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FINANCE BROKERS CONTROL ACT 1975

**FINANCE BROKERS
CODE OF CONDUCT**

Code of Conduct for Finance Brokers

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Finance Brokers Control Act 1975

Code of Conduct for Finance Brokers

The following Code of Conduct has been approved by the Finance Brokers Supervisory Board pursuant to the provisions of section 81 of the Finance Brokers Control Act 1975 (“the Act”).

Finance brokers failing to comply with the terms of the Code of Conduct will be liable for disciplinary action pursuant to section 83(2)(c)(iii) of the Act.

This Code of Conduct shall apply on and after the date of publication of this notice and replaces the Code of Conduct published in the *Government Gazette* on 23 June 2000.

1. Introduction — General Fiduciary Obligations

This Code of Conduct for finance brokers is approved by the Finance Brokers Supervisory Board pursuant to section 81 of the *Finance Brokers Control Act 1975* to take effect from 4 December 2001.

This Code of Conduct addresses ethical issues likely to confront finance brokers. It imposes requirements consistent with obligations imposed on finance brokers under general law, and will assist them in fulfilling those obligations.

Finance brokers must be fully acquainted and comply with all duties imposed by the Act, this Code, the Regulations and the

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Maximum Remuneration Schedule. In particular, finance brokers must—

- avoid any conflicts of duties or interests;
- never take improper advantage of the trust of any party in order to obtain a benefit for the finance broker or a third party; and
- as a general principle, finance brokers must fulfil all commitments made to borrowers and lenders.

A finance broker who fails to act in conformity with this Code will be liable for disciplinary action under section 83 (2)(c)(iii) of the Act.

2. Definitions

2.1 In this Code of Conduct (“this Code”) —

“**the Act**” means the *Finance Brokers Control Act 1975*

“**as if complete**” in relation to a valuation means a valuation that assumes the proposed development to be in a completed state as at the date of valuation and reflects current market conditions at the date of valuation.

“**as is**” in relation to a valuation means a valuation that provides the current value of the property as it currently exists rather than the value of the proposed development.

“**Form 1**” means the notice required to be given by Article 3.12.

“**guarantor**” means any person who provides a guarantee, indemnity or any other form of collateral security for the obligations of a borrower under a loan transaction.

“**Maximum Remuneration Schedule**” means any schedule of maximum amounts of remuneration fixed by the Board from time to time under section 44(1) of the Act.

“**on completion**” in relation to a valuation means a valuation that reflects the anticipated value of the project at the time the project is actually completed.

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“party” means any party to a loan transaction in which the finance broker acts as a finance broker, and includes, without limitation, any borrower, lender or guarantor. Also, where an article of this code imposes duties on a finance broker in relation to the proposal and negotiation phases of a loan transaction then the term ‘party’ extends to any person with whom the finance broker deals as a potential party to a proposed loan, whether or not that person becomes a party to an actual loan.

“person” has its ordinary meaning but also means a body corporate.

“principal” means each person for, or on behalf of whom, a finance broker negotiates or arranges a loan of money.

“proposed development” means any planned development or redevelopment of a property, including building improvements or additions, which are proposed, approved or under construction on the site with the exception of properties for which the value of the work on the land when completed will be \$200,000 or less.

“regulations” means any regulations made under section 95 (1) of the Act.

- 2.2 Unless otherwise provided in this Code, terms defined in the Act have the same meaning when used in this Code.

3. Duties to Parties

Confidentiality and Disclosure

- 3.1 A finance broker must not, directly or indirectly disclose a principal’s confidence or reveal the contents of any instructions, information, documents or papers given to the finance broker by a principal, to any person except to the extent authorised, or required by law or any other provisions of this Code.
- 3.2 A finance broker can only act for more than one party in the same matter if each of those parties, prior to entering into

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negotiations, understands, acknowledges and agrees that the finance broker has a duty to disclose information to other parties pursuant to Article 3.7(c).

- 3.3 A finance broker's duty of confidentiality towards a principal continues after the relationship of principal and agent has ceased.

Honesty and Competency

- 3.4 A finance broker must treat:
- (a) all parties fairly and honestly; and
 - (b) not engage in harsh or unconscionable conduct towards any party.
- 3.5 A finance broker must exercise reasonable skill, care and diligence when conducting and carrying on the business of a finance broker.
- 3.6 A finance broker must competently carry out all relevant instructions issued by any principal of the finance broker as soon as is reasonably possible.

