in association with a *bona fide* business of supplying land, goods or services, negotiates loans or credit. In addition, the Act is not to be construed as requiring a person who is -

- (a) a legal practitioner acting in the ordinary course of his profession,
- (b) a registered company auditor acting in the ordinary course of his profession as an accountant,
- (c) an estate agent acting in the ordinary course of his business,
- (d) a banking or insurance corporation or trustee company,
- (e) a sharebroker who is a member of the Melbourne Stock Exchange acting in the ordinary course of his business,
- (f) a building or friendly society,
- (g) an employee of any person mentioned in paragraphs (a) to (f) above,

- (h) a corporation which is not required to be a registered moneylender and which negotiates loans or credits on behalf of corporations only

to hold a license under the Act or to observe its conditions (s.3 as to (a) to (g) and the *Finance Brokers (Licensing and General) Regulations 1970*, regulation 14, as to (h)).

16. Finance brokers must be licensed. To obtain a license, a finance broker must reside in Victoria, be not less than 21 years old (s.4), be of good character, not bankrupt or in liquidation, not have been convicted of an offence against the Act or regulations which warrants the refusal of the license, and be capable of carrying duties of a finance broker (s.11(2)). The license is granted by the Registrar of Finance Brokers unless he refers the application to the court of petty sessions or unless the applicant requests referral to that court (s. 11).

17. A finance broker is not entitled to payment unless his engagement is in writing, is signed by the person to be charged and contains particulars of the loan or credit (s.18(1)). It is an offence for a finance broker to demand or receive any payment which is not authorised by the regulations, or to demand or receive payment before he secures the loan or credit (s.18(2)). However, he may receive payment in advance of the estimated cost of valuing the security up to the prescribed amount (s.18(3)). The scale of fees is contained in the regulations and is set out in Appendix II to this paper.

18. The Act also contains restrictions on advertising (s.20), the requirement of a registered office (s.22) and creates offences for selling or otherwise allowing the use of a licence (s.23) and for false, misleading or deceptive representations or wilful concealment (s.24). However, it has no trust account or audit provisions. The Commission understands that the reason for this is that the Act was primarily designed to give protection to borrowers rather than to lenders.

Other jurisdictions

19. Several Australian jurisdictions have enacted legislation which in various ways affects the activities of mortgage brokers.

Queensland

Queensland has prohibited the charging of fees for the procuring or negotiating of loans on behalf of other persons (the *Moneylenders Acts 1916 to 1969*, s.14).

Tasmania

Tasmania has limited the amount of such fees that may be charged (the *Lending of Money Act 1915*, s.6).

The Australian Capital Territory

The Australian Capital Territory has restricted the collection of mortgage payments to real estate agents (*Agents Ordinance 1968*, s.5(2) (a)).

New South Wales

In New South Wales it is provided that where a real estate agent carries on business as an agent in collecting mortgage payments, a reference in the Act to a real estate agent includes a reference to a person carrying on the business of collecting such payments (*Auctioneers and Agents Act 1941*, s.3 (3) (b)).

LAW REFORM PROPOSALS

20. The English Committee under the chairmanship of Lord Crowther which reported on Consumer Credit (Report 1971, Cmnd. 4596), in proposing a general review of the Law of consumer credit, recommended that persons carrying on business as brokers or other agents in connection with the making of consumer loans should be required to be licensed by the proposed Consumer Credit Commissioner, and that employment of unlicensed brokers and agents should be prohibited. The Report also recommended restrictions on canvassing by such brokers and agents.

A Consumer Credit Bill has been introduced into the United Kingdom Parliament in 1973 to give effect to this Report. It is proposed in Part X of the Bill that persons acting as credit brokers, debt adjusters, debt counsellors and debt collectors in connection with consumer

credit or consumer hire agreements should be licensed by the Consumer Credit Commissioner (clauses 128 & 129) with a right of appeal in matters of law. Restrictions on advertising and canvassing are proposed (clause 130). No fee or commission in excess of £1 will be payable to a credit broker if an agreement is not reached within 6 months of an introduction of the individual desiring credit to the credit provider (Clause 132).

The Bill only applies -

- (a) where the consumer credit or consumer hire agreement is with a debtor who is an individual (clauses 8 & 14);
- (b) where the credit is for a sum of less than £5,000 (clauses 8, 11, 14); and
- (c) where credit is given by persons other than certain specified companies or bodies upon the security of land (clause 15(1)).

