



New South Wales

# **Consumer Credit Administration Amendment (Finance Brokers) Bill 2003**

## **Explanatory note**

This explanatory note relates to this Bill as introduced into Parliament.

## **Overview of Bill**

The objects of this Bill are:

- (a) to amend the *Consumer Credit Administration Act 1995* to make provision for the regulation of finance broking, including the regulation of contracts to act as a finance broker, the charging of commission, the action that may be taken by consumers to redress actions taken by finance brokers in certain circumstances and the keeping of records, and
- (b) to repeal the *Credit (Finance Brokers) Act 1984*.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision giving effect to the amendments to the *Consumer Credit Administration Act 1995* set out in Schedule 1.

**Clause 4** is a formal provision giving effect to the consequential amendments to the *Consumer, Trader and Tenancy Tribunal Act 2001* set out in Schedule 2.

**Clause 5** repeals the *Credit (Finance Brokers) Act 1984*.

## Schedule 1 Amendment of Consumer Credit Administration Act 1995

### New definitions

**Schedule 1 [1]** inserts several definitions.

The definition of *client* makes it clear that the client of a finance broker is the person on behalf of whom consumer credit is to be obtained or is obtained by the finance broker, whether or not the person is to be charged any commission in relation to the finance broking.

The definition of *commission* covers any fee, charge, reward or other remuneration, however characterised, whether monetary or otherwise, chargeable for or with respect to finance broking, if the remuneration is paid or payable by the client and retained by the finance broker. The definition specifically includes any remuneration characterised as a termination fee.

*Finance broking contract* is defined to mean a contract between a finance broker and a client under which the finance broker agrees to engage in finance broking on behalf of the client.

**Schedule 1 [3]** replaces the definition of *finance broker*.

**Schedule 1 [4]** omits a redundant definition.

**Schedule 1 [5]** explains what is meant by “engages in finance broking”, “repayment amount” and “repayment arrangement” and by “securing” consumer credit for a client.

## Regulation of finance broking

**Schedule 1 [6]** inserts a new Part 1A into the Act. Part 1A consists of the following provisions relating to the regulation of finance broking:

Proposed section 4A sets out the object of the proposed Part, which is to provide for the regulation of persons who engage in finance broking to ensure that the clients of finance brokers are given adequate information before entering into a finance broking contract, are protected from unfair practices by finance brokers and have access to a redress mechanism when finance brokers breach the terms of the finance broking contract, engage in unjust conduct or charge excessive commission.

Proposed section 4B provides that the proposed Part applies to a finance broker in so far as the credit to which the business of the finance broker relates is, or includes, credit to be provided under the *Consumer Credit (New South Wales) Code*, but does not apply to a finance broker of a class prescribed by the regulations.

Proposed section 4C requires a broking contract to be in writing and to contain certain matters. The new section provides that a client of a finance broker must be given a copy of the finance broking contract before finance broking commences. The proposed section also prevents a finance broker from demanding, receiving or accepting any commission in respect of engaging in finance broking for a client if the finance broker has failed to comply with the proposed section.

Proposed section 4D prohibits up-front commissions, that is commissions that are payable before the credit is secured.

Proposed section 4E provides that the finance broker must not demand, receive or accept commission if the amount of credit secured is not the same as the amount specified in the contract, if the consumer credit is for a term that is not the same as any term specified in the contract, if the periodic repayments are more than the maximum repayments specified in the contract or if other repayment arrangements are not the same as those set out in the contract or if the consumer credit is at a rate of interest that is more than the maximum rate specified in the contract. The section also provides that the credit must be secured by the date that is specified in the contract. The section allows for a finance broking contract to be varied if the finance broker cannot secure credit on those terms and the client is still prepared to keep the contract on foot.

Proposed section 4F prevents a finance broker from obtaining more commission than that disclosed in the finance broking contract, or any commission that is greater than the amount calculated by the method specified in the contract. If the amount calculated by the method specified in the contract would result in an amount greater than the amount estimated in the contract, the proposed section

prevents the finance broker from obtaining any commission that is greater than the amount estimated in the contract.

Proposed section 4G allows a finance broker to charge a fee if the client decides not to enter into a credit contract that the finance broker has secured in specified circumstances.

