25/06/08

RESPONSE TO THE COMMONWEALTH GOVERNMENT'S GREEN PAPER
RELATING TO FINANCE BROKING adoption of the Dept of Fair Trading NSW Draft "Finance Broking Act 2007" in its present form .

We have a number of concerns with that.

THIS SUBMISSION IS PREDICATED ON THE BASIS THAT THE GREEN PAPER WILL IN APPLICATION RECOMMEND THE WHOLESALE ADOPTION OF THE DRAFT FINANCE BROKING ACT 2007 AS PREPARED BY THE DEPT OF FAIR TRADING NSW.

We welcome the opportunity to provide a response to the Green Paper. In responding to the Green Paper we have interpreted from the text that the Green Paper favours the wholesale adoption of the Dept of Fair Trading NSW Draft "Finance Broking Act 2007" in its present form. We have a number of concerns with that draft which are detailed below.

For ease of identification of our concerns we have set out below a number of case studies so that the problems which we have identified can be of measured against their application in real life situations.

This document is the result of meetings of a group of brokers who individually may be members of the Mortgage Finance Association Australia and/ or the Finance Brokers Association Australia. Notwithstanding their membership they have felt compelled to express their views via this document. The participating members of the group represent brokers who are sole traders, brokers who are part of a network or who operate via an aggregator, mortgage originators, mortgage managers, While the predominance of members of the group are active in the residential market others operate in the broader home loan and business loan markets. The experience of the group ranges from those who have over 30 years experience in property and finance to recent participants.

The draft legislation suggests that the information from which it is sourced has been provided to the drafting panel on a selective basis so that the full breadth of the industry has not been given due consideration. Assumptions appear to have been made about the way in which information can be made available to borrowers and in turn the day to day operations by which that information may be delivered.

This document has five key features which are as follows:

1/**That licensing should be kept separate from the operational issues which are incorporated in the draft.**

2/**That the operational matters such as the defining of contractual relations should be in a non legislated Code or Rules form allowing for greater ease of amendment to deal with ongoing changes that occur as a consequence of different products being introduced into the market from time to time.**

3/That it recommends against a number of the procedures envisaged in the draft in that they will add substantially to the costs in servicing clients. A cost which must ultimately be borne by the client. The multiplicity of loan products in the marketplace leads consumers to believe there is a highly diverse range of products in the market. In fact there are only two types of loan product in the market these are:

Interest Only loans
Principal and Interest loans

While there are thousands of product brands and product names (white labeled products) in the market they are all sourced from either of these two product types. Additionally not all branded products are available through brokers as deposit taking lenders retain approximately 30% of products to themselves which enables them to market direct to the consumer in direct competition with the broker in the marketplace.

4/ **That the body charged with assessing a complaint against a licensed party should be at arms length to the body which has oversight or authority for licensing**.

5/ **That the Draft legislation creates a strong bias in favour of Banks over Non Bank lenders who have a greater reliance on brokers for product distribution.**

For ease of reference our comments have been matched to the Sections of the NSW Draft Finance Brokers Act 2007.

Section 4
5 We have a concern that these two sections as drafted will envelop the actions of management consultants advising or assisting borrowers in relation to debt structures and will be brought within the ambit of the role of a person engaging in finance broking.

Example: Borrower engages the services of a consultant to assist in negotiations with their current credit provider whereby the role of the consultant is to achieve more equitable/terms of the repayment of debt.

A member of the group has established a specific business support service where a number of retired professionals, current business owners or executives and current accountants and/or legal professionals provided advice or assistance to business clients. These persons act as a coordinated advisory group providing solutions to small and medium-size business owners in respect to the operation of their business and which can extend to advice on debt structure or renegotiation of structure. None of these persons would in the ordinary course of events be considered a finance /mortgage broker as their primary role is to provide a coordinated advice / solutions to business problems. In some instances this will entail examining the security arrangements provided by the business person in respect to their borrowings which commonly will involve use of the family home as security.

We cannot conceive that the proposed legislation would encapsulate this type of service. The service is designed to fill the void between seeking legal advice on one side and accounting advice on the other where the business person can get objective business/commercially related advice. This advice may recommend that the borrower seek

a) Restructure funding arrangements
b) Seek additional funding
c) Dispose of assets to retire debt
d) Seek an equity partner
e) Close the business
f) And a range of other business management solutions

Therefore the legislation in final form should not capture persons who primary business is advisory work and not finance /mortgage broking notwithstanding that there may be referral in either direction from broker to consultant or the reverse.

Section 6 This section has links to section 58 & 59. Its should not be possible for a broker to be disqualified without a Tribunal hearing unless a court has, in the ordinary course of exercising its jurisdiction stated that a broker should be suspended or disqualified in which case the licensing body would be entitled to act immediately to suspend or disqualify.

PART 2
DIVISION 1
Section 9 We acknowledge that there has been support for the licensing of brokers. The early calls for licensing were in our opinion, calls seeking to establish a restrictive regime for the issue of licenses with the hope that it would cause competition to leave the industry.

This section does not provide for newcomers to the industry. It is a very competitive industry. It may be that after one or two months a newcomer will not continue. We recommend provision be made to accommodate the newcomer with a provisional license for say, 3 months to be converted to a full license as defined education standards or milestones are completed at which time a full license could be issued..

DIVISION 2
Section 10 There is a reference to the words “local licence” but we have not been able to define what this means. Is it intended that “local” should relate to “state of issue??

Section 10/ 5 It is bad public policy to have a person applying for a license to have no response for 90 days and only then to find out that they have by default been denied a licence.

This section should provide for a written response within a shorter period of time, say 45 days setting out reasons why a licence has been declined so that the party involved can then assess whether an appeal is under Section 20 is an appropriate response . To do otherwise is a denial of natural justice

Section 11 (1)

A person should not be limited to a "local license" They should be able to be licensed beyond a local, territorial or jurisdictional license. If the legislation is contemplated as template based and each State adopts the template with amendment to conform to relevant State legislation then the standards of licensing should be the same on a State by State basis. It follows therefore that the standard for a license in say, NSW would be the same as for a licensee in Victoria. If that is the outcome then a licensee should be able to be licensed in more than one State

(d). It is unfortunate that the "prescribed qualifications" have not been made available with the Draft Bill Therefore it is not possible to make an informed judgment as to the standards to be considered.

We are of the view that the industry has a proliferation of brokers who are better at sales than they are at advice. This is due to the fact that the broker is generally attached to an aggregator who emphasises courses concentrating on sales skill rather than applying ethical standards for their broker's performance. Courses provided by accredited trainers and TAFE'S such as Cert IV provide limited information beyond the information necessary to the delivery of mortgages to residential consumers.

The average broker has little operational knowledge beyond the information needed to be collected to meet lenders standards and has little understanding of the operation of the back office of the Mortgage Manager. Additionally the residential mortgage broker has little knowledge of the information required for plant/vehicle leasing or chattel mortgages. In the market of business related lending the average broker has no knowledge of the range of business loan products in the market and their application.

The question that arises is what is a reasonable level of training to apply to a new broker to equip them for a career in the finance broking business.

