



Western Australia

Finance Brokers Control (Code of Conduct) Regulations 2007

Compare between:

[29 Jun 2007, 00-a0-03] and [01 Jul 2011, 00-b0-07]

Western Australia

Finance Brokers Control Act 1975

Finance Brokers Control (Code of Conduct) Regulations 2007

1. Citation

These regulations are the *Finance Brokers Control (Code of Conduct) Regulations 2007*.

2. Code of conduct prescribed (section 81)

The code of conduct set out in Schedule 1 is prescribed as a code of conduct for finance brokers for the purposes of section 81 of the Act.

Schedule 1 — Code of conduct

[r. 2]

Finance Brokers Control Act 1975

Code of Conduct for Finance Brokers

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Division 1 — Introductory provisions

1. Preliminary

- 1.1 The purpose of this Code is to give effect to the *Finance Brokers Control Act 1975* section 81.
- 1.2 Finance brokers failing to comply with the terms of this Code could be subject to disciplinary action or orders of the State Administrative Tribunal in accordance with sections 34(1), 73(1) and 83(2)(c) of the Act.

2. Interpretation

- 2.1 Terms defined in the Act or regulations have the same meaning when used in this Code.

- 2.2 In this Code —

A class licensee means a person who holds an unrestricted licence as described in regulation 16 of the regulations;

aggregator means any person that has an arrangement with a lender to facilitate —

- (a) the submission of loan applications to that lender by finance brokers who may not have such an arrangement with the lender; or
- (b) the payment of commissions by that lender to finance brokers who may not have such an arrangement with the lender;

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

as is valuation means a valuation that provides the current value of the property as it currently exists rather than an “as if complete valuation” of any proposed development;

associate includes an employee, C class licensee, partner, co-director or officer of the finance broker, any member of the finance broker’s family, or any company or firm associated with the finance broker or any member of the finance broker’s family;

B class licensee means a person who holds a restricted licence, classified as a “B” class licence under regulation 16 of the regulations;

borrower means the person to whom a loan is made and includes a person seeking a loan whether or not a loan is made;

C class licensee means a person who holds a restricted licence, classified as a “C” class licence under regulation 16 of the regulations;

equipment finance means a loan where the predominant purpose of the loan is to fund the purchase of chattels;

external party means a person (including an aggregator) that the finance broker will deal with in relation to a loan or a person directly or indirectly referring the borrower to the finance broker;

financial services licensee means a financial services licensee as defined in the Commonwealth *Corporations Act 2001*;

Form 1 means the form set out in Appendix 1, or a substantially similar form that contains the information required by clause 11.2;

guarantor means any person who provides a guarantee, indemnity or any other form of collateral security for the obligations of a borrower in a loan transaction and includes a person offering to be a guarantor for a loan whether or not that person becomes the guarantor;

lender means the person who makes a loan and includes a person offering a proposed loan whether or not that person becomes the lender;

Maximum Remuneration Schedule means the schedule of maximum amounts of remuneration for finance brokers fixed under section 44(1) of the Act as at the time of the relevant transaction;

on completion valuation means a valuation that reflects the anticipated value of the proposed development at the time the development is actually completed;

party means any borrower, lender, guarantor or any other party to a loan transaction to which the Act applies;

person has its ordinary meaning and also means a body corporate;

principal means a person for whom, or on behalf of whom, a finance broker acts and —

- (a) is the borrower if a finance broker deals directly with the borrower in negotiating or arranging a loan (unless the

dealings with that borrower are incidental or ancillary to negotiating or arranging the loan); and

- (b) may be a lender or, subject to clause 5.2, both a borrower and a lender;

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;

refinance includes replacing or rearranging an existing loan, or any part of that loan;

regulations means the *Finance Brokers Control (General) Regulations 2005*;

remuneration includes any fees, commission, reward, benefit or other valuable consideration whatsoever;

UCCC means the Consumer Credit (Western Australia) Code.

Division 2 — General obligations for all finance brokers

3. Application of Division 2

- 3.1 Division 2 applies to all loans negotiated or arranged by a finance broker.

4. General fiduciary obligations

- 4.1 A finance broker must know and comply with the duties imposed by the Act, this Code, the regulations and the Maximum Remuneration Schedule.
- 4.2 A finance broker must establish and maintain reasonable compliance measures intended to ensure compliance with clause 4.1.
- 4.3 In particular, a finance broker must —
 - (a) observe the general rule to avoid a conflict of duties or interests, otherwise than with the fully informed consent of the finance broker's principal; and
 - (b) not take improper advantage of the trust of any party in order to obtain a benefit for the finance broker or a third party; and

(c) fulfil all commitments honestly, fairly and competently.