No Deceptive or Misleading Behaviour

- 3.7 A finance broker must not knowingly or negligently —
- (a) mislead or deceive any party;
 - (b) make any false representation to any party; or
 - (c) omit to provide to any party any relevant information that could influence a reasonable person's decision to enter into the loan transaction or to consent to the broker acting for more than one party.

Duty to Act in Principal's Best Interest

- 3.8 A finance broker must always act in the best interests of the finance broker's principal, and to that end the finance broker's principal must be given undivided loyalty unaffected by any

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interest of the finance broker or of any other person, except when otherwise provided by this Code.

All Benefits to Finance Broker Must be Disclosed

- 3.9 At all times, whilst negotiating and arranging a loan, a finance broker must disclose to his or her principal, and all other prospective parties, any interest the finance broker may have, or intends to have, directly or indirectly —
- (a) in the loan transaction;
 - (b) in any property being offered as security for a loan; or
 - (c) in any other transaction to which that loan is commercially relevant.
- 3.10 Without in any way limiting the general application of Article 3.9, the disclosure required in that article must be made in any circumstances in which employees or agents of the finance broker, or members of the finance broker's family, may have or intend to have an interest as described in Article 3.9.
- 3.11 If an interest referred to in Articles 3.9 or 3.10 exists, a finance broker must not act in the loan transaction unless —
- (a) all parties to the loan are fully informed of all matters required to be disclosed under Article 3.9;
 - (b) the finance broker recommends in writing to each party that it is in their best interests to obtain independent advice in relation to the merits of the transaction; and
 - (c) each party consents to the finance broker acting or continuing to act on their behalf in that transaction.

Provision of Information to all Parties

- 3.12 Before a loan is made, a finance broker must give to all parties to the loan a notice in writing, substantially in the form of Form 1 in Schedule 1 to this Code (including all warnings and notices

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as set out in that Schedule), containing the following information —

Details of Parties to the Loan

- (a) finance broker's full name and address;
- (b) full name and address of all lenders;
- (c) full name and address of all borrowers;
- (d) full name and address of all guarantors;
- (e) full name of each party for whom the finance broker acts;
- (f) amount and terms of finance broker commission;

Borrower and Guarantor's Financial Position

- (g) Borrower's net assets (refer Article 5.10(b));
- (h) Guarantor's net assets (refer Article 5.10(b));

Loan Details

- (i) purpose of loan;
- (j) amount of the loan;
- (k) amount of loan to be used to repay existing loans;
- (l) term of loan;
- (m) date of advance;
- (n) interest rate;
- (o) commencement date of interest;
- (p) when interest is payable;
- (q) penalty rate;
- (r) terms of repayment or repayment dates;
- (s) rights of discharge;
- (t) insurance requirements;
- (u) management agreement required/not required;

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Property Security Information

- (v) Security required;
- (w) description of the mortgaged property;
- (x) purchase price of property (where relevant);
- (y) priority of mortgage;
- (z) ratio of loan to valuation of mortgaged property calculated on an "as is" market value;
- (aa) person responsible for preparation and custody of security documents;

Additional Action to be Taken by the Finance Broker

- (ab) action the finance broker will take to notify lenders of a loan default;
- (ac) action the finance broker will take to enforce the loan should a default occur;
- (ad) the fee to be charged by the finance broker or debt collecting agency in pursuing the borrower for payment; and
- (ae) all requirements of Articles 5.3 to 5.4 and 5.7 to 5.10 attached as an annexure.

3.13 The finance broker must ensure that all parties to the loan sign the Form 1.

3.14 The finance broker must retain the original signed Form 1 and give a signed copy of that notice to all parties.

Provision of Other Information

3.15 A finance broker must provide in a timely manner and without undue delay all information requested by a party relating to a loan to which they are a party.

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- 3.16 A finance broker must, upon request by a party, provide free of charge and in a timely manner and without undue delay, a statement of account for a loan that is managed by the finance broker.
- 3.17 The requirement in Article 3.16 to provide a statement free of charge is limited to once every six months by each party, otherwise the finance broker is entitled to charge for the service rendered.

4. Duties to Borrowers

- 4.1 If a finance broker is also a licensed real estate and business agent, real estate sales representative or business sales representative, and if a loan transaction is negotiated or arranged on behalf of a borrower, then the loan shall not be made conditional upon the finance broker obtaining from the borrower an authority to sell or the finance broker being given a management agreement in relation to any property being offered as security for the loan or any other property owned by the borrower.
- 4.2 A finance broker must enquire as to whether a prospective borrower is eligible for a low interest government or other beneficial loan and, if the prospective borrower is eligible for such a loan, the borrower must be informed in writing of this fact by the finance broker before negotiating and arranging the loan.