The industry has grown rapidly in the last 7-8 years. It has attracted persons who came from a banking style background and has many who have been in the non bank sector for 15-20 years. There needs to be a recognition of the experience of the participants in the industry especially those who have been active continuously for 10years or more.

Therefore we propose the following.
For long standing participants in the industry

a) a grandfathering provision to accommodate those who have been in the industry on a fulltime basis for not less than 10 years

For those seeking to participate

b) There should be a preliminary license as outlined in Section 9 above. The standard should be that the provisional licensee must undertake a limited course as a precondition to the issue of the license. That would be more in the line of an induction training rather than a Cert IV style course. That license to be capable of renewal for 90 days periods until they have completed the Cert IV course for Brokers

c) The next license to be based on the completion of a Cert IV

d) License extensions.

We are of the view that there should **not** be license extensions to cover additional fields such as asset financing such as leasing/ chattel mortgages, business financing, structuring etc.

These are skill based matters and should be addressed via industry skill based training with the proviso that there should not be any right to claim a Specialisation Standard unless the licensed person has completed a relevant course and had at least 3 years experience operating with that education standard other than a person who would qualify under grandfathering conditions.

OTHER Given the changes that have recently occurred in the industry in respect to payment arrangements by banks to brokers for services provided there is likely to be an exodus from the industry by brokers.

Consideration needs to be given to the fact that there will be some who will retain a limited relationship to the broking business and others who will leave and later return. We submit that it should be possible for a licensed broker to renew a license even if they are not active in the industry where the broker expects to return at a future date.

l1 (2) This section does not allow for the fact that the courts recognize that despite a person being found by the courts that they have breached the law they are allowed to regain their "respectability" through the lapse of time since the event. Thus for example a person who may have been fined under Administrative Law and may be precluded from obtaining a license would be allowed to obtain a license because of either the period of time that had elapsed since the imposition of the fine or could demonstrate behavioral change which would allow a license to be issued.

These comments are relevant to the application made under a corporation or partnership category.

Section 14 a (ii)

It is impossible for a broker to have knowledge of all of the loan products available in the market. See our comments above on products and brands. Accordingly it is impossible for the broker to meet the criteria of providing services that are "always" in the best interests of the consumer.

c (iii) This sub sections fails to recognize that credit providers may have granted accreditation in a non formal manner, ie the

lender may have agreed to accept applications from the broker due to a long standing relationship and without issue of a formal agreement and for reasons of change of management may cease to deal with a broker.

For example the Challenger Group may require its Originators and Managers to cease dealing with Challenger direct and require them to operate through one of the three major aggregation firms partly owned by Challenger.

The merger of Bendigo Bank and Adelaide Bank will likely see a number of Originators and Managers currently dealing with the Bendigo Bank subsidiary, National Mortgagee Market Corporation have their contracts terminated and switched to Adelaide Bank to reduce the channel lines of communication.

c iv It envisages that a broker is a member of an industry association. This legislation should not force membership of an association as a precondition of a licence. A broker should be free to join in any group or act alone on matters of concern to the broker.

Section 16 b This section envisages that the licensing body will also specify insurers and policy conditions
While it is common for insurance policies to have similar wording the claims interpretation can vary from insurer to insurer especially under the terms of their Reinsurance Policy.

Section 22 The section does not require the appointment to be in writing only the termination /cessation as a representative. It is important in the event of a dispute over action of a broker that the broker or the licensee can point to a defined document delivered to the address of the relevant party or provided by hand as being the document by which arrangements were established, changed or terminated.

Section 23 c This seems to envisage that the broker representative is constrained to the state within which they reside. Brokers should be able to be appointed representative of an appropriately appointed licensee and carry out the broking

role in another state to the one they reside in. Similarly where broker and client reside in the same state they should be able as between themselves to transact a loan even if the security is located in another state.

Section 27 2 The requirement to notify with 24 hours is unrealistic. It fails to consider that offices may have staff on leave and it is highly unlikely that a standby employee would be retained to fill the position. We suggest that 7 or 14 days is more realistic.

2 (b) This anticipates that every licensee has a formal agreement in place with every lender with whom they would transact business. The licensee may not have a formal link to a lender but may from time to time place business with the lender on the basis on a long standing arrangement based on mutual respect for broker/lender roles. Or the link may be provided by an aggregator to maintain the relationship. The lender will make the decision as to whether they will do business with a broker on the basis of their own commercial needs.

3 (b) If the licensee is changing the commission arrangements between the broker / representative and the licensee it is of no interest to a lender. Information of a commercial nature has no place in the information provided to the regulator.

While there is obviously a need for the regulator to maintain a tracking of licensee or broker representatives the commercial arrangements are not essential to the regulatory process.

Section 28 (4) A standard legal document defining the relationship between the licensee and the broker/representative would in the ordinary course of events contain a clause that stated that the broker/representative was liable for their actions on and from the time the licensee changed or terminated the relationship.

PART 3 **REGULATION OF FINANCE BROKING**

We are of the view that this Part has no place in legislation dealing with licensing.

a/ Prescriptive procedures relating to the day to day operation of a business and defined in legislative form will prevent new loan products coming into the market in the future because the proposed legislative process may make the process unworkable.

b/ Procedures locked into legislation are not capable of prompt amendment to accommodate change due to the fact that legislative change is subject to parliamentary schedules and cannot be dealt with quickly.

> A good example of the rigidity of legislated processes is the failure of the legislation relating to Comparison Rates. New Zealand has tried and removed the use of comparison rates. It was widely recommended that the same apply to Australia but the sunset clause was not applied despite the general view that Comparison Rates failed to deliver meaningful information to those who might rely on them.

There are cases where the Minister of the day may desire change for political reasons. In one case successive Ministers wanted to change but the parliamentary legislative schedule was filled with matters of interest to the Party as a whole. As a result years had gone by before a draft act was written and that was written externally to the Parliamentary Drafting office.

Had that not been done it was acknowledged that another term of parliament would have passed with no change thus denying the community the benefits of the changes to the original act.

CONSIDERED AS A SEPARATE PROCEDURE TO THE LICENSING OF BROKERS

We are of the view that licensing has no place along side the operational aspects of the delivery of broker services. The industry operates under a Code of Conduct at present and while this of its self does not present brokers failing in the delivery of their service either to the client or to the lender the risk is that a code in legislated form will act to prevent new loan products coming into the market because of the necessity to rely on parliamentary process to allow for amendment. As demonstrated below the operational aspects of the draft legislation requires further amendment to provide for a workable structure in operational matters.

1/ Procedures must not act to hinder the role and services of the broker

2/ Must not discriminate against the small scale broker versus the large scale broker or a balance sheet lender v a non bank lender dealing direct with the prospective borrower And recognize that there are differences between a broker and the role of the mortgage originator and mortgage manager in how they are contracted with upstream partners..
3/ Must ensure that the broker and client deal openly and honestly with each other.
4/ Must ensure that the procedures do not place the consumer in a position whereby they would be put under extreme pressure to respond to one broker versus another.
5/ Must not create a market that favors balance sheet lenders over non bank lenders or brokers.