5. Compliance with common law obligations, loyalty and disclosure of interests

5.1 Subject to this Code (including clause 5.2), a finance broker must always act in the best interests of the finance broker's principal and give that principal undivided loyalty unaffected by any interest of the finance broker (including, without limitation, any interest referred to in clause 5.3) or of any other person.

5.2 A finance broker can only act for more than one principal in the same matter if —

- (a) each principal has given prior written informed consent; and
- (b) each principal understands and agrees that the finance broker may have duties to disclose information to other parties under this Code.

5.3 A finance broker must seek to avoid any conflicts between the finance broker's duties to the finance broker's principal and the finance broker's duties to any other person or the finance broker's personal interest. If a conflict of interest or duties occurs the finance broker must disclose that conflict in writing to the finance broker's principal and obtain the principal's fully informed consent to the broker continuing to act.

5.4 To the extent that disclosure is not made under clause 8, at all times, whilst negotiating or arranging a loan, a finance broker must disclose in writing to the finance broker's principal any interest the finance broker may have, or intends to have, directly or indirectly in —

- (a) the loan transaction; or
- (b) any property or services being purchased using any part of the loan; or
- (c) any property being offered as security for the loan; or
- (d) any other commercially relevant transaction which may affect the advice given in respect of that loan,

and of which the principal is not, or reasonably could not be, aware.

5.5 Clause 5.4 includes, without limitation, any agency or other commercial relationship which the finance broker may have with any

lender, borrower, aggregator, valuer, real estate agent, mortgage insurer, lawyer, accountant, financial planner, financial advisor, insurer or insurance broker, or other finance broker directly or indirectly related in any way to the relevant loan.

- 5.6 A finance broker's disclosure obligations under clause 5.4, extend to disclosure of the relevant interests of an associate of the finance broker, of which the broker is or reasonably ought to be aware.
- 5.7 If an interest referred to in clause 5.4 or 5.6 exists, a finance broker must not act in the loan transaction unless —
- (a) each principal in relation to the loan is fully informed of all matters required to be disclosed under clauses 5.4 and 5.6; and
 - (b) each principal consents to the finance broker acting or continuing to act on their behalf in that transaction; and
 - (c) the finance broker has recommended in writing to each principal that it is in their best interests to obtain independent advice in relation to the merits of the transaction.
- 5.8 A finance broker must not, directly or indirectly, disclose or reveal the contents of any instructions, information, documents or papers given to the finance broker by the finance broker's principal, to any person otherwise than to the extent authorised by the finance broker's principal in writing, or as the finance broker may be required to disclose by law or under this Code (including, without limitation, clause 5.12(c)).
- 5.9 A finance broker's duty of confidentiality towards the finance broker's principal continues after the relationship of principal and broker has ceased.
- 5.10 A finance broker must —
- (a) treat all parties honestly and fairly; and
 - (b) not engage in harsh or unconscionable conduct towards any party; and
 - (c) exercise reasonable skill, care and diligence when conducting and carrying on the business of a finance broker and fulfil the broker's obligations to the finance broker's principal and other parties in a timely manner; and

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- (d) ensure that the broker, and the finance broker's employees and C class licensees under that finance broker's supervision, are competent in those areas and aspects of the industry in which they participate.
- 5.11 A finance broker must take reasonable steps to keep up-to-date with the relevant current laws and practices in those aspects of the finance broking industry in which the finance broker participates.
- 5.12 A finance broker must not —
 - (a) mislead or deceive any party; or
 - (b) make a false representation to any party or cause any other finance broker to make a false representation to any party; or
 - (c) omit to provide to any party any significant information of which the broker is aware, that could influence a reasonable person's decision to —
 - (i) enter into the loan transaction; or
 - (ii) consent to the broker acting for more than one principal.
- 5.13 If a finance broker is also a licensed real estate or 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 —
 - (a) obtaining from the borrower an authority to sell; or
 - (b) being given by the borrower a management agreement in relation to,

any property being offered as security for the loan or any other property owned by the borrower.
- 5.14 If 2 or more finance brokers act in conjunction in negotiating or arranging a loan, the total remuneration payable in respect of negotiating or arranging the loan must not exceed the maximum remuneration for the transaction determined under the Maximum Remuneration Schedule.
- 5.15 Where a finance broker has employees or is supervising C class licensees, it is the finance broker's responsibility to take reasonable steps to ensure that those employees or C class licensees —

- (a) have up-to-date qualifications or experience relevant to their duties in the finance broker's business; and
- (b) keep up-to-date with relevant current laws and practices in those aspects of the finance broking industry in which they participate; and
- (c) comply with the following —
 - (i) any conditions on their licences;
 - (ii) the provisions of the Act and regulations;
 - (iii) the Maximum Remuneration Schedule;
 - (iv) the requirements set out in this Code.