Proposed section 4H requires a finance broker to keep certain records.

Proposed section 4I provides that any valuation fee, credit application fee or credit establishment fee payable in relation to a finance broking contract should be paid directly to the valuer or credit provider and should not be paid to the finance broker. The section also provides that a finance broker may accept a valuation fee, credit application fee or credit establishment fee in certain circumstances.

Proposed section 4J provides for consumer access to the Consumer, Trader and Tenancy Tribunal if a finance broker breaches the finance broking contract, engages in unjust conduct or charges excessive commission.

Proposed section 4K provides for courts to make certain orders if they consider that a finance broker has breached the finance broking contract, has engaged in unjust conduct or charged excessive commission.

Proposed section 4L provides that in any proceedings for an offence arising under the Act, the court may, if it finds the finance broker guilty of the offence and whether or not it proceeds to conviction, order the finance broker to refund any amount received or accepted by the finance broker in contravention of the Act and interest on that amount.

### **Other amendments**

**Schedule 1 [2]** is consequential on the repeal of the *Credit (Finance Brokers) Act 1984*.

**Schedule 1 [7]** corrects an error in a heading.

**Schedule 1 [8]** provides for the making of savings and transitional regulations.

**Schedule 1 [9]** makes savings and transitional provisions.

### **Schedule 2 Amendment of Consumer, Trader and Tenancy Tribunal Act 2001**

**Schedule 2** omits references to the repealed Act.



New South Wales

# Consumer Credit Administration Amendment (Finance Brokers) Bill 2003

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New South Wales

# **Consumer Credit Administration Amendment (Finance Brokers) Bill 2003**

No. , 2003

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## **A Bill for**

An Act to amend the *Consumer Credit Administration Act 1995* to make further provision with respect to the regulation of finance broking; to repeal the *Credit (Finance Brokers) Act 1984*; and for other purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Consumer Credit Administration Amendment (Finance Brokers) Act 2003</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on a day or days to be appointed by proclamation.	6 7
<b>3 Amendment of Consumer Credit Administration Act 1995 No 69</b>	8
The <i>Consumer Credit Administration Act 1995</i> is amended as set out in Schedule 1.	9 10
<b>4 Amendment of Consumer, Trader and Tenancy Tribunal Act 2001 No 82</b>	11 12
The <i>Consumer, Trader and Tenancy Tribunal Act 2001</i> is amended as set out in Schedule 2.	13 14
<b>5 Repeal of Credit (Finance Brokers) Act 1984 No 96</b>	15
The <i>Credit (Finance Brokers) Act 1984</i> is repealed.	16



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## Schedule 1 Amendment of Consumer Credit Administration Act 1995

(Section 3)

### [1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

*client* of a finance broker is the person on behalf of whom consumer credit is to be obtained or is obtained (whether or not for commission) by the finance broker.

*commission* includes any fee, charge, reward or other remuneration (whether or not monetary and whether characterised as a termination fee or otherwise) that is:

- (a) paid or payable by the client of a finance broker for or in respect of finance broking engaged in by the finance broker on behalf of the client, and
- (b) retained by the finance broker.

*credit application fee* or *credit establishment fee* means a fee charged by a credit provider, or a person or body authorised to act on behalf of a credit provider, for determining an application for consumer credit or the initial administrative costs of providing consumer credit, or both.

*engages in finance broking*—see subsection (3).

*finance broking contract* means a contract between a finance broker and a client under which the finance broker agrees to engage in finance broking on behalf of the client.

*repayment amount* or *repayment arrangement*—see subsection (4).

*secured*—see subsection (5).

*valuation fee* means a fee for a valuation obtained in respect of any security to be offered for a contract for consumer credit.

### [2] Section 3 (1), definition of “consumer credit legislation”

Omit paragraph (d).