FINANCE BROKER DETAILS

Section 31/ 32

It is reasonable for the broker to provide certain information to the client. It is unreasonable for the broker to have to undertake work for the client without the protection or the assurance that the broker will be paid for the services provided in due course. In complex transactions it is not unreasonable to have the broker paid for work undertaken as a precursor to recommending a solution. Nor should it preclude the client from signing brokerage agreements with one or more brokerage companies provided that when the broker/s delivers a loan approval [See below] that if it meets the clients previously agreed requirements that the client becomes liable for any fees due and payable to the broker for the service and that may be to one or more brokers.. The legislation should also recognize that the client may pay for a service prior to the loan being considered by a lender and it may be declined by the lender.

It is entirely inappropriate for a borrower to ask a broker to undertake work on their behalf with the expectation that a lender will pay for all the work undertaken by the broker. In many instances there will be loans wholly within the UCCC that require the broker to undertake work for the client which may be disproportionate to the remuneration provided by the lender. It is not the lenders responsibility to compensate the broker for work which is client focused

Loan approval: A loan approval should not include a “pre approval” for a loan. Too often such approvals do not bind the lender to proceed to settle the loan when a formal loan application is lodged and the security is made known to the lender.

Therefore;
The approval must be from a party who has the authority to authorize the settlement of the loan once the security documents have been signed by the borrower.

This could be a bank, a Non-Bank lender, Mortgage Manager with delegated authority to approve, a Mortgage Originator with delegated authority to approve. It is not likely to come from the broker given the nature of the role.

The approval in written form should contain certain basic information.

a/ Be addressed to the borrower/s and if applicable, guarantors
b/ Identify the security property (may not be known for a pre approval)
c/ Define the loan sum approved
d/ Define the interest rate (fixed/variable)
e/ Define the expected loan repayments based on the interest rate.

Not considered necessary

An exhaustive list of fees that may apply during the life of the loan is not in our opinion necessary . This should be capable of inclusion in a hand book or an attachment to a loan approval.

BROKER DETAILS

The agreement/mandate governing the relationship between the parties should have as follows

1/ Name and address of broker and business
2/ Licence number or representative’s licensee number
3// Brokers ABN.
4/ Business Name (If trading under a business name)
5/ Confirmation of participation in EDR scheme.

6/ Name and contact arrangements are essential

7/ Disclosure of Charging Arrangements

Disclosure as to whether the broker is going to charge the borrower, the lender or both is important to enable the client to determine the direct cost to themselves.

But see Notes below:

Not Necessary

List of credit providers (Not a valid inclusion)

We are of the view that borrowers are more product driven than lender driven.
If we are wrong and the list of lenders is important the larger the list the more a small broker is discriminated against compared to a larger broker. Given the fact that some broker / aggregator lists of lenders contain names of loan originators and managers with common sources of funds it would be very easy for a broker with what was perceived by the client to be a large list to represent that they had a better list than a competitor when this may in fact not be the case. They may have a number of White Label organisations on the panel all with identical funding sources. In this environment the small broker with a limited list would be placed at a disadvantage to the larger broker. The Rules or Code covering the operation of brokers must not be discriminatory to the participants.

The access of a small broker to a larger range of lenders is often facilitated through an aggregator. The industry has a history of aggregators (alone or likely in conjunction with their lenders) imposing minimum volumes of loans per annum on their brokers in return for allowing them access to the lender pool. In other instances the broker has been sacked because they have not met measurement imposed and the aggregator has absorbed the commissions due to the broker.

This has led in our view to a rise in broker fraud as they struggle to maintain volumes to preserve accreditation in a competitive market.

Disclosure of Commission

The disclosure of commissions does not serve the purpose that it was intended to cover. It is intended to address the presumption of undue influence that a commission generated may influence the way the loans are presented.

This fails to recognize that the broker is driven by the need to make the sale. It is illogical to suggest the broker would constrain the borrower's decision to a limited product range which might favour the broker. The broker is paid on success. Therefore they will present products that reflect the clients likelihood to accept rather than not.

Loans all have a common base. Ie there is a cost of funds in the market. Therefore the higher the commission that the lender pays to the broker the higher the cost of that loan either immediately or in the future to the borrower.

The broker will only be successful if the loans overall pricing is within the frame work of what they, the borrower, wants to pay. The broker is not in the position of say, a used car salesman where the salesman can manipulate the trade in price v the sale price of the new car v commission on the car loan they arrange to make up the income stream..

Disclosure of Charging Arrangements

Disclosure as to whether the broker is going to charge the borrower, the lender or both is important to enable the client to determine the direct cost to themselves.

However experience in relation to business lending has shown that borrowers are more likely to not pay for services personally but prefer to rely on the lender to meet the borrower's obligation to remunerate the broker for services received. This can result in the borrower not getting the loan they wanted or offered a lesser sum because the broker was not being paid to properly research the complexities of the transaction

prior to submission. This is especially the case where the borrower's solution is a group of products and is not limited to a single product such as with a home loan.

There is a substantial difference between a broker completing a loan application and delivering it to a lender and relying on the lender to complete the processing and a Commercial Originator for the Bank who is contractually required to research the loan/s, write up the credit report, incur the expenses searches and credit enquiries, attend to document signing and generally act as an extension to the bank.

The economics of this have their emphasis on the referral to the Bank by brokers of as many loans as the Bank can get so the Bank can cherry pick business they want. There is a general failure to understand that a Bank being a balance sheet lender has a finite sum to lend each day based on the banks overall capital structure. The more loans they get submitted the more choices they have to make decisions on which loans to reject as being too difficult and to maximize the loan/capital ratio.

As a consequence the more complex the transaction the greater the likelihood of the loan being rejected if not processed by the broker correctly for the banks internal credit processes because the bank may meet its target with other less complex transactions.

If it is intended to prevent the assumption of undue influence that a commission payment may generate to influence the way the loans are presented, then is at odds with the rest of the draft. Either the broker interviews the client at the brokers risk to ascertain the client's interest in products or the broker does so after a general purpose agreement is entered into with a range of parameters.

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If the broker is put in a situation whereby they are required to spend time with a prospective borrower and collect information which may necessitate a second or third meeting with the client they will ration their time until they can be sure that the risk (time wasted) is worth the reward. Especially in light of moves by banks to reduce the remuneration of the brokers.

Borrowers will change their mind on their needs or product choice as they meet each broker they have lined up to interview. Therefore there will be substantial pressure brought on the borrower to deal with the broker making the presentation in front of them to exclude all others. The presumption that brokers are advisors first and sales person second is not correct. The veneer of skill at any level is always subject to the sales skill of the presenter.

This is evidenced by the proliferation of "sales courses and coaching articles" listed in various industry publications or promoted by industry bodies that have come into existence since the mortgage broking industry commence to flourish in the late 1990's

Payment of commissions by brokers to third parties.
While it is common for third party commissions to be paid given the multi tiered structure of the industry it does not appear to be an issue in the borrowers mind. The borrower is focusing on what they are getting not who is paid what and if the broker is paying a third party referrer the borrower has little interest if the product outcome is what they want.

Disclosure as to whether the broker is going to charge the borrower, the lender or both while of value to enable the client to determine the direct cost to themselves remains a cost that cannot be accurately determined in many instances.

