



Consumer Credit Administration Amendment (Finance Brokers) Bill.

Second Reading

The Hon. JOHN DELLA BOSCA (Special Minister of State, Minister for Commerce, Minister for Industrial Relations, Assistant Treasurer, and Minister for the Central Coast) [8.27 p.m.]: I move:

That this bill be now read a second time.

The second reading speech is lengthy and has already been delivered by my colleague the Minister in the other House. I seek leave to have it incorporated in *Hansard*.

Leave granted.

The Bill I introduce today will significantly improve the protection offered to consumers who use the services of finance brokers, increase competition in the finance broking industry, and bring legislation governing finance brokers into line with new industry practices.

Finance brokers, or mortgage brokers as they are sometimes called, provide intermediary services between persons seeking finance and credit providers, usually in return for a commission paid either by the client or the credit provider. A finance broker finds suitable potential lenders offering credit products which match their client's needs, assists the client in applying for the loan and obtains approval for the loan. The loan contract is then taken out between the credit provider and the client.

Finance brokers are becoming increasingly important in the Australian credit market. Since the deregulation of the Australian finance sector in the 1980s there has been a proliferation of different types of consumer credit products, particularly in the area of home loans. Increased competition between lenders has resulted in a high level of consumer awareness of the range of finance products available, accompanied by an increased motivation to find the best possible credit arrangement. In this environment, finance brokers are increasingly being used to help consumers compare and assess credit products.

The nature of finance broking has also changed. Rather than charging a client commission, many finance brokers now receive their commission from the lender. While this style of broking is often marketed as a free service, many consumers are not aware that the broker's recommendations may be influenced by the amount of commission paid by different lenders.

Given the important role played by finance brokers and the trust placed in them by consumers, providing consumers with protection from unfair practices and with sufficient information to enable informed decision-making is essential.

The proposals in the Bill are based on the recommendations of a National Competition Policy review of the Credit (Finance Brokers) Act 1984. The review found that consumers continue to experience some risks in their dealings with finance brokers, and that these risks justify continued regulation of the finance broking industry. The main risks faced by consumers of finance broking services are:

- lack of broker independence where commission is paid by lenders, which may result in consumers entering into overpriced credit arrangements;
- consumer loss where the broker's commission is paid in advance and the credit is not subsequently obtained;
- the charging by brokers of excessive, undisclosed commissions or other fees;
- unethical conduct whereby consumers are persuaded to borrow larger amounts than needed or to include fraudulent information in credit applications; and
- difficulty in obtaining redress where the consumer has not been provided with a copy of their agreement with the broker.

Given these risks, the review concluded that the objectives of the Credit (Finance Brokers) Act remain valid. These objectives are:

- ensuring that consumers have sufficient information when dealing with finance brokers,
- reducing the costs of obtaining information from finance brokers and enforcing contracts against finance brokers, and
- protecting consumers from financial loss.

The review recommended retention of the existing provisions of the Act, with some amendments to improve their effectiveness, and the enactment of a number of new provisions which will improve consumer protection.

The review also recommended that, as finance brokers are now subject to the prohibitions on false, misleading and deceptive conduct contained in general fair trading and criminal legislation, it is not necessary to duplicate these prohibitions and their associated remedies in legislation aimed specifically at finance brokers.

In order to streamline legislation relating to finance brokers, the review recommended repeal of the Credit (Finance Brokers) Act and transfer of its provisions and the proposed new provisions to the Consumer Credit Administration Act, which already contains provisions governing discipline of finance brokers.

The review supported continuation of the current disciplinary regime applying to finance brokers. This regime aims to prevent and deal with conduct which is unfair, dishonest or fraudulent or which breaches a contract or consumer credit legislation. If it is found that a finance broker has engaged in such conduct, the Commissioner for Fair Trading may make a range of orders, including requiring undertakings as to future conduct, requiring action to rectify the consequences of the conduct, and prohibiting a person from conducting business as a finance broker. Contravention of a prohibition order can lead to a fine of up to \$22,000, and consumers who contract with a person subject to a prohibition order are not liable to pay any amounts under the contract and may recover any amounts paid.

The review concluded that replacement of this disciplinary system with a licensing or registration scheme could not provide sufficient benefits to outweigh the costs of creating a barrier to entry to the finance broking industry and the significant costs which a licensing scheme would impose on government and brokers, and which would subsequently be passed on to consumers.

The Bill's provisions fall into six broad categories: repeal of the Credit (Finance Brokers) Act 1984; definitions; disclosure requirements; commissions; records and third party fees; and consumer remedies.

I will now take the opportunity to outline some of the main provisions in the Bill.