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<b>[3] Section 3 (1), definition of “finance broker”</b>	1
Omit the definition. Insert instead:	2
<i>finance broker</i> means a person who engages in finance broking.	3 4
<b>[4] Section 3 (1), definition of “finance broking”</b>	5
Omit the definition.	6
<b>[5] Section 3 (3), (4) and (5)</b>	7
Insert after section 3 (2):	8
(3) For the purposes of this Act, a person <i>engages in finance broking</i> if the person (“the intermediary”) acts, or purports to act, as an intermediary to negotiate and obtain consumer credit for a person (other than the intermediary’s employer, or a principal who is not a client of the intermediary) in return for a commission or financial benefit, whether payable to the intermediary by the person, the credit provider or any other person or body.	9 10 11 12 13 14 15 16
(4) In this Act, a reference to a <i>repayment amount</i> or <i>repayment arrangement</i> , in relation to consumer credit, is a reference to a repayment amount or repayment arrangement that includes all amounts payable under the contract for the consumer credit (including any credit application fee or credit establishment fee payable in connection with the consumer credit).	17 18 19 20 21 22 23
(5) For the purposes of this Act, consumer credit is <i>secured</i> for a client when the credit provider has made a final determination regarding the credit application and is prepared to provide the client with the consumer credit sought.	24 25 26 27

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<b>[6] Part 1A</b>	1
Insert after section 4:	2
<b>Part 1A Regulation of finance broking</b>	3
<b>Division 1 Preliminary</b>	4
<b>4A Object of Part</b>	5
The object of this Part is to provide for the regulation of persons who engage in finance broking so as to ensure that the clients of finance brokers:	6
(a) are given adequate information before entering into finance broking contracts, and	7
(b) are protected from unfair practices engaged in by finance brokers, and	8
(c) have access to a redress mechanism when finance brokers breach the terms of the finance broking contract, engage in unjust conduct or charge excessive commission.	9
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<b>4B Application of Part</b>	17
(1) This Part applies to and in respect of a finance broker only in so far as consumer credit to which the business of the finance broker relates is, or includes, credit to be provided under a credit contract within the meaning of the <i>Consumer Credit (New South Wales) Code</i> .	18
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(2) This Part does not apply to or in respect of a finance broker of a class prescribed by the regulations.	23
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<b>Division 2 Finance broking contracts</b>	25
<b>4C Finance broking contract must be in writing and must be given to client</b>	26
	27
(1) A finance broker must not engage in finance broking on behalf of a particular client unless:	28
(a) the finance broker has first entered into a written finance broking contract with the client, and	29
(b) that contract has been signed by the client, and	30
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- (c) the contract contains the matters required by subsection (3), and 1  
2
- (d) a copy of the contract has been given to the client. 3
- Maximum penalty: 50 penalty units. 4
- (2) Subsection (1) applies to finance broking on behalf of a client whether or not the client is under any obligation to pay commission under the finance broking contract. 5  
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- (3) The matters required by this subsection are: 8
  - (a) particulars of the amount of consumer credit to be obtained or, if the amount is not ascertainable, the maximum amount of consumer credit, or the credit limit, to be obtained, and 9  
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  - (b) if the consumer credit is to be for a fixed term—the term of the consumer credit desired by the client, and 13  
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  - (c) if the consumer credit is intended to be repaid by repayments at regular intervals—the intervals at which the client is prepared to make repayments and the maximum amount of each periodic repayment that the client is prepared to make in respect of the consumer credit, and 15  
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  - (d) if the consumer credit is not intended to be repaid at regular intervals—the repayment arrangements that are acceptable to the client, and 21  
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  - (e) the maximum interest rate that the client is prepared to pay, and 24  
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  - (f) the date by which the finance broker is to have secured the consumer credit for the client, and 26  
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  - (g) a statement, in the form prescribed by the regulations, that the finance broker’s recommendations will be drawn from a range of potential lenders that does not necessarily include all lenders who offer consumer credit of the nature of the consumer credit sought, and 28  
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  - (h) the name and address of the finance broker, and 33
  - (i) if the finance broker is a company—the Australian Company Number (ACN) of the company, and 34  
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  - (j) if the finance broker trades under a business name—the name and address of the principals of the relevant business, and 36  
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- (k) the amount of commission (if any is payable) payable by that client or, if the exact amount of commission is not known, the method of calculating the commission and an estimate of the amount that will be payable if consumer credit is provided on the terms set out in the finance broking contract, and
  - (l) when and how any such commission will be payable, and
  - (m) if a financial or other benefit will be received from a person other than the client by the finance broker if consumer credit is ultimately provided to the client—a statement, in the terms prescribed by the regulations, as to the fact that the finance broker will receive a financial or other benefit and as to any other matters that may be prescribed, and
  - (n) any other matter that may be prescribed by the regulations.
- (4) A finance broker must not demand, receive or accept any commission in respect of finance broking engaged in on behalf of a client if the finance broker has failed to comply with this section in relation to that finance broking.
- Maximum penalty: 50 penalty units.