CHARGING FOR SERVICES

The following is an example of the inability to define cost due to the complexity of circumstances surrounding the borrower. The provision of finance to a borrower is not the same as buying a tangible item of the supermarket shelf for a known sum.

EXAMPLE.

Couple sought a $60000 loan from a non bank lender (NBL) for "working capital". They had recently purchased a business from the husband's employer where the husband had worked as a subcontractor for 7 years. They had sought advice from an accountant on the purchase.

They had a home with a home loan ($120.000) from a major non-bank lender to which they had added a $100.000 loan to buy the business. The purchase price was $160.000. They paid $60.000 deposit and took a loan back from the vendor of $100.000 which the vendor's solicitor secured with a caveat on their home. The balance was business capital.

NBL asked what the extra money ($60.000) was to be spent on. The answer was that $25.000 was to pay for a new computer network and the balance was to pay creditors and to buy material to complete jobs.

In the interview the following conclusions were drawn.
1/ The $25.000 for the computer was likely a guess.
2/ They had no reliable accounting information as neither husband nor wife had any training in the use of their accounting software.
3/ The caveat prevented them from borrowing any additional money on their home unless they paid out the vendor who at this time was owed around $90.000. This was complicated due to the fact that the vendor had gone into receivership after the sale and they were now dealing with a Receiver.
4/ Neither they nor the accountant who advised them on buying the business had copies of financial information on the vendors business.

It was obvious at this point that considerable time would need to be spent sorting out the problems before the loan could even be considered. NBL maintains contact with a number of professionals in various fields to act for the benefit of the client.

They arrange for an IT professional to attend to check the computers. The $25.000 problem was solved at a cost of $330 but with a recommendation they spend $3-3500 on computer upgrades in the near future.

A specialist bookkeeper was recommended and he commenced work on the accounts but advised that while there appeared a viable business due to the mess the records were in he could not provide accounts that could be relied upon at that time. NBL spoke to the accountant who advised the couple on the purchase and sought copies of the vendors figures. The accountant advised he had no copies of the accounts and no notes on what he had told them about the business they had purchased.

NBL had prepared an agreement to cover costs in working the matter to a stage where NBL could process a loan. The urgency of their financial needs meant that the loan had to be processed before the accounting work had been completed. NBL charges were in line with those for an average sized accounting firm. The couple advised that their home was worth $370-390.000 and they proposed that they borrow to 80% to give them money to pay meet their foreseeable obligations and refinance the current loans and to pay out the Receiver
Loan. Due to market conditions and other adverse factors in the vicinity the house valued at $336.000. This meant increasing the loan ratio and being a loan based on a Declaration from the client that they could pay it back it was not insured and therefore a marginally higher interest rate was imposed.

Their dilemma was that with the reduced equity the loan they could borrow for working capital meant that there were insufficient funds to pay the receiver out and provide working capital. They do one or the other but not both.

NBL was asked us to negotiate with the Receiver. After several weeks during which time the Receiver referred matters to his own solicitor NBL finally obtained an agreement from the Receiver that they would recommend the vendors creditors accept a 45% reduction in monies outstanding. This would enable the couple to pay out the vendor and have a smaller sum available as working capital and improve net cash flow by around $4200 per month.

This loan was clearly a business related transaction but had the home loan component been $155.000 or above the loan would have been Code Affected because of the diminished value of the house. Until such time as the valuation was done and the negotiations with the Receiver completed it would have been impossible to enter into a single agreement with the borrower to say whether they should be billed by NBL, or the funder would pay, or both.

The estimated time that is likely to have been invested from first interview to the stage where a loan was approved including various meetings with the clients, correspondence & discussions with the receiver and his solicitor, seeking advice from solicitors, perusing and researching the clients' situation totaled to around 22 hours.

The **point being demonstrated here is that there are regularly situations which make it impossible to say to the client what the payment arrangement should be until a substantial amount of time/work has already been invested.**

The fact that the couple was able to borrow on the basis of a Declaration enabled them to continue with the business. They had been declined by two banks to overcome their immediate problems simply because they had been in business for less than 2 years.

Comment

There is an assumption implicit in the draft that the broker arrives, produces a contract for the borrower to sign, has it signed, opens a laptop, proceeds to demonstrate the range of loans that the client could have access to and the client chooses a loan from a selection.
That model may fit with the salaried borrower but does not fit for the self employed borrower whose loan may or may not be subject to the UCCC standards. Business borrowings bought of the strength of a laptop selection which focuses on residential products generally short change the borrower.

Section 31

There is a serious risk that the regulation of brokers will result in the delivery of a huge volume of paper to the client which will be consigned unread to the rubbish bin. The legislation should not have the following effect. To quote an insurance broker. "If I wanted to give you a quote to insure your car I have to give you a document that runs to 84 pages". That is what this draft legislation is sending as a message.

We would seriously recommend that the outcome on the Regulation of broker / client relationships only be documented after work shopping the process with people front line experience in the industry and able to bring real life experience to the table.

Clients find brokers either by responding to advertisements or by personal referral. They have a preconceived idea of what will be discussed. While it is appropriate that the broker provide certain information the borrower does not need to be swamped in paper.

Section 32 2

As outlined above listing of lenders will mitigate against small brokers when competing with larger brokers. There are hundreds of home loan branded products in the market. Of these

approximately 30% are retained by lenders for their own sales team and are not available through a broker.
See our comments above regarding the leverage brokers obtain by using various mortgage managers to increase perception of broker size where the participants listed by the broker are all funded by the same source.

Our view is that the listing proposed does not enhance the information available to the borrower and as borrowers select by product more than they select by lender the listing serves no good purpose.

Section 33

The proposed information collection as set out in the draft has no place within the rigidity of a legislated form.

While the questions proposed [S 33.(1).a, b, c, d, e] are common sense questions that one would assume are the kind that would be asked they are better placed in a set of rules if there must be a documented process to follow.

It has to be understood that the majority of brokers are under pressure from aggregators or lenders to deliver a minimum volume of loans each month/ year.
They are trained to sell loans. This results in a presentation to the borrower which emphasis the importance of the brokerage business rather than the importance of the products.

EXAMPLE
The borrowers were a couple. He is a self employed contractor and she was not employed spending her time raising 3 young children. Their accountant was concerned that they were unable to maintain the payments on their loans.

Their situation was that they had previously lived in a house nearby and borrowed against that house to build a new house for the family. They told the lender they were going to rent the former house when they moved into the new house so they could pay for the new loan. Instead they moved his parents who were pensioners into the old house. The parents were supposed to pay rent but the rent was only occasionally paid due to their low income. The couple's income from the business was just sufficient to meet the mortgage on their new home. The family lived on the Centrelink income which the wife received for the 3 children. The new house was sparsely furnished with the various items being paid off through store credit facilities.

They were on the point of defaulting on their loans and they rang two of the better known brokerage companies who sent brokers to see them.

Broker A promised that he could solve their problems with a loan with a honeymoon rate for 12 months. Since the difference in repayments was approximately $350 pm on the reduced rate it would not deliver a meaningful increase in income to a family on the breadline. Nothing else was offered.