5.16 A finance broker must keep and maintain copies of all records of business and the forms and documents required by this Code in relation to a loan transaction for a period of at least 7 years after the date on which the authority to act is signed.

5.17 Clause 5.16 continues to apply to a person even when that person has ceased to carry on business as a finance broker.

5.18 Subject to clauses 9 and 14, a condition or provision of an agreement or statement by a party is void to the extent it purports to waive compliance with any clause of this Code.

6. Cold calling/canvassing

6.1 A finance broker must at all times comply with the ~~Door-to-Door~~[Fair Trading Act 1987](#)[2010](#) and the UCCC, including whilst —

- (a) canvassing (whether in person, over the telephone or via any other unsolicited communication) any person at their place of residence to apply for or obtain any loan; or
- (b) engaging any other person to carry out the activities in paragraph (a).

[\[Clause 6 amended: Gazette 30 Jun 2011 p. 2645.\]](#)

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Division 3 — Restricted finance broking business (applies to A, B and C classes)

7. Application of Division 3

7.1 Subject to clause 8.1, Division 3 applies to loans negotiated or arranged by an “A” class, “B” class or “C” class finance broker where the lender is —

- (a) a financial services licensee authorised to operate a managed investment scheme registered under the Commonwealth *Corporations Act 2001* Chapter 5C; or
- (b) regulated by the Australian Prudential Regulation Authority (APRA) of the Commonwealth; or
- (c) a licensed credit provider under the *Credit (Administration) Act 1984*; or
- (d) a person exempt from the licensing requirements of the *Credit (Administration) Act 1984* section 6, pursuant to section 7(1) of that Act; or
- (e) both a “financial corporation” and a “registered entity” within the meanings given to those terms in the Commonwealth *Financial Sector (Collection of Data) Act 2001*; or
- (f) a person noted in a condition on a finance broker’s licence as an approved lender.

7.2 Clause 7.1 applies to the holder of an “A” class licence, while that finance broker is negotiating or arranging a loan in circumstances that fit one of the criteria in clause 7.1, otherwise Division 4 applies to that “A” class licence holder.

8. Duties to borrowers

8.1 Clause 8 does not apply —

- (a) to finance brokers who act as intermediaries for other finance brokers and —
 - (i) who do not deal directly with the borrower for whom the loan is to be negotiated or arranged; or
 - (ii) who deal directly with the borrower but only in relation to matters that are incidental or ancillary to negotiating or arranging the loan for the borrower;

or

- (b) where the borrower is —
 - (i) a statutory corporation (other than a local government) acting on behalf of the State; or
 - (ii) an “agency” within the meaning given to that term in the Commonwealth *Public Service Act 1999* or in the *Public Sector Management Act 1994*; or
 - (iii) a “listed entity”, or a “related body corporate” of a listed entity, within the meanings given to those terms in the Commonwealth *Corporations Act 2001*;

or

- (c) to the extent it is waived in accordance with clause 9.

8.2 The following provisions of clause 8 do not apply to payments to other finance brokers, apart from associates, who do not deal directly with the borrower, or deal directly with the borrower but only in relation to matters incidental or ancillary to negotiating or arranging the loan, and who do not offer a choice of brand of loan —

- (a) clause 8.6(h);
- (b) clause 8.6(i);
- (c) clause 8.8(n);
- (d) clause 8.8(o).

8.3 In general terms, the duties owed to a borrower by a finance broker under this Division are as follows —

- (a) to negotiate or arrange appropriate finance;
- (b) to provide preliminary information to the borrower including —
 - (i) the broker’s introductory details; and
 - (ii) the remuneration, fees, commissions, etc., that the broker is entitled to charge the borrower; and
 - (iii) how complaints are dealt with;
- (c) to provide information to the borrower as to the full details of any loan arranged;