**Division 3 Commission**

**4D Up-front commission prohibited**

A finance broker must not demand, receive or accept any commission from a client before securing the consumer credit in respect of which the commission is payable.

Maximum penalty: 50 penalty units.

**4E Payment of commission depends on terms of consumer credit being the same as those agreed to**

- (1) A finance broker must not demand, receive or accept any commission from a client in respect of finance broking engaged in on behalf of a client if:
  - (a) the amount of consumer credit secured is not the same as the amount specified in the written finance broking contract, or

- (b) in the case of consumer credit intended to be for a fixed term—the consumer credit secured is for a term that is not the same as the term specified in the contract, or 1  
2  
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- (c) in the case of consumer credit intended to be repaid by periodic repayments—the repayment periods are not the same as those specified in the contract or the amount of each periodic repayment is more than the maximum amount set out in the contract, or 4  
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- (d) in the case of consumer credit not intended to be repaid by periodic repayments—the repayment arrangements are not the same as those set out in the contract, or 9  
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- (e) the consumer credit secured is at a rate of interest that is more than the maximum rate specified in the contract, or 12  
13  
14
- (f) the consumer credit is not secured by the date that is set out in the contract. 15  
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Maximum penalty: 50 penalty units. 17

- (2) In this section, a reference to a finance broking contract includes a reference to a contract that has been varied in writing and signed by both the finance broker and the client. 18  
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**4F Commission must not be greater than that disclosed or estimated in contract** 21  
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A finance broker must not demand, receive or accept from a client in respect of consumer credit obtained pursuant to a finance broking contract with the client: 23  
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- (a) if an amount of commission is specified in the finance broking contract—any commission that is greater than the amount so specified, or 26  
27  
28
- (b) if the exact amount of commission is not specified in the finance broking contract: 29  
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  - (i) any commission that is greater than the amount calculated by the method specified in the contract, or 31  
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- (ii) if the amount calculated by the method specified in the contract would result in an amount of commission greater than the amount estimated in the contract, any commission that is greater than the amount estimated in the contract.

Maximum penalty: 50 penalty units.

**4G Finance broker may charge for costs even if client declines credit**

A finance broker must not demand, receive or accept a commission in respect of finance broking engaged in on behalf of a client who has decided not to enter into a credit contract for the consumer credit that the finance broker has secured unless:

- (a) the consumer credit secured by the finance broker:
  - (i) is of the same amount as that specified in the written finance broking contract with the client, and
  - (ii) is for a term that is the same as any term specified in that contract, and
  - (iii) if the consumer credit is to be repaid in periodic repayments—involves repayment periods that are the same as those specified in the contract and periodic repayments that are no more than the maximum periodic repayment amount specified in the contract, and
  - (iv) if the consumer credit is not to be repaid in periodic repayments—involves repayment arrangements that are the same as those specified in the contract, and
  - (v) is at a rate of interest that is not higher than the rate specified in the contract, and
  - (vi) was secured by the date that is specified in the contract, and
- (b) the finance broking contract was not validly terminated before the finance broker secured the credit, and
- (c) the finance broker and the client agreed in the finance broking contract that commission may be demanded, received or accepted if the client decided not to enter

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into a credit contract for the consumer credit that the  
finance broker has secured in the circumstances  
referred to in paragraphs (a) and (b).

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Maximum penalty: 50 penalty units.

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**Division 4      Records and fees**

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**4H      Finance broker to keep records**

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(1) A finance broker must, before or immediately after entering  
into a transaction in the course of business as a finance broker,  
make, or cause to be made, a record containing full particulars  
of that transaction, including a copy of any relevant finance  
broking contract.

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(2) A finance broker must preserve a record made under  
subsection (1) for a period of at least 7 years after the date of  
the transaction to which the record relates.