Broker B told the couple that he could provide a mortgage management system that would have the loan paid off in 8 years. Since they could not pay for the current loans there was no possible surplus to make accelerated repayments.

The correct advice was to sell the house they used to live in and use the equity to reduce debt on the new home. That course of action would have delivered over $20.000 in annual savings to the family. There was room in the new house for the parents to be accommodated with the family. If that was not sufficient for the future they could then sell the new house to downsize or relocate.

The point being that:
a) The brokers irrespective of the information obtained offered products which they have been trained to sell. This common for a large percentage of brokers. They were unable to stand back and give objective advice to the clients as the solution to the dilemma.

b) This emphasis's our point that brokers are trained to sell products not analyse social consequences.

This is further highlights the problem of regulators, organizations and associations requiring minimum CDP points for ongoing membership of the organization or participation in an industry. Organisations and associations create programs to make up reasons for members to acquire CDP points. Often these programs as a superficial events masquerading as training when they are no more than courses in high pressure selling or a social talkfest.

Section 33.2

We are of the view that the application of this section is a precondition to the treatment of a loan as a business loan: REF Schedule 1 Exemptions

Why it does not work.

In the above case study the couple chose an accountant to advise them on the purchase of the business. Subsequently when trying to find out what was the basis of the recommendation of the accountant that they should buy the business that accountant admitted he had no record of the vendor's accounts on which he based his opinion nor did he have notes on the advice given. He did acknowledge that he had advised them it was "OK" to buy the business

Under the proposed section the couple would be required to seek either advice from another party at a cost to themselves or to return to the accountant that advised them to buy the business who had no records of his previous advice.

Implicit in the sub section is the expectation that a borrower will have professional person available to whom the broker can direct enquiries and who will confirm that the loan is for business purposes. This fails to recognize that a substantial number of persons / business owners have a tenuous relationship with an accountant or tax agent and many do not use an accountant or tax agent preferring to lodge their own tax returns. They are seeing an accountant or tax agent only once a year on compliance related matters. The tax agent's are not in a position to reliably inform the broker of the need or benefit of borrowing ht money. The majority of business borrowers see an accountant or tax agent because they have to for compliance reasons and they do not get other commercial advice. If there was not a compliance obligation the borrower would not consider they had the need to seek out an accountant and tax agents.

In the alternative if the client is forced to see a third party (read "accountant") to have them validate the decision to borrow and to verify that they are borrowing for business purposes this will only come at a cost to the client. With some accountants this could run to $.000's of dollars as the accountant refuses to validate the decision until such time as they have undertake their own research

Clients know when they need money, despite often borrowing later than earlier and although knowing they need the loan may have no idea of the proper structure or amount.

In this regard for a business related borrower only marginally more so than for a home buyer the structure of the loan is almost as important as the rate. Most borrowers do not have a knowledge of structure of loans that are available and rely on the only common benchmark that they know, being highly publicized interest rates for loans.

Borrowers regularly fail to understand that a well publicized low interest rate for a home loan which may be a "No Frill" loan will bear no relationship to an interest rate for business borrowings secured on the family home and be different again to interest rates for loans secured on the business itself. This failure to understand places the borrower in situation where they buy on price and do not take a holistic view of what they need or what are the components of the product they are buying.

Other 33.2 Issues

As outlined above this section is in our opinion a precondition to the broker relying on the borrower advice that the loan is for business purposes. It is an example of bad public policy

The application of the section will prevent borrowers accessing the widely used Lo Doct and No Doct loans which have an important place in the range of products available to the consumer.

It will not prevent a balance sheet lender such as a bank offering Lo Doct/ No Doct products via an employee . That will create an unequal market place. The Draft does not envisage application to employees of balance sheet lenders. The Draft does not in our view stop a balance sheet lender from obtaining a Declaration from the borrower as to purpose and being able to rely on that declaration.

Declarations have an important place in the morality of borrowing. The borrower has a responsibility to act honestly and to take responsibility for their own actions. A lender has the right to expect that the borrower has acted honestly. A lender has the right to ask a borrower to substantiate the integrity of their position by asking the borrower to state the truth of their position.

If the broker is the borrower's agent the lender would be entitled to ignore any statement made by the borrower via the broker on grounds of uncertainty if the lender was forced to rely on oral statements and not documented evidence.

Since the Basel Agreement #2 requires lenders subject to the agreement to allocate capital to risk, the inability of a balance sheet lender or other lender to rely on the statements of the borrower will result in the lenders risking a mismatch of risk to capital and therefore breach the rules under which they are required to operate. More particularly it will raise the cost of funds to the borrower as the lender will be required to make provision for unstated risks with their capital since there will be no obligation on the borrower to state the purpose of the loan in such a way that the lender will be able to rely on that information.

While it is recognized that there has been predatory lending which has taken place under the guise of the Lo Doct / No Doct loan there has been a much greater public good derived by the fact that borrowers have been able to access such products for a myriad of reasons.

EXAMPLE
Actual case

A former senior Commonwealth Public servant who on resigning to establish a service based business was denied a working capital loan by the banks he approached because he had not been in business for 2 years.

His dilemma was solved with a Declaration/Statement of Purpose to the lender who provided the funding necessary to establish the business..

Many borrowers especially in the business environment wait until it is too late to borrow and have urgency attached to the enquiry for a loan. If their tax returns are not done by their accountant/tax agent who are subject to a lodgement timetable agreed with the ATO then it can be weeks before the accountant can provide the information that a lender may seek.

EXAMPLE

A couple were joint owners of a business with a business partner. The business partner experienced personal financial difficulty unrelated to the operation of the business and demanded that they buy him out under the terms of their shareholder agreement. The outgoing partner who was desperate for money said to the couple that they had to come up with the

money [$250.000] within 2 weeks or he would sell to his brother who the couple did not want as a business partner.

They had jointly owned the business for less than two years and the couple relied on the business partner to have compliance matters dealt with through his accountant. The outgoing party was in dispute with his accountant and owed the accountant money. The accountant refused to make any financial information available until the debt was paid.

Other issues: The business was a cash based business.
The couple worked on the floor of the business and the partner was responsible for the administration therefore they did not have detailed knowledge of the financial side of the business.

This is a classic case of where a Declaration would work for the borrower.

The couple approached several banks for a loan and each declined on the basis of the initial interview because they had not had the business for more than 2 years.

They approached a Business Loan Broker. [BLB] Firstly BLB arranged to obtain the bank records and then prepared financial models on the performance of the business under diverse market conditions. Following this an application was made to one of the banks that had previously declined their loan.

Outcome: The lender accepted them despite the fact that they had only limited financial information and had been in business less than 2 years.. They were able to buy out the partner.
They have subsequently opened a second store and now employ over 30 people.

Applying the above case to the provisions of 33.4

(a) The couple had limited information to explain the capacity to service the loan other than they knew on that the sum they needed to borrow was around the amount the business partner had borrowed to join in the business prior to his borrowing for other activities which caused the partner problems.

(b) Until credit was assessed and the risk weighted by the lender there was no way the broker could have made a value judgment on credit cost.