5. Duties to Lenders***Information in Relation to Property Offered as Security***

- 5.1 A finance broker must —
- (a) ascertain and communicate to a lender all material facts relating to any property or the value of any property being offered as security for a loan; and

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- (b) take reasonable steps to ensure all information, which is provided to a lender relating to any property being offered as security for a loan, is accurate.

True Copy of Current Certificate of Title to be Provided

- 5.2 If land is to be offered as security for a loan, finance brokers must provide all prospective lenders with a true copy of the current Certificate of Title relating to that land.

Valuations

- 5.3 If property is to be offered as security for a loan, the finance broker must inform prospective lenders in writing that they are entitled to appoint a valuer of their own choice by including such a statement in the notices in Form 1 (as required by Article 3.12 and the Schedule to this Code).
- 5.4 When a finance broker or any person other than the lender appoints a valuer to value any property offered as security for a loan, the finance broker must —
 - (a) ensure the valuer is qualified to undertake the valuation;
 - (b) take reasonable steps to ensure that the valuer has no direct or indirect interest, financial or otherwise, in the property to be valued or the loan for which the property is required as security or in any transaction to which the loan is commercially relevant;
 - (c) provide an unedited copy of all valuations obtained from the valuer to all prospective lenders, attached to Form 1 (refer Article 3.12 and the Schedule to this Code);
 - (d) ensure that the valuer acknowledges in the valuation document that the lender may use and rely on the valuation and that the valuer accepts legal responsibility, by acknowledging a duty of care, to the lender for the valuation;
 - (e) if the valuation is to be undertaken on a proposed property development, ensure that the valuation

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- obtained contains an “as is”¹ market valuation in addition to any “as if complete” or “on completion” market valuation that may also be provided, and which shall appear consecutively (with the “as is” valuation stated first) and in the valuation summary in the report;
- (f) ensure that the valuation provides an explanation of the basis upon which the value is calculated, including any assumptions made;
 - (g) obtain and provide to all prospective lenders (bound into the copy of the valuation report), a written copy of the original and any subsequent instructions given to the valuer by the person that appointed the valuer or by any other person;
 - (h) provide to all prospective lenders (attached to or included as a part of the valuation report) a written statement identifying the person(s) that gave the instructions mentioned in (g) above and, if that person is the borrower, for the written statement to clearly identify that this person is the borrower; and
 - (i) ensure that the information provided in the valuation document can be understood by the prospective lenders with whom the finance broker is negotiating.
- 5.5 A finance broker is not permitted under any circumstances to use a valuation obtained by the finance broker or any other person for the purposes of soliciting funds from prospective lenders, unless that valuation is in writing and meets all the requirements of Article 5.4.
- 5.6 A finance broker must not obtain or attempt to obtain a statement signed by a prospective lender stating that the lender has appointed a valuer to conduct a valuation of property to be secured.

¹ Refer to definitions in section 2.

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Disclosure of Transaction Information

- 5.7 A finance broker must provide all prospective lenders with a budget attached to Form 1 which must contain all such information, in relation to the project to be funded, as prospective lenders and their professional advisers would reasonably require for the purpose of making an informed assessment of —
- (a) the total amount of funding required to complete the development and whether all those funds will be raised prior to the commencement of the project;
 - (b) the proposed application of lenders' funds at each stage of the project development, including the time expected to be required to complete each stage; and
 - (c) the amount of funds belonging to lenders to be held in trust at each stage of the project development.
- 5.8 The budget referred to in Article 5.7 must separately identify but is not limited to the following items at each stage of the project development —
- (a) the cost of purchasing the land relating to the property development;
 - (b) payments to builders;
 - (c) payments to individual contractors comprising more than 5% of the total cost;
 - (d) payments to valuers;
 - (e) amounts used to repay existing loans;
 - (f) amounts used to pay interest and interest in advance;
 - (g) amount of commission paid to the finance broker; and
 - (h) taxes, duties and charges.
- 5.9 In determining the nature of information to be included in the budget referred to in Article 5.7, regard shall also be had to —
- (a) the nature of the proposed loan;

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- (b) the kinds of persons likely to consider participating in such a loan; and
- (c) the matters which may reasonably be expected to be known to professional advisers of any kind who those persons may reasonably be expected to consult.