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- (d) to provide information to the borrower regarding any further remuneration, fees, commissions, etc., that will be received by the broker;
 - (e) to warn of and where appropriate explain any variance in a loan and confirm the borrower's intentions in relation to the terms of a loan.
- 8.4 A finance broker must not negotiate or arrange a loan which the finance broker does not genuinely and reasonably believe is appropriate for the borrower, and the finance broker must document in writing, and be able to demonstrate that, the finance broker has —
 - (a) made reasonable inquiries in relation to the needs, objectives and financial circumstances of the borrower, including existing loans; and
 - (b) cautioned the borrower that the proposed loan arrangements were based on the lenders canvassed and the information provided by the borrower and that, if the information is incomplete or inaccurate, the borrower should, before entering into the proposed loan arrangements, consider its appropriateness having regard to the borrower's relevant personal circumstances and, if necessary, seek independent financial advice.
- 8.5 A finance broker —
 - (a) must not refinance a loan if the refinancing is solely for the purposes of generating commission or fees for the finance broker, or the finance broker's associates; and
 - (b) must be able to demonstrate, in relation to the refinancing, that the finance broker has complied with clause 8.4; and
 - (c) where the refinancing will increase the overall financial commitments of the borrower, must ensure that the borrower is aware of this and recommend in writing that the borrower seek independent financial advice.
- 8.6 Before being appointed to act as a finance broker to a borrower, a finance broker must disclose in writing to the borrower, the following information —
 - (a) the finance broker's full name and address;
 - (b) the finance broker's licence number;

- (c) the nature and range of services that the finance broker provides;
- (d) a statement listing the lenders from whom, subject to the borrower meeting the lender's lending criteria, the finance broker can obtain a loan for the borrower;
- (e) the proposed timeframe required to establish the borrower's eligibility for a loan;
- (f) that the remuneration of finance brokers is limited to a maximum as prescribed by the Maximum Remuneration Schedule;
- (g) any fees or other amounts that may be charged to the borrower by the finance broker or any associate of the finance broker and the manner in which the finance broker (or any associate) requires the borrower to pay the fees (*for example, paid upfront or drawn down from the proceeds of the loan*);
- (h) where the finance broker's services comprise of arranging loans regulated by the UCCC other than equipment finance (but subject to clause 8.2) —
 - (i) the range of commissions, including, at least, the highest and the lowest commissions (upfront and trail) payable by the broker's panel of lenders to any person in relation to negotiating or arranging a loan, if the finance broker were to arrange a loan for the borrower, expressed as —
 - (I) percentages, where commissions are payable as percentages across that panel; or
 - (II) fixed amounts, where commissions are payable as fixed amounts across that panel; or
 - (III) either percentages or fixed amounts, provided always that the highest and lowest commissions are expressed in the same manner for any loan amount and term nominated by a prospective borrower, where commissions are payable as both percentages and fixed amounts across that panel;

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and

- (ii) whether any external party or associate is likely to share in the commission, or otherwise be remunerated in relation to loan transactions negotiated or arranged by the finance broker (*for example, referral fees*) for the borrower; and
- (iii) a prominent warning that the borrower should ask, if the borrower so requires —
 - (I) where in such range the proposed lender (once selected) sits; and
 - (II) the role and identity of any such external party or associate and the amount payable to such party;
- (i) where the finance broker's services consist of arranging equipment finance or loans not regulated by the UCCC (but subject to clause 8.2), either the disclosure set out in paragraph (h) or a general statement —
 - (i) explaining the method and source of the finance broker's remuneration (monetary or non-monetary) including an explanation of who pays that remuneration and how it is payable (*for example, as commission or as a margin on the interest charged*); and
 - (ii) indicating whether any external party or associate is likely to share in the remuneration, or otherwise be remunerated, in relation to loan transactions negotiated or arranged by the finance broker (*for example, referral fees*) for the borrower; and
 - (iii) offering to provide the borrower, if the borrower so requires, with —
 - (I) the actual amount of the broker's remuneration, once ascertainable; and
 - (II) details of the role and identity of any such external party or associate and the amount payable to such party, once ascertainable;

- (j) to the extent that the disclosure required by paragraphs (g), (h) or (i), does not provide full disclosure of the source of and method of calculation of, the finance broker's remuneration, a statement of —
 - (i) the source of the finance broker's remuneration; and
 - (ii) the method by which the remuneration is calculated; and
 - (iii) when, and how, the remuneration is received;
 - (k) that any complaint in respect of a loan transaction may be lodged by the borrower with the Commissioner for Consumer Protection.
- 8.7 Before being appointed to act as a finance broker, a finance broker must ensure that the borrower has signed the written disclosure given under clause 8.6 following which the finance broker must retain the document and give a signed copy of that disclosure to the borrower.
- 8.8 Before the borrower accepts any offer to enter into a loan, a finance broker must ensure that the borrower has had written disclosure of the following information where it is applicable to the loan transaction contemplated —
- (a) the full name and address of all borrowers and guarantors;
 - (b) the amount of the loan;
 - (c) the term of the loan;
 - (d) the purpose of the loan;
 - (e) any amount of the loan that is to be used to repay existing loans and the transaction costs that apply to that repayment;
 - (f) the security the lender requires to be given for the loan;
 - (g) the date by which finance is to be obtained;
 - (h) in relation to —
 - (i) loans regulated by the UCCC, the interest rate and whether that rate may increase; or
 - (ii) non-UCCC loans, the interest rate and whether that rate may increase or, alternatively, the amount, number and frequency of payments;
 - (i) any default interest rate or other penalty in respect of late payment or non-payment;