The Secretary of State may also, by order, exclude other consumer credit agreements from the application of the Bill by reference to the number of repayments to be made or the rate to be charged for the credit (clause 15(4)).

DISCUSSION

21. Persons acting as mortgage brokers often handle large sums of money on behalf of their principals, both in cases where the lender deposits his funds with the mortgage broker for investment, and where the mortgage broker collects debt repayments on behalf of the lender. For this reason, it could be argued that mortgage brokers should be subject to a statutory control.

If a defalcation by a mortgage broker did occur, complex questions could arise in determining who the broker's principal is, and who should bear the loss. While the borrower is normally the broker's principal, and is liable for the broker's commission, in some situations the broker may be instructed by and be the agent of the lender, or may be the agent of both borrower and lender for different purposes. Such difficulties give support to the need for statutory controls of mortgage brokers, in order to avoid the possibility of defalcation in the first instance.

On the other hand, it could be argued that any system of statutory controls which imposes restrictions upon entry into any section of trade or commerce is undesirable, unless justified in order to protect the public's money.

22. The Commission is at this stage of view that some statutory control over mortgage brokers is desirable. In particular the Commission is of the view that mortgage brokers should be required to maintain trust accounts which should be liable to annual audits. They should also be required to take out a bond with an approved surety or to contribute to a fidelity guarantee fund. in a similar manner to that required of land agents (see paragraph 12 above).

23. If the statutory controls referred to in the preceding paragraph were enacted, it would be necessary to decide -

- (a) whether mortgage brokers should be licensed with some qualification requirements, or whether they should be merely registered with no qualification requirements;
- (b) if they should be licensed, what should be the qualification requirements;
- (c) what court or administrative body should license or register mortgage brokers;
- (d) who should be exempt from the provisions of the legislation;
- (e) what body (if any) should exercise disciplinary control over mortgage brokers;
- (f) whether the written appointment of mortgage brokers should be a prerequisite to payment for their services;
- (g) whether the fees charged by mortgage brokers should be controlled, and if so by whom;

- (h) whether a person (such as a solicitor, accountant or land agent who acts as a mortgage broker from time to time in the course of his profession or business should be entitled to charge mortgage brokerage fees;
- (i) whether advertising and canvassing by mortgage brokers should be controlled, and if so, by whom.

24. Where a mortgage broker arranges a loan in some capacity other than as an agent, then -

- (a) if he comes within the definition of a "moneylender" as defined in the *Money Lenders Act 1912* he must be licensed (see paragraph 9 above).
- (b) if he comes within the definition of a "hire purchase credit provider", as defined in the *Hire Purchase Act 1959-1973* he must be licensed (see paragraph 8(c) above); and
- (c) if he comes within the definition of a "dealer" or an "investment adviser" as defined in the *Securities Industry Act 1970* he must be licensed (see paragraph 8(b) above).

It may be considered that these statutory controls are already adequate and that there is no need for further statutory control in these three situations.

The Commission would, however, welcome comment on these matters.

25. If, as the Commission believes, the *Land Agents Act* does not at present apply to the practice of mortgage broking (see paragraph 12 above), it is clear that the Land Agents Fidelity Guarantee Fund does not cover theft by a land agent or his servants when acting in the capacity of a mortgage broker. However, persons dealing with a land agent in this capacity may not be aware of this.

The Commission does not suggest that only licensed land agents should act as mortgage brokers and accordingly is of the view that any doubts in this regard should be clarified in the

legislation relating to land agents. It may, however, be desirable whether or not separate licensing or registration of mortgage brokers is introduced (see paragraph 22 above), to extend the provisions of the *Land Agents Act* (or any new legislation replacing the Land Agents Act) to licensed land agents when they are arranging the lending of money or collecting debt repayments. This already applies in New South Wales in cases where an estate agent collects mortgage debts for his principal (see paragraph 19 above).

APPENDIX NO. I

Mortgage Brokers Association of Western Australia BROKERAGE RATES AND OTHER CHARGES

(a) Application Fee -

\$25.00 for requested loans up to \$50,000, and \$25.00 additional for each additional \$50,000 or part thereof.