(c)Already covered in 33 1 (b)

(d) Firstly, brokers do not do credit checks. They rely on the lender or lenders processors to undertake these enquiries. If the broker is the agent of the borrower and the borrower declines to fully disclose information to their agent that may be detrimental to their application and the lender being forced to rely on the broker as the borrowers agent and it subsequently comes to light that the borrower has lied, the broker is at risk of having their accreditation cancelled for reasons of failing to disclose information that the lender regarded as essential simply because the client withheld such information.

(e) If the broker is denied the right to rely on:-

1/ a borrower’s declaration that they will dispose of certain assets at a future date to enhance their ability to service,

2/ a borrower's awareness of obligations due under other credit contracts that the borrower is prepared to disclose and which the borrower intends to cancel,
3/ the borrower's honesty in disclosing store or credit cards which have unused limits,
4/ borrowers stating a propose of use for the funds when a contrary application is actually intended,

then there is no way that the broker can satisfy this section. For example most borrowers fail to disclose unused store cards if they are not in regular use.

Secondly, there is a common practice of providers of store credit to make more liberal credit available via a store credit card following the change in social status from renter to home purchaser. An addition to card capacity is more likely to be declined to a renter than a home buyer.

Likewise a car financier will be more willing to extend larger credit for a car loan in the future if the borrower is a property purchaser than would be the case with a renter.

These are just two examples of the possible future action of the borrower but such action, if to be taken into consideration on a speculative basis by the broker, will result in the broker endeavouring to reduce the loan size/ borrowing capacity of the borrower to ensure they will not be subject to future criticism, a situation that would not apply to a balance sheet lender representative.

This will result in balance sheet lenders having a commercial advantage over the non-bank lenders who rely wholly on a broker distribution network.

(f)Given the entrenched provisions of the draft and the inability of regulations to overturn legislated procedures this section either should be removed or detail provided on the future /prospective regulations.

33.5 Since the lender will make the credit decisions in relation to the borrower and not the broker and dictate the delivery interest rate the broker is limited to an uncertain estimate that the borrower can repay. In cases where the borrower having not disclosed either through neglect to disclose or by deliberate act and the lender subsequently determines that on the information that the terms will be otherwise than is anticipated then the broker has no knowledge in the early stages to make the judgments required by this section.

33.6 Refer to comments in 33.4.(f)

Section 34 We refer to our comments above that the broker will be placed in an unequal situation where they represent a non bank lender to a person representing a balance sheet lender or a bank employee. The balance sheet lender's employees can elect to dispense with certain information if they so choose.

The information capture by a broker is dictated by the lender or mortgage insurers commercial requirements and should not be in legislated form. These requirements vary to market conditions such as has been seen as the lender/ mortgage insure response to recent economic changes.

Refer our comments elsewhere regarding the fact that brokers do not make credit decisions in respect to borrowers. If they had to make credit decisions on the borrower's capacity to repay they would be denied the opportunity to accept loans supported by a declaration whereas a Balance Sheet lender's representative would be able accept the Declaration.

Reference to third parties for validation will add to the borrowers cost especially if the borrower has not regular third party who has an intimate knowledge of the reasons that the borrowings were for business purpose. .

EXAMPLE.

The borrower in seeking a loan asks the broker to calculate how much they can borrow and the broker calculates that using one lenders calculator and the sum is written into the contract and the borrower signs the contract. Now the borrower proceeds to look at property which is going to require a bigger loan because they have indicated to the broker in the first instance that their borrowing requirements were smaller than eventuated. The broker is put to the cost of returning to enter into a new contract for the increased sum assuming the borrower is eligible (which the lender may not agree). Likewise if the borrower having decided to take a smaller loan because they have decided on reflection to buy a property that needs renovation and to retain capital AND they then choose to increase the loan ratio (LVR) thus incurring mortgage insurance charges (which may not have been an issue in earlier discussions) the broker is forced to return to sign a new agreement.

If after entering into a second contract the terms offered by the lender are different to the terms sought via the broker is forced to return for a third time to have a fresh agreement signed.

Ultimately the borrower will wear the increase in costs but the overall provisions of this section create an un-level playing field for brokers representing non bank lenders versus salaried employees for balance sheet lenders who would not have the same need to return to the borrower every time there was a material change in the loan details/product details/borrowers personal circumstance.

Section 35

35.1 The substantial cost associated with meeting this sections requirements will mitigate against brokers providing comparisons. A broker will not put time at risk to prepare a comparison chart if there is a marginal opportunity that the loan may be written.

35.1 As general rule a broker cannot influence the cost of funds to the client. A mortgage manager can, as can an originator but they have different roles to the broker and they should have the right to choose their margin over the cost of funds relative to the services that they provide and the locality of their operation. A broker has a limited future obligation to the borrower and therefore the costs of the broker in the future are markedly different to the costs of a mortgage originator or manager both of whom would have whole of loan life obligations. If they are placed in a position whereby they have to disclose margins over cost of funds they are placed at a disadvantage to the bank which will not have to disclose cost of funds and delivery rate to the client despite the transactions being the same.

COMMENT

Defining Roles.

There is a chronic failure of parties looking at the mortgage industry to understand the difference in roles of the various parties.

Mortgage Broker:

A party paid a commission for sourcing a loan from a lender.
The commission may be paid by the lender or borrower or both.
In some instances the broker will receive only a front end commission for a referral to the lender and not receive a down stream income in the form of a “trail commission”.

An experienced broker will have good personal contacts with a defined group of lenders or if new to the industry (joined in last 5 years) will likely rely on an aggregator to provide a list of lenders to whom the broker can refer loans.

The price (interest rate) the borrower pays for the broker sourced loan is subject to the credit decisions of the lender. In some instances the lender will refer future loan enquiries from the client back too the broker for servicing but this is not guaranteed and commonly lenders take action to eliminate the broker from the relationship at an early date.

The broker role is to service the client's requirements while balancing the need to disclose to the lender such information as is necessary to ensure the lender can make informed judgement about the borrower against which to issue credit.
.
Under the proposal that the broker is the borrower's agent the question arises as to whether the broker has to follow the principles of acting with the utmost good faith to the lender.

It is a myth that brokers will shop the market as it infers that the broker has access to the whole market. They don't and as noted above the broker could be put in a position whereby they could present the borrower with loans from several non bank lenders all of whom were funded by the same source of funds. Approximately 30% of all loan products are not available through brokers.

`In summary the broker is a commission based deliverer of loan applications to lenders and may receive income as a commission and future reward as a trail income. The brokers obligation to the client ceases when the loan is approved.

Mortgage Originator

The mortgage originator undertakes work for the lender under the terms of a loan processing agreement. They may have a limited range of products to offer on behalf of the lender or act for more than one in respect to the products available. They can in most cases set the margin of income over and above a cost of funds to underwrite future servicing that may be required. Lenders will look to the originator to provide assistance in the future to the client on a service by service basis such as in arrears recovery, process loan variations, etc.

Unlike the broker they will have a contractual obligation to the funder to perform tasks exclusively under the agreement. Their obligation is to the lender not to the borrower. They will offer the product from the range that they have available but would be unlikely to "offer to shop the market".

Like a mortgage manager they will have a wholesale rate at which they receive funds and add a margin in keeping with their overheads in exactly the same way as a bank borrows in the market and adds a margin for overheads and profit. The Originator like the Mortgage Manager will have life of loan obligations to the funder they contract with. The Originator
will be required by the funder to retain loan records for the life of the loan.