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- (j) the terms of drawdown, redraw and repayment of the principal and interest;
- (k) any rights of early repayment, including any exit or deferred establishment fees;
- (l) any insurance requirements imposed by the lender;
- (m) if not previously disclosed, any fees or other amounts that will be charged to the borrower by the finance broker or any associate of the finance broker and the manner in which the finance broker (or any associate) requires the borrower to pay the fees (*for example, paid upfront or drawn down from the proceeds of the loan*);
- (n) in relation to loans regulated by the UCCC other than equipment finance (but subject to clause 8.2) —
 - (i) a statement of commission (including upfront and trailing commission) which will be paid by the lender or any other person if the lender provides the loan to the borrower (which can be expressed in percentage amounts) and whether (to the knowledge of the finance broker) any other remuneration (including monetary and non-monetary benefits) may be earned or received by the finance broker, or whether any associate of the finance broker or any external party is to receive remuneration (as a result of participating with the finance broker in negotiating or arranging the loan), if the lender were to provide the loan to the borrower; and
 - (ii) where it is reasonable to anticipate that the finance broker will not receive or retain all of the fees payable by the borrower or all of the commission or other remuneration disclosed under paragraph (i), an explanation of the amount the finance broker personally will be entitled to retain and of any amounts that, to the knowledge of the finance broker, any associate of the finance broker or external party will receive in relation to the loan transaction negotiated or arranged by the finance broker (*for example, referral fees*) for the borrower, and the identity of that person; and

- (iii) where the amount of any remuneration is not able to be ascertained, a clear description of the means by which it will be calculated;
 - (iv) if not previously disclosed, the identity of any person who will otherwise be remunerated for referral and the amount payable to such person;
 - (o) in relation to equipment finance or loans not regulated by the UCCC (but subject to clause 8.2) and where the details differ from those disclosures made under clause 8.6(i), either the disclosure set out in paragraph (m) or the following explanations and reminders —
 - (i) a general statement explaining the method and source of the finance broker's remuneration (monetary or non-monetary) including an explanation of who pays that remuneration and how it is payable (*for example, as commission or as a margin on the interest charged*);
 - (ii) an explanation of any external party or associate who will share in the same or who (to the knowledge of the finance broker) will otherwise be remunerated in relation to the loan transaction negotiated or arranged by the finance broker (*for example, referral fees*) for the borrower;
 - (iii) a reminder to the borrower of the offer made pursuant to clause 8.6(i)(iii).
- 8.9 To comply with the requirement for written disclosure under clause 8.8 in particular cases, the finance broker —
- (a) may be able to refer the borrower to documents already in the borrower's possession (*for example, a lender's offer to enter into a loan may provide most of the information required to be disclosed under clause 8.8*); or
 - (b) may be able to rely on the written information given under clause 8.6, if no subsequent changes have taken place and no additional information needs to be added; or
 - (c) may use another method of disclosure (in a form likely to be understood by the borrower) provided the borrower has some written record of the required information.

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- 8.10 Where a written disclosure is made by the finance broker under clause 8.8, the finance broker must ensure that the borrower has signed the written disclosure, following which the finance broker must retain the document and give a signed copy of that disclosure to the borrower.
- 8.11 Before the borrower accepts any offer to enter into a loan, the finance broker must —
- (a) if and when the finance broker is or becomes aware that the terms of the loan vary from the borrower's application, explain to the borrower those differences and why they have occurred and offer to confirm the explanation in writing; and
 - (b) in any event, caution the borrower to check that the terms of the loan do not vary from the borrower's application and, if they do vary, inform the finance broker forthwith.