Definitions

The Bill applies to finance broking where the credit to be obtained is covered by the Uniform Consumer Credit Code, that is, where the credit is predominantly for personal, domestic or household purposes. The review noted that the recent Post Implementation Review of the Uniform Consumer Credit Code did not support extension of the Code to small business consumers, and the review was not in favour of extending the coverage of finance broking legislation beyond that of the national credit regime. Small business consumers are, however, protected by the provisions of the Fair Trading Act which prohibits misleading or deceptive conduct and false representations, and the unconscionable conduct provisions of the Trade Practices Act.

The National Competition Policy review found that under the existing legislative provisions, there is some confusion over whether the finance broker's client is the consumer or the lender. The Bill therefore provides that the broker's client is the consumer for whom credit is to be obtained, whether or not that person pays any commission.

The review also found that, as the current Act does not clearly define commission, finance brokers may seek to obtain fees from consumers under other names, such as termination fees. The Bill therefore defines commission to include any fees payable by the consumer to the finance broker in respect of finance broking, no matter what those fees are called.

Disclosure requirements

The current Credit (Finance Brokers) Act provides that a finance broker must not accept commission from a consumer unless the appointment to act as a finance broker is in writing signed by the person to be charged the commission, and contains particulars of the amount of credit to be obtained, the term of the credit and the maximum amount of interest or other charges to be paid.

The Bill deals with new industry practices by providing that a finance broker must always provide a client with a written contract, whether or not the client is to be charged commission. The Bill also provides that the written and signed contract must be given to the client before finance broking commences, and that it must contain particulars

of:

- the maximum amount of credit to be obtained;
- the term of the credit, if the credit is to be for a particular term;
- the periodic repayment amounts or repayment arrangements that the client is prepared to agree to;
- the maximum interest rate the client is prepared to pay;
- the date by which the finance broker is to have secured the consumer credit;
- the name and address of the finance broker, the ACN if the finance broker is a company, and the name and address of the principals if the finance broker trades under a business name;
- the amount of commission payable by the client (if any is payable) or, if the amount of commission is not known, the method of calculating the commission, and an estimate of the amount of commission that will be payable if credit is provided on the terms specified; and
- when and how commission will be payable.

Further, the Bill requires the finance broking contract to contain:

- a statement, in a form to be prescribed by the regulations, that the finance broker's recommendations will be drawn from a limited range of potential lenders;
- a disclosure, if relevant and in terms to be prescribed by regulation, of the fact that a finance broker will obtain a financial or other benefit if credit is ultimately provided to the client; and
- any other matter that is prescribed.

Requiring the contract be completed and given to the consumer prior to the commencement of finance broking will ensure that the rights and obligations of each party are clear from the beginning. It will also address those situations where a consumer experiences difficulty in taking action against a finance broker because they do not have a copy of their agreement.

The requirement that the contract set out the details of the credit to be obtained, including the maximum amount of credit, the term of the credit, the repayment amounts and the maximum interest rate the client is prepared to agree to, will help to ensure that the credit secured matches the consumer's requirements, assist the consumer in taking action against the broker and clarify when the broker is entitled to payment of commission.

Up-front disclosure of any commission to be paid by the consumer is essential to enable the consumer to make an informed choice about using the broker. The proposal will increase competition in the finance broking industry by helping consumers to decide which broker is offering the most competitive arrangement.

Disclosure of the way commission is to be charged will also assist informed consumer decisions, and help to stamp out unfair practices such as the broker's commission being added to the amount borrowed without the consumer's prior consent. This practice results in increased costs for the consumer due to the additional interest payable on the higher loan amount.

Disclosure of the broker's financial relationship with lenders and the fact that the broker's recommendations will be drawn from a limited range of lenders are two of the most important requirements in the Bill. The disclosures will alert consumers to the fact that brokers are not independent and their recommendations may be influenced by financial or other benefits. Many consumers unfamiliar with the credit marketplace assume that finding the best deal is part of the service offered by a finance broker, whereas, in fact, as some submissions to the review pointed out, brokers rarely recommend lenders who do not pay commissions, even if they offer a product superior to that recommended by the broker.

Alerting consumers to the financial relationships between lenders and brokers will help to ensure that consumers question brokers about the reasons for their recommendations, and scrutinise more closely the conditions of the credit product being recommended.

The broad power to require the finance broking contract to disclose any other matter that may be prescribed will allow future changes to the matters which must be included in the contract. In particular, the power will enable a broker to be required to disclose whether the broker has paid a fee to any other person as payment for referring business to the broker.

Referral fees paid by brokers are an increasing feature of the finance broking industry. These fees may be paid to

real estate agents or other persons as payment for referring business to a finance broker.