Provision of Borrower Information

- 5.10 A finance broker shall obtain and provide to each prospective lender, in writing as an attachment to Form 1 (refer Article 3.12 and the Schedule to this Code), the following information concerning all prospective borrowers and guarantors —
- (a) the names and addresses of each prospective borrower and guarantor;
 - (b) a statement of the assets and liabilities of each prospective borrower and guarantor, statutorily declared by those persons to be true and accurate at the time of signing;
 - (c) the details of parties to any existing loan, if any part of the funds to be provided by prospective lenders are to be used to repay that existing loan; and
 - (d) details of any insolvency, administration or bankruptcy proceedings to which any of the following persons has been party to in the last ten years —
 - (i) any borrower or guarantor of a loan; or
 - (ii) any company of which any borrower or guarantor is or has been a director or officer.

Dealings with Relevant Documents

- 5.11 When a finance broker arranges execution of any documents by a party, the finance broker must ensure that those documents are properly witnessed by a person able to verify the authenticity of the signature or execution.

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- 5.12 If a lender is not represented at settlement by a solicitor or settlement agent who is also independent of the finance broker, the finance broker must ensure that the appropriate documents are lodged, on behalf of the lender, at the Department of Land Administration immediately following settlement to ensure that the lender's interest is registered on the Certificate of Title of the security property.
- 5.13 If a finance broker is also a licensed settlement agent and arranges settlement on behalf of lenders to be secured, that finance broker must —
- (a) inform all lenders in writing that settlement and lodgement have been effected;
 - (b) provide a copy to all lenders of a Department of Land Administration lodgement receipt; and
 - (c) inform all lenders in writing that the finance broker will be sending lenders a true copy of the Certificate of Title bearing lenders' names registered as mortgagee within 7 days of receipt of the duplicate Certificate of Title from the Department of Land Administration.
- 5.14 If a finance broker receives a 'Stopped Documents' notice from the Department of Land Administration, the finance broker must —
- (a) immediately inform all affected lenders in writing that a 'Stopped Documents' notice has been received;
 - (b) provide a copy of the 'Stopped Documents' notice to all affected lenders;
 - (c) take all reasonable steps to resolve the issue giving rise to the 'Stopped Documents' notice; and
 - (d) keep all affected lenders fully informed about progress in dealing with and successful resolution of the 'Stopped Documents' notice.

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- 5.15 If a finance broker retains the duplicate Certificate(s) of Title for the lender, then the finance broker must —
- (a) acknowledge in writing that fact to the lender;
 - (b) send lenders a true copy of the Certificate of Title bearing such lenders' names registered as mortgagees, within seven (7) days of receipt of the duplicate Certificate of Title from the Department of Land Administration; and
 - (c) hold the duplicate Certificate of Title in safe custody.

6. General Provisions***Combined Shared Commission Not to Exceed Maximum***

- 6.1 If two finance brokers act in conjunction in negotiating or arranging a loan and reach agreement in relation to sharing remuneration, that remuneration must not exceed the maximum remuneration for the transaction determined by the Board pursuant to Section 44 of the Act.

Licensed Finance Broker to Take Responsibility

- 6.2 A finance broker who operates a business under a business certificate and licence must —
- (a) personally manage on a full-time basis and carry out the principal managerial duties of the business and, when business is conducted in a branch office, ensure that the manager of the branch office personally manages and carries out the principal managerial duties of the branch office; and
 - (b) except for reasons of genuine emergency sickness or for the taking of holidays, properly supervise the business and ensure all employees comply with the provisions of the Act, this Code and all other relevant Acts, rules and regulations.

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- 6.3 Finance brokers shall keep and maintain copies of all records of negotiations and the forms and documents required by this Code in relation to a loan for a period of at least 6 years after the date on which the loan is repaid. Without limitation, this provision continues to apply to a person even when that person has ceased to carry on business as a finance broker.

Auditing Guidelines

- 6.4 In addition to any obligations under the Act, finance brokers must comply with any auditing guidelines determined by the Board from time to time as set out in Schedule 2 to this Code.

7. Ability to Waive Compliance is Restricted

- 7.1 Any condition or provision of an agreement or statement signed by a prospective party is void to the extent it waives compliance with any article of this Code.
- 7.2 Article 7.1 does not apply if the lender is commercially sophisticated and fully understands the import of the article of the Code in respect of which compliance has been waived.
- 7.3 The onus of proof in relation to Article 7.2 rests with the finance broker.