It may be that a mortgage originator and a Broker have the same source of funds offered to the borrower. The cost to the client may be the same but the income distribution may on disclosure show that the broker is receiving a smaller proportion of the income than the mortgage originator. This could lead to the broker seeking to influence the client to deal with the broker on the basis that the mortgage originator was receiving more without explaining that the originator had a whole of loan life obligation to support the funder in the loan administration whereas the broker role ceased at approval.

Mortgage Manager

The mortgage manager exists as two levels.
A/ Where they have direct responsibility to manage the funds raised from investors such as in a Managed Investment Fund and where they have responsibilities for prudent investment of the money to be lent. They may deal direct with the borrower and provide all accounting and loan management services in respect to funds held.

B/ Where the manager of the fund outsources services to a specialists Mortgage Manager who deals directly with the client and in effect provides the front office service to the client while the Fund Manager provides the back office services. The Mortgage Manager is required to provide active and ongoing management to the loans for the life of the loan. This means they maintain the original loan files, are responsible for all arrears collection, processing loan administration enquiries such as suspensions of payments, changing repayments, processing loan variations, etc

The Mortgage Manager may deal direct with the client for loan processing of a new enquiry or variation or deal with the client via a Mortgage Originator or a broker.

The Draft envisages that all of these parties are on an equal footing when it comes to revenue earned from the services provided to a borrower. They are not and the legislation if retained in any form must recognize this. As it stand\s the balance sheet lender (bank, credit union, finance company etc) is not required to make any disclosures if the person seeing the borrower is an employee thus they can manipulate the client relationship. For example the bank loan officer can offer a discount to get the borrower to make a decision knowing that the bank can and does raise interest rates in the future to restore the profit level required.

As noted above a balance sheet lender such as a bank is not required to disclose its margins over cost of funds to the borrower. The Originator and Mortgage Manager by being drawn incorrectly into the same environment as a broker are expected to make disclosure. This creates an unlevel field of operation.

Summary

The broker is commission based and it is open to the broker to reduce their commission if they can to influence the decision of the borrower.
However it is more likely that the broker will make the sale using the sales techniques taught and willingly accept whatever commission is payable to make the sale.

A broker’s job of arranging a loan is essentially finished when that loan is approved although they may derive a trail income to supply on-going ‘sales support’ to the client. However the Mortgage Manager / Originator have whole of life of loan obligations in respect to the management of the loan. Their costs are different and the services they provide are different. In most instances the Mortgage Manager. / Originator has a wholesale facility to which they add a margin, just the same as a bank. It is entirely appropriate that orgnanisations with differing overheads have the right to price to their own need which will vary due to location and circumstance

To this end the Mortgage Manager / Originator is no different to a butcher who buys meat at one price and sells at another. A car dealer who buys from a manufacturer and provides future warranty service to the car buyer. The chemist who buys from a wholesaler and retails the goods. They do not disclose their margin of gross profit. Nor should they have to. The information is commercially sensitive and deserves to be kept to the party pricing the cost of the service provided.

The draft does not acknowledge that banks via their employees who are paid bonuses for performance and who do not have to make disclosures will gain commercial advantages from the Draft Act

It would be naive to believe that a Mortgage Manager dealing direct with a client and in competition with a broker or bank will not be disadvantaged. The broker whose income is commissions and trail income will disclose an income opportunity below the income level that a Mortgage Manager / Originator would need to earn (disclose) on the same transaction due to the higher costs of business operation. And if a bank was in competition direct without disclosure the disadvantage is widened.

Cl 34.(2) (b) This section anticipates that the borrower will make informed judgements about the loan products available in the market in that the broker will list in an agreement the borrowers credit requirements. While some borrowers will have used internet based loan calculators to ascertain their loan capacity the majority will fail to calculate their borrowing capacity at an appropriate test rate set above the rate they will likely pay for the product in the market.

(2) © It is not the broker role to ascertain the borrowers capacity to pay. That s the role of the credit provider or Mortgage Originator or Manager. The broker role is limited to information collection against which a lender will make a credit decision.

©(i) Other than for Lo Doct loans the lenders will specify the information sources that they want a broker to collect as a precursor to considering a credit application. Better organized brokers will have a checklist against which they will collect information. The information will vary depending upon the product and nature of the loan being sought.

©(ii) We refer to our comments above regarding the necessity to refer the loan application to third parties. It is entirely inappropriate to place borrowers who do not use accountants or tax agents into a position whereby they have to pay for a third party to determine if the loan they seek is for business purposes.

(d) Refer our comments above on the issue of fees

(3) Given the proposal in the legislation that there must be a contract the Draft act fails to appreciate that the borrower can and does change their mind in the course of discussions with various parties about a loan.

EXAMPLE

The borrower wants to start a business from home and decides to borrow to facilitate the capital necessary for the business. They approach broker A who proposes a loan funded by a non bank lender secured on the home which is a simple refinance and increase on the current loan which they have with a lender. The client signs a broker agreement to that effect.

The borrower now sees Broker B who being more experienced recommends that they take a split loan. Split 1/ being the amount of the old home loan and Split 2/ being the amount they will require for the business. In this way the old loan which is not tax deductible is quarantined from the loan that may be tax deductible. The borrower signs an agreement to that effect. Being a start up the broker realizes that they will not be able to prove serviceability to meet prime borrowing requirements and advises that they can proceed with a Lo Doct/ No Doct loan based on a declaration. They sign an agreement to that effect.

Broker C having access to bank commercial products recommends a bank overdraft instead of a loan and a refinance of the home loan. The borrower signs an agreement to that effect.

Prospective Outcome:

Borrower goes back to Broker A and asks the broker to provide an overdraft instead of the original proposal. A new agreement is signed. The broker being inexperienced fails to realise that the bank s will probably not provide the overdraft for a start up business.

The borrower approaches Broker B and asks for the same thing as Broker A and C. The broker resists and advises that as they are in a start up situation with no cashflow they will likely have to proceed with a No Doct loan supported by a declaration based on their expectations as to the success of the proposed business venture but split as per the original concept.

The borrower realizes that broker B is most likely the one who knows the most and asks the other brokers to arrange loans similar to Broker B. Broker A now signs a third agreement. Broker C now signs a second agreement..

Broker B lender will not accept the loan due to past credit issues . The borrower goes to Broker C who now being aware of the credit problems not previously disclosed who approaches a lender who also declines the borrower.

The Borrower now approaches broker A who they ask to get a loan under any circumstances. The broker signs a fourth contract.

This is not an inconceivable situation. The broker could be forced to travel to the client 4 times to sign documents to enable the broker to act on the eventual outcome.

Section 36 (1) Refer our comments in relation to S 35(1)

We refer to our comments elsewhere that brokers will provide information on products to suit the clients stated need. It is unreasonable to expect a broker to provide and exhaustive selection of products for the clients consideration if the client has a preconceived product in mind. This section would not encourage brokers to provide comparison information as the cost and time will be counterproductive to them.

(2) This section will not encourage brokers to provide comparisons.