The major consumer problem in relation to such fees is that consumers who are unaware of the fees may use a broker because of their trust in the person who refers them and on the assumption that a broker has been recommended on the basis of merit or integrity. The consumer may therefore be less vigilant in their dealings with the broker than if they were aware that the broker had paid a fee to secure the referral.

Commissions

The existing Credit (Finance Brokers) Act prohibits a finance broker from demanding, receiving or accepting any commission from a consumer before securing the credit, and from demanding, receiving or accepting any commission in respect of credit which is:

- for an amount less than the amount specified in the contract of appointment;
- at a rate of interest, or for a charge, greater than the rate or charge specified in the terms of the contract; or
- for a term less than the term specified in the contract.

The Bill retains the prohibition on accepting commission prior to securing credit, and expands the existing obligations on the broker by prohibiting the claiming or accepting of commission unless the credit matches the amount, term, repayment arrangements, and interest rate set out in the contract, and is secured within the timeframe specified in the contract.

While providing this protection to consumers, the Bill also operates fairly towards finance brokers. Although it requires the credit to be exactly on the terms requested in order for commission to be claimed, the Bill allows for the broking contract to be varied if the variation is in writing and signed by both parties. Therefore if a broker finds that credit can only be obtained on slightly different terms to those requested, a contract variation can preserve the broker's ability to claim commission. The requirement that the variation be in writing and signed by both parties ensures that the client has clearly consented to the variation and the new terms are clear to both parties.

The Bill also allows a broker who has secured the credit on the terms and within the timeframe requested to claim commission even if the client does not proceed with the credit secured, provided the contract was not validly terminated before the credit was secured, and the contract expressly allows for commission to be claimed in these circumstances.

Records and third party fees

The Bill retains the current requirement that finance brokers make and keep records of transactions, but increases the time for which these records must be kept from 3 to 7 years. This amendment acknowledges consumer advocates' concerns that consumers may require finance broker records to defend later debt recovery action by credit providers, and brings finance broker records into line with the records of other advisors such as solicitors.

In relation to the payment of fees due to third parties, the existing Act provides that valuation fees paid to a finance broker must be held in trust and any amount left over after payment of the fee be repaid to the consumer. The review found that a more effective method of preventing brokers from misusing valuation fees would be to require these fees to be paid in the form of a cheque or similar instrument made payable to the valuer.

The Bill implements this recommendation, and applies the same principle to credit application and establishment fees, which may also be accepted by finance brokers. During consultation on the Bill, it was pointed out that finance brokers may sometimes be authorised by a credit provider to instruct the valuer, assess the credit application or establish the credit contract on the credit provider's behalf. Therefore the Bill allows a finance broker to accept a valuation, application or establishment fee made payable to the broker if the broker is authorised to undertake these functions on the lender's behalf.

Consumer remedies

The Credit (Finance Brokers) Act currently provides that a consumer can apply to the Consumer, Trader and Tenancy Tribunal for a remedy against excessive commission. A court can also provide such a remedy if a finance broker takes legal action to recover commission which the court considers to be excessive.

The Bill retains these provisions, and goes further to provide for consumer remedies in the case of breach of contract, breach of any consumer credit legislation, and unfair, dishonest or fraudulent conduct by a finance broker.

On 28 March 2003 the Australian Securities and Investment Commission released a report on the finance broking industry prepared by the New South Wales Consumer Credit Legal Centre. The report recommended uniform national regulation of finance brokers and made a number of recommendations regarding the content of such

regulation.

While the Commonwealth Government is responsible for the regulation of financial planners and financial advisers under the Corporations Law, the Parliamentary Secretary to the Treasurer, Senator the Honourable Ian Campbell, has indicated that, as the regulation of credit has traditionally been a State responsibility, the Commonwealth does not wish to take on responsibility for finance brokers.

While this Bill will significantly improve the position of New South Wales consumers who use the services of finance brokers, the Government acknowledges that finance broking is a national issue. In view of the Commonwealth Government's lack of interest in this area, the New South Wales Government will be taking a leading role in discussions with the other States and Territories regarding the possibility of a coordinated approach to the regulation of finance broking.

As any agreement on a uniform approach is likely to take some time, the Government considers it important that the current Bill proceed. This will mean that New South Wales consumers will not need to wait for inter-jurisdictional agreement before they receive appropriate protection in their dealings with finance brokers.

In closing, I would like to thank the finance broking industry and the consumer groups who have contributed to the development of this Bill. The proposals in the Bill represent a balanced regulatory approach, which will protect consumers without imposing significant costs on finance brokers or interfering unreasonably in the conduct of their business.

I commend the Bill to the House.

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