



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 45**

**Mortgage Brokers**

**WORKING PAPER**

**FEBRUARY 1974**



## **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

- (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 Amend Tf 69.5 0 TD.19 r1 TD 6 /F1 12 Tf -0.032 Tc1c 019 Tw (c 019 amenss*

- (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%.

## 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*



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.









## 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**

**(f) Brokerage - Overseas Money O2uuet**

**(q) Production of Title -**

Standard Charge \$10.00.