9. Limited ability to waive compliance

- 9.1 Compliance with part or all of clause 8.8 may be waived if —
- (a) there is a written waiver of compliance that relates solely to clause 8.8; and
 - (b) the loan transaction is not regulated by the UCCC; and
 - (c) the borrower —
 - (i) is independently professionally advised, and indicates that he or she understands the effect of the waiver; or
 - (ii) is a person who regularly engages in and is conversant with loans of money (secured or unsecured) and by the person's experience over a reasonable period of time, may be expected to fully appreciate and understand the risks involved and their consequences.
- 9.2 Compliance with part or all of either clause 8.6 or 8.8, or both, may be waived if —
- (a) there is a written waiver of compliance that relates solely to clause 8.6 or 8.8, or both; and
 - (b) the borrower is a sophisticated borrower who may be expected to fully understand the importance of the clause of

the Code in respect of which the compliance requirement has been waived.

- 9.3 To be a sophisticated borrower a person must —
- (a) have net assets of at least \$2.5 million; or
 - (b) has a net income for each of the last 2 financial years of at least \$250 000 a year.
- 9.4 The onus of establishing the requirements of clause 9.1, 9.2 or 9.3 rests with the finance broker.

Division 4 — Unrestricted finance broking business (applies to A class only)

10. Application of Division 4

- 10.1 Division 4 applies to loans negotiated or arranged by finance brokers who hold an “A” class licence, when the lender does not fall within a category set out in clause 7.1.
- 10.2 A finance broker who holds an “A” class licence is subject to Division 3 when the lender does fall within a category set out in clause 7.1.

11. Duties to parties

- 11.1 In general terms, the duties owed to the parties to a loan by a finance broker under this Division are as follows —
- (a) to provide details of the parties to the loan to each other party;
 - (b) to provide details of the financial position of the borrower and guarantor;
 - (c) to provide details of the loan arranged or negotiated;
 - (d) to provide details of the property being used as security;
 - (e) to set out any additional action that the finance broker will take in the case of default.
- 11.2 Before a loan is made, a finance broker must give to all parties to the loan a notice in writing, in the form of Form 1, containing the following information —
- (a) the finance broker’s full name, licence number and address;

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- (b) the full name and address of all lenders;
- (c) the full name and address of all borrowers;
- (d) the full name and address of all guarantors;
- (e) the full name of each party for whom the finance broker acts;
- (f) the amount and terms of the finance broker's remuneration;
- (g) the borrower's net assets and details of the borrower's ability to service interest payments (*refer clause 12.10(a)*);
- (h) the guarantor's net assets and details of the guarantor's ability to service interest payments (*refer clause 12.10(a)*);
- (i) the purpose of the loan;
- (j) the amount of the loan;
- (k) the amount of loan to be used to repay existing loans;
- (l) the term of the loan;
- (m) the date of advance;
- (n) the interest rate;
- (o) the commencement date of interest;
- (p) when interest is payable;
- (q) any penalty rate;
- (r) the terms of repayment or repayment dates;
- (s) any rights of redraw and discharge;
- (t) any insurance requirements;
- (u) whether management agreement is required or not required;
- (v) the security required;
- (w) where real property is to be used as security —
 - (i) a description of the mortgaged property; and
 - (ii) the purchase price of that property (where relevant); and
 - (iii) the priority of any mortgage and details of all prior encumbrances; and
 - (iv) the ratio of loan to valuation of any mortgaged property, calculated on an "as is valuation" basis;

- (x) the person responsible for preparation and custody of security documents;
- (y) any action the finance broker will take to notify lenders of a loan default;
- (z) any action the finance broker will take to enforce the loan should a default occur;
- (aa) the fee to be charged by the finance broker or debt collecting agency in pursuing the borrower for payment;
- (ab) all the information required by clauses 12.3 and 12.4, and clauses 12.7 to 12.10, attached as an annexure to Form 1.

11.3 The finance broker must ensure that all parties to the loan sign the completed Form 1, following which the finance broker must retain the original notice and give a signed copy of that notice to all parties.

11.4 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.

11.5 Subject to clause 11.6, 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.

11.6 The requirement in clause 11.5 to provide a statement free of charge is limited to once every 6 months by each party, otherwise the finance broker is entitled to charge for the service rendered.

12. Duties to lenders

12.1 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 (including all registered or known encumbrances); and
- (b) take reasonable steps to ensure the accuracy of all information which is provided to a lender relating to any property being offered as security for a loan.