Section 37 Reverse mortgages

While it is reasonable to define certain information that must be addressed in relation to these mortgages the critical issue is that the information outcome must not overwhelm the purchaser of the product. Because of the various components that comprise the variable factors that influence outcomes there is a real risk that the purchaser will be swamped with information.

If the object is to provide a defence to not having provided enough borrowers and require borrowers to read the equivalent of War & Peace to be informed and the mass of information therefore generated leads to borrowers passing over the information for reasons of confusion or information fatigue then that objective has failed. It is far better if less information but in a short and easily understood form is made available which will encourage the borrower to read and importantly will be understood by the borrower.

Section 38 (1) We refer to our comments elsewhere. Given the inability of the broker to access information in detail relating to the current mortgagee and their costs it is highly unlikely that the broker could ever satisfy the conditions of this section.

(2) A borrower may be in default with their current lender. The proposed section will not allow the borrower to use a broker to refinance with a lender willing to take on the borrower at a higher rate if the borrower chooses that avenue to preserve the asset.

(3) We suggest that this section be reworded if it is preserved.. If the conditions for the proposal and for the current arrangements are the same there will be no difference in the outcome.

Section 40

The section would appear to omit the retention of records in electronic form. Given the mass of paper that is attached to the loan overall and the practice of retaining records in electronic form physical records should be able to be stored off the premises of the broker.

Section 43

We refer to the examples above. The draft if enacted will mitigate the provision of advice in the form of a consulting service and will place the borrower at a disadvantage as there is little incentive for complex matters to be handled by a broker without assurance that they will be paid for the work undertaken. The presumption in the draft is that brokers get paid by lenders therefore there is no reason for a broker to charge for services.

It is not the lenders obligation to absolve the borrower for the cost of services.

It is a convenient convention that has arisen in relation to simple mortgage transactions that the lender will influence the borrower to deal with them by remunerating the broker for what should be a borrower obligation. Now that lenders are reducing the commissions that brokers receive the future is likely to require borrowers to pay some or all of the brokers costs in relation to the transaction.

Business borrowers will frequently use the home, the business and other assets to fund their requirements. Some borrowings will sit within the framework of the current UCCC while other will be clearly outside. The complexity of some arrangements is such that the experienced broker may use a range of products to fund the requirements of the borrower.

The more complex the transaction the more time the broker has to put in upfront to structure the funding arrangements. If the broker is not able to charge for the service there is little incentive to undertake the research necessary to provide the right outcome.

Commercially aware borrowers will pay for the service because they realize that a well researched structure works better than an un-researched structure. Naive borrowers will think that getting the broker to be paid by the bank or lender is better (cheaper). Invariably if they get the loan they get it on lender terms not negotiated terms.

There is every chance that the broker on conducting the research that they will advise the borrower that the ambition to the funded cannot be funded. Why should a broker undertake work if this is to be the outcome.. It will only be known after the broker has done the work.

For example a solicitor is not expected to research a matter of litigation for the client for free if the outcome and advice is that they should not take the course of action sought. An accountant will not do for free the analysis that a client may have to undertake if they are buying a business if the advice is “don’t buy”

Brokers should be able to charge for advice as should management consultants advising a borrower on borrowing strategy or management structures.

Section 44

Refer above

Section 45

Refer to comments above:
There should not be a prohibition on charging an hourly rate, a flat fee, a percentage or combination of all.

Section 50

The broker should no be denied the rights that other commercial entities have in respect to report debts by the borrower. Brokers do incur costs which would ultimately be recoverable from the borrower. If the borrower does not proceed with the loan and the broker has incurred costs in the initial stage whether they be valuation fees, consulting fees, loan application fees or otherwise they should have the right to record a default by whatever means is commercially available.

EXAMPLE;
Borrower gives the broker a cheque for valuation fees and lender fees which is dishonoured. Before the broker is aware the cheque is dishonoured the broker orders the valuation and that is completed. The loan does not proceed because the lender declines for credit reasons not previously known to the broker.

The broker has incurred costs. The borrower owes the broker. The broker should be able to follow normal debt process from this point.

Section 51	Comments re S50 apply
Part 7	Comment There is no requirement that the Inspector acts fairly in the course of their duty. Nor is there a requirement for the Inspector to record and include in any report compiled by the Inspector the statements that have been made by the broker or licensee in mitigation of any complain or issue under investigation. If the Inspector compiles a report for senior officers and omits information provided by the broker / licensee then any outcome becomes a denial of natural justice. Any action by the senior officer as a result of information shortfall may be prejudicial to the broker/licensee. The broker /licensee is entitled to be dealt with fairly and to be confident that the information being compiled will present a whole picture rather than a selective picture.
Schedule 1 1 (2)	To categorise an investment in a dwelling as not being a form of business transaction is to create artificial standards and does not represent good policy. Buying an investment property is not a social event. This section by exception is a saying that if the money borrowed by a borrower using the family home as security and is invested in DIY superannuation or shares or a study tour to advance personal income opportunities is an investment. The borrower may get a tax deduction and therefore it is not a matter of personal consumption but making an investment by buying real estate which will give the same benefits is not a business investment. Making a commercial activity into a social event is an example of bad public policy.
Schedule 1 2	We are of the opinion that the broker cannot rely on statements made by the borrower in respect to this section. If the act was enacted in current form and the broker is the agent of the borrower then the bona fides of the definition of the transaction must come from the borrower. Therefore there should be no reason why the broker and the lender cannot rely on the borrower making a written declaration to that effect. The broker needs it because they are the borrower's agent and the lender needs it because the lender has no contractual enforcement to impose on the broker to disclose as the broker is the borrower's agent not the lenders. In any event we are of the opinion S33.2 is a precondition to the application of the exemptions in this section. Our views are noted above.

SUMMARY:

THIS IS A SUBMISSION RESULT OF INDIVIDUAL BROKERAGE FIRMS COMING TOGETHER TO DEVELOP A BETTER UNDERTSANDING OF THE EFFECTS OF THE DRAFT FINANCE BROKING ACT 2007.

THE SUBMISSION REPRESENTS THEIR VIEWS AND OUTLINES THEIR CONCERNS

THE BROKERS HAVE A REAL CONCERN THAT THE OUTCOME OF THE DRAFT ACT WILL RESULT IN OPERATIONAL CONDITIONS SIMILAR TO THOSE WHICH UNHAPPILY NOW PREVAIL IN THE INSURANCE AND FINACIAL PLANNING INDUSTRIES.

WE BELIEVE THAT BY CAREFULLY CONSIDERING THE UNIQUE STRUCTURE OF THE BROKING ARENA AND BY APPLYING THE WIDEST POSSIBLE CONSULTATION WITHIN THE INDUSTRY, IT WILL BE POSSIBLE TO DEVELOP LEGISLATION THAT WILL AVOID THE PITTFALLS AND ACHIEVE THE BEST PROTECTION FOR THE PUBLIC AT LARGE, WHILST PRESENTING A LEGISLATIVE FRAMEWORK WITHIN WHICH BROKERS AND MORTGAGE PROVIDERS WILL BE ABLE TO OPERATE EFFECTIVELY AND LEGALLY.

JUNE 2008