8. Exemptions

The provisions of Articles 5.1 to 5.15 and Article 3.12 of this Code do not apply to —

- (a) loan transactions negotiated by a finance broker that are regulated by —
- (i) the Consumer Credit Code;
 - (ii) Chapter 5C of the Corporations Act 2001; or
 - (iii) any enactment of the Financial Services Reform Bill (CLERP 6).

or

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- (b) finance brokers in their dealings with lenders who are either —
 - (i) licensed as a credit provider under the *Credit (Administration) Act 1984*, or
 - (ii) a body mentioned in Section 7(1) of the *Credit (Administration) Act 1984*.

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Schedule 1

(Article 3.12)

Form 1

NOTICE

DETAILS OF PARTIES TO THE LOAN

Finance Broker's Name
and Address

.....

Lender(s) Name and
Address

.....

Borrower(s) Name and
Address

.....

Guarantor(s) Name and
Address (if applicable)

.....

Name of Party/Parties for whom the Finance Broker acts

Warning: If a Finance Broker acts for more than one Party, this may lead to a conflict of interest. Before signing this contract you are entitled to appoint another Finance Broker to negotiate the loan for you.

Amount and terms of Finance Broker commission

Warning: Under section 43(1)(b) of the Finance Brokers Control Act 1975 a Finance Broker is not entitled to receive any commission, reward, or other valuable consideration in respect of services rendered unless the Finance Broker has first been appointed in writing to act in that capacity.

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Borrower and Guarantor Financial Position

Borrower's Net Assets (\$)

Guarantor's Net Assets (\$)

Refer Attachment 1 for detailed Statement of Assets and Liabilities for all borrowers and guarantors

Refer Attachment 2 for copy of Insolvency and Trustee Service Australia report concerning all borrowers and guarantors

Loan Details

Purpose for which loan is required

Refer Attachment 3 for detailed budget outlining specifically how all funds will be applied

Amount of Loan

Amount of loan used to repay existing loans

Refer to Attachments 1 and 3 for specific details of existing loans

Term of Loan

Date of Advance

Interest Rate

Commencement Date of Interest

When interest is payable

Penalty Rate

Terms of repayment/Repayment Dates

Rights of Discharge

Insurance requirements

Management agreement required/not required

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Property Security Information

Security required

Description of Mortgaged Property

Refer Attachment 4 for current true copy of Certificate of Title

Purchase Price of Property (where relevant)

Priority of Mortgage (ie first, second mortgage)

Ratio of loan to valuation of mortgaged property calculated on an "as is" market value

Ratio of loan to valuation of mortgaged property calculated on an "as if complete" or "on completion" market value (optional)

Refer Attachment 5 for copy of valuation, all instructions given to the valuer and the identity of the person that gave the instructions

Responsibility for preparation and custody of security documents

Additional Action to be Taken by the Finance Broker

Action the Finance Broker will take to notify lenders of a loan default

Action the Finance Broker will take to enforce the loan should a default occur

The fee to be charged by the Finance Broker or debt collecting agency in pursuing the borrower for payment

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NOTICES TO ALL PARTIES TO THE LOAN TRANSACTION

1. If property is offered as security for a loan, lenders are entitled to appoint a valuer of their own choice.
2. If the Finance Broker acts for one Party, the other Party should seek independent financial, legal and valuation advice.
3. If the Finance Broker acts for both Parties, each Party should seek independent financial, legal and valuation advice.

Signature of lender(s)

<i>(name)</i>	<i>(name)</i>
---------------	---------------

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<i>(address)</i>	<i>(address)</i>
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Signature of borrower(s)

<i>(name)</i>	<i>(name)</i>
---------------	---------------

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<i>(address)</i>	<i>(address)</i>
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Signature of guarantor(s)

<i>(name)</i>	<i>(name)</i>
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<i>(address)</i>	<i>(address)</i>
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Signature of finance broker

.....
(name)

.....
(name)

.....
(address)

.....
(address)

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Schedule 2

(Article 6.4)

Auditing Standards as prescribed by either the Society of Certified Practicing Accountants or the Institute of Chartered Accountants in Australia.

Dated this 30th day of November 2001

The common seal of the Finance Brokers Supervisory Board was hereunder affixed by the authority of a resolution of the Board in the presence of —

P. JOOSTE, QC, Chairman.