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- 12.2 If real property is to be offered as security for a loan, the finance broker must provide all lenders with a true copy of the current Certificate of Title relating to that real property.
- 12.3 If real 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 given under clause 11.2.
- 12.4 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) obtain written confirmation to ensure that the valuer is qualified to undertake the valuation; and
 - (b) obtain written confirmation 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; and
 - (c) provide an unedited copy of all valuations obtained from the valuer to all lenders, as an attachment to the notice required under clause 11.2; and
 - (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; and
 - (e) if the valuation is to be undertaken on a proposed property development, ensure that the valuation obtained contains an “as is valuation” in addition to any “as if complete valuation” or “on completion valuation” that may also be provided, and that these appear consecutively (with the “as is valuation” stated first) and are also so included in the valuation summary in the report; and
 - (f) ensure that all valuations are up-to-date and provide an explanation of the basis upon which any value is calculated, including any assumptions made; and
 - (g) obtain and provide to all 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 who appointed the valuer or by any other person; and

- (h) provide to all 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 paragraph (g) and, if that person is the borrower, the written statement must clearly identify that this person is the borrower; and
 - (i) ensure that the information provided in the valuation document can be understood by the lenders with whom the finance broker is negotiating.
- 12.5 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 lenders, unless that valuation is in writing and meets all the requirements of clause 12.4.
- 12.6 A finance broker must not improperly procure, or attempt to procure, a statement signed by a lender stating that the lender has appointed a valuer to conduct a valuation of property to be secured.
- 12.7 A finance broker must provide all lenders with a budget attached to the notice required under clause 11.2 which must contain all such information, in relation to the project to be funded, as lenders and their professional advisers would reasonably require for the purpose of making an informed assessment of the transaction, including where any proposed development is concerned —
- (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; and
 - (b) the proposed application of funds at each stage of the project development, including the time expected to be required to complete each stage; and
 - (c) who will inspect the project development and authorise the advance of funds at each stage; and
 - (d) the amount of funds to be held in trust, and for whom, at each stage of the project development.
- 12.8 The budget referred to in clause 12.7 must, in relation to each stage of any project development, separately identify (but is not limited to) the

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following items or, if applicable, reasonable estimates of those items at each stage —

- (a) the cost of purchasing the land relating to the property development;
- (b) payments to builders;
- (c) payments to individual contractors and development consultants comprising more than 2% of the total cost involved in that stage;
- (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;
- (h) taxes, duties and charges.

12.9 In determining the nature of information to be included in any budget referred to in clause 12.7, regard is to be had to —

- (a) the nature and purpose of the proposed loan; and
- (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 whom those persons may reasonably be expected to consult.

12.10 A finance broker shall obtain and provide to each lender, in writing as an attachment to the notice required under clause 11.2, the following information concerning all borrowers and guarantors —

- (a) in addition to the names and addresses of each borrower and guarantor —
 - (i) a statement of the assets and liabilities of each borrower and guarantor; and
 - (ii) a statement of available income to service interest payments of each borrower and guarantor,

statutorily declared by those persons to be true and accurate at the time of signing;

- (b) the details of parties to any existing loan, if any part of the funds to be provided by lenders is to be used to repay that existing loan;
 - (c) details of any insolvency, administration or bankruptcy proceedings to which any of the following persons has been a party to in the last 10 years —
 - (i) any borrower or guarantor of a loan;
 - (ii) any company of which any borrower or guarantor is or has been a director or officer.
- 12.11 If a lender is not represented at settlement by a solicitor or settlement agent who is 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 Information immediately following settlement to ensure that the lender's interest is registered on the Certificate of Title of the security property.
- 12.12 If a finance broker arranges a settlement on behalf of lenders to be secured, that finance broker must —
 - (a) inform all lenders in writing that settlement and lodgment have been effected; and
 - (b) provide a copy of a Department of Land Information lodgment receipt to all lenders; and
 - (c) inform all lenders in writing that the finance broker will be sending lenders a true copy of the duplicate Certificate of Title bearing lenders' names registered as mortgagees within 7 days of receipt of the duplicate Certificate of Title from the Department of Land Information.
- 12.13 If a finance broker receives a 'Stopped Documents' notice from the Department of Land Information, the finance broker must —
 - (a) immediately inform all affected lenders in writing that a 'Stopped Documents' notice has been received; and
 - (b) provide a copy of the 'Stopped Documents' notice to all affected lenders; and
 - (c) take all reasonable steps to resolve the issue giving rise to the 'Stopped Documents' notice; and

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- (d) keep all affected lenders fully informed about progress in dealing with and successful resolution of the 'Stopped Documents' notice.

12.14 If a finance broker retains a duplicate Certificate of Title for any lender, then the finance broker must —

- (a) acknowledge that fact in writing to the lender; and
- (b) send the lender a true copy of the duplicate Certificate of Title bearing all lenders' names registered as mortgagees, within 7 days of receipt of the duplicate Certificate of Title from the Department of Land Information; and
- (c) hold that duplicate Certificate of Title in safe custody.