The Application Fee is a DEPOSIT against Broker's *own Inspection Fee* and eventual Brokerage charge. If an *independent qualified valuation* is required this is chargeable separately at cost. Any net balance of Application Fee after Broker's Inspection Fee as per scale below has been charged may be refunded if application not proceeded with.

(b) Inspection Fee -

Initial Inspections:

Up to 15 miles radius	\$20.00
Over 15 " "	\$25.00

Subsequent Inspections:

(For buildings under construction)	\$10.00
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(c) Brokerage - Local Money Market -

On loans up to \$20,000	2½% on first \$3,000 1% on balance above \$3,000 Minimum Brokerage \$50.00
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On loans \$20,001 up to \$50,000	1¼% over all
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On loans \$50,001 upwards	1½% over all
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(d) Brokerage - Bridging Finance -

Minimum of ½% chargeable on bridging finance six months or less.

(e) Brokerage - Interstate Money Market -

A flat rate of 1½% or by special arrangement between borrower and broker where there are unusual circumstances involving additional costs to the broker. Where bridging finance is arranged an additional brokerage fee of ½% to be charged.

(f) Brokerage - Overseas Money Market -

Finance arranged with overseas sources to be the subject of agreement between broker and client.

(g) No brokerage shall be charged by a selling agent where vendor's terms or a mortgage to the vendor is arranged.

(h) Where an agent offers or advertises a property for sale on terms no brokerage fee should be charged, unless special finance, as distinct from the original terms offer is arranged.

(i) An agent is entitled to charge brokerage when specifically instructed by a purchaser to arrange finance in circumstances other than those referred to in Notes (g) and (h).

(j) Where brokerage is payable, provision shall be made for the actual amount of the brokerage to be stated either on the Offer and Acceptance form and contract or otherwise agreed to in writing by the applicant or purchaser.

(k) Brokerage may not be charged where the source of the finance arranged is a building society, bank, or insurance company where the broker involved is also the selling agent, or an associated company.

(l) Conjunctual Transactions - Apportionment of Brokerage -

Where a conjunctual transaction is arranged between Broker A providing the finance and Broker B whose client is the borrower, excluding business arising out of M.L.B. arrangements, the following apportionment applies:-

Broker A (providing finance) retains 60% of the brokerage fees.

Broker B (whose client is the borrower) receives 40% of the brokerage fees.

(m) Commission on Interest Collection -

6% Commission chargeable on all collections.

(n) Transfer of Mortgage between Investor Clients -

Standard scale of brokerage charges.

(o) Finalisation Fee (By prior agreement with mortgagor) -

(i) Fixed mortgages: flat fee of \$20.00 to include all services required of brokers.

(ii) Reducible mortgages: \$30.00 where interest calculations have to be undertaken by broker.

(p) Extension of Mortgage -

Brokerage at ? of rates set out in (c) above. Cost of any necessary re-inspection is included in this brokerage.

(q) Production of Title -

Standard Charge \$10.00.

APPENDIX NO. II

An Extract from the Victorian Finance Brokers (Licensing and General) Regulations 1970.

12. (1) Subject to sub-regulation (2) of this regulation the maximum commission or rate of commission that a finance broker may receive for negotiating a loan or credit shall be two per centum upon the amount negotiated up to \$5,000, plus one and one half per centum upon so much of the amount negotiated (if any) as exceeds \$5,000.

(2) The minimum amount that a finance broker may receive for negotiating a loan or credit shall be \$6.50.

13. (1) For the purpose of sub-section (3) of Section 18 of the Act the fee which a finance broker who has been engaged or appointed in writing pursuant to subsection (1) of Section 18 of the Act may require such person to pay to him for the obtaining from a valuer registered under Part II of the *Valuation of Land Act 1960* of a valuation of any security offered for any proposed loan or credit shall be calculated as follows –

- | | |
|---|--|
| 1. Where the valuation is \$8,000 or less | the sum of \$26.00. |
| 2. Where the valuation exceeds \$8,000 but does not exceed \$50,000 | the sum of \$26.00 plus \$1.50 each \$1,000 or part thereof in excess of \$8,000. |
| 3. Where the valuation exceeds \$50,000 | The sum of \$110 plus \$1.50 for each \$1,000 or part thereof in excess of \$50,000. |

(2) The prescribed valuation fee received by the finance broker shall be inclusive of all costs and expenses incurred by the valuer in determining the valuation.