13. Execution of documents

13.1 When a finance broker arranges execution of any documents by any party, the finance broker must ensure that those documents —

- (a) in the case of an individual, are properly witnessed by a person able to verify the authenticity of the signature or execution; and
- (b) in the case of a company, are properly signed or executed in accordance with the *Commonwealth Corporations Act 2001*.

14. Limited ability to waive compliance

14.1 Compliance with one or more provisions of clause 12 may be waived if —

- (a) there is a written waiver of compliance that relates solely to any provision in clause 12; and
- (b) the lender is a sophisticated investor who fully understands the importance of the clause of the Code in respect of which the compliance requirement has been waived.

14.2 To be a sophisticated investor a person must —

- (a) have net assets of at least \$2.5 million; or
- (b) has a net income for each of the last 2 financial years of at least \$250 000 a year.

14.3 The onus of establishing the requirements of clauses 14.1 and 14.2 rests with the finance broker.

Appendix 1

[cl. 8.4]

Form 1

NOTICE

Details of Parties to the Loan

Finance Broker's name,
Licence Number 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 or duty.

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 the *Finance Brokers Control Act 1975* section 43(1)(b), a Finance Broker is not entitled to receive any commission, reward or other valuable consideration in respect of services rendered unless the broker has first been appointed in writing to act in that capacity by the person to be charged therewith or some person lawfully authorised to sign the appointment on their behalf.

Borrower and Guarantor Financial Position

Borrower's Net Assets and Details of
Ability to Service Interest Payments (\$)
Guarantor's Net Assets and Details of
Ability to Service Interest Payments (\$)

Refer Attachment 1 for detailed Statements of Assets and Liabilities and Available Income for all borrowers and guarantors (Clause 12.10(a)).

Refer Attachment 2 for copy of Insolvency and Trustee Service Australia report concerning all borrowers and guarantors (Clause 12.10(c)).

Loan Details

Purpose for which loan is required
Refer Attachment 3 for detailed budget outlining specifically how all funds will be applied (Clause 12.7).

Amount of Loan \$
Amount of Loan used to repay existing Loans \$
Refer 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 Redraw and Discharge
Insurance Requirements
Management agreement Required/Not Required

Property Security Information

Security required
Description of Mortgaged Property
Refer Attachment 4 for current true copy of Duplicate Certificate of Title (Clause 12.2).

Purchase Price of Property (where relevant) \$
Priority of Mortgage (i.e. first, second mortgage) and details of all prior encumbrances

Ratio of loan to valuation of mortgaged property calculated on an "as is valuation"
Refer Attachment 5 for copies of valuations, all instructions given to the valuer and the identity of the person that gave the instructions (Clauses 12.3 to 12.6)

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

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

NOTICES TO ALL PARTIES TO THE LOAN TRANSACTION

If property is offered as security for a loan, lenders are entitled to appoint a valuer of their own choice.

If the Finance Broker acts for one Party, the other Party should seek independent financial, legal and valuation advice.

If the Finance Broker acts for both Parties, each Party should seek independent financial, legal and valuation advice.

Signature of Lender(s)

| | |
|-----------|-----------|
| | |
| | |
| (Name) | (Name) |
| | |
| | |
| (Address) | (Address) |
| | |
| (Date) | (Date) |

Signature of Borrower(s)

| | |
|-----------|-----------|
| | |
| | |
| (Name) | (Name) |
| | |
| | |
| (Address) | (Address) |
| | |
| (Date) | (Date) |

Signature of Guarantor(s)

| | |
|-----------|-----------|
| | |
| | |
| (Name) | (Name) |
| | |
| | |
| (Address) | (Address) |
| | |
| (Date) | (Date) |

Signature of Finance Broker

.....
.....
(Name)
.....
.....
(Address)
.....
(Date)

Notes

- ¹ This is a compilation of the *Finance Brokers Control (Code of Conduct) Regulations 2007*. The following table contains information about those regulations.

Compilation table

| Citation | Gazettal | Commencement |
|--|--|---|
| <i>Finance Brokers Control (Code of Conduct) Regulations 2007</i> | 29 Jun 2007 p. 3111-44 | 29 Jun 2007 |
| <u><i>Finance Brokers Control (Code of Conduct) Amendment Regulations 2011</i></u> | <u>30 Jun 2011</u> <u>p. 2645</u> | <u>r. 1 and 2: 30 Jun 2011</u> <u>(see r. 2(a));</u> <u>Regulations other than r. 1 and 2:</u> <u>1 Jul 2011 (see r. 2(b))</u> |