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(3) Any record kept at a place of business of a finance broker is,  
unless the contrary is proved, to be presumed to have been  
made by, or with the authority of, the finance broker.

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Maximum penalty: 50 penalty units.

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**4I      Valuation fees, credit application fees and credit  
establishment fees**

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(1) A finance broker must not demand, receive or accept from a  
client:

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(a) any valuation fee, or

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(b) any credit application fee, or

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(c) any credit establishment fee,

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except in accordance with this section.

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Maximum penalty: 50 penalty units.

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(2) A finance broker receives or accepts a valuation fee, a credit  
application fee or a credit establishment fee from a client in  
accordance with this section only if:

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(a) the fee is in the form of a cheque, money order or  
transfer made payable to an approved person and the  
finance broker gives or delivers it to the approved  
person as soon as practicable after receiving it, or

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- (b) in the case of a valuation fee—the finance broker is authorised by the credit provider to instruct the valuer, or 1  
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  - (c) in the case of a credit application fee or credit establishment fee—the finance broker is authorised to act on behalf of the credit provider and will incur the costs of determining the application for consumer credit or the initial administrative costs of providing the credit, or both, or 4  
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  - (d) in the case of a credit application fee or credit establishment fee—the finance broker is also the credit provider. 10  
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- (3) In this section: 13
- approved person* means: 14
- (a) in relation to a valuation fee—the valuer, the credit provider or a person or body authorised by the credit provider to instruct the valuer, or 15  
16  
17
  - (b) in relation to a credit application fee or a credit establishment fee—the credit provider or a person or body who is authorised to act on behalf of the credit provider and who will incur the costs of determining the application for consumer credit, or the initial administrative costs of providing the credit, or both. 18  
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**Division 5 Consumer action** 24

**4J Consumer action where contract breached, unjust conduct or excessive commission** 25  
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- (1) The client of a finance broker under a finance broking contract may apply to the Tribunal for an order that the finance broker: 27  
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  - (a) has not complied with the contract, or 30
  - (b) has engaged in, or is engaging in, unjust conduct in finance broking in relation to that contract, or 31  
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  - (c) has charged an excessive commission in relation to that contract. 33  
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- (2) The Tribunal may, if it considers that the finance broker has not complied with the contract, has engaged in unjust conduct or has charged an excessive commission: 35  
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- (a) order the finance broker to take specified action or refrain from specified action, or 1  
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  - (b) order the finance broker to pay a specified amount to the client, or 3  
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  - (c) order that a specified sum of money is not due or owing by the client to the finance broker, or 5  
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  - (d) make any other order that the Tribunal thinks is necessary or proper for the purposes of this section (not being an order that affects any contract for consumer credit). 7  
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- (3) An application under this section must be made no later than 3 years after the alleged non-compliance, unjust conduct or charging of excessive commission. 11  
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- (4) A person must not fail to comply with an order made by the Tribunal under this section. 14  
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- Maximum penalty: 100 penalty units or imprisonment for 12 months, or both. 16  
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**Division 6 Court may take action 18**

**4K Court action where contract breached, unjust conduct or excessive commission 19  
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- (1) This section applies if proceedings are taken in a court by a finance broker for the recovery of money in respect of a transaction entered into by the finance broker under a finance broking contract and it appears to the court: 21  
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- (a) that the finance broker has not complied with the finance broking contract, or 25  
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  - (b) that the finance broker has engaged in unjust conduct in relation to the finance broking contract, or 27  
28
  - (c) that the commission charged by the finance broker in respect of the transaction is excessive. 29  
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- (2) If this section applies, the court may: 31
- (a) order the finance broker to take specified action or refrain from specified action, or 32  
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  - (b) order the finance broker to pay a specified amount to the client, or 34  
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(c)	order that a specified sum of money is not due or owing by the client to the finance broker, or	1 2
(d)	make any other order that the court thinks is necessary or proper for the purposes of this section (not being an order that affects any contract for consumer credit).	3 4 5
<b>4L</b>	<b>Court may order refund</b>	6
(1)	A court that finds a finance broker guilty of any offence under this Act, may, whether or not it proceeds to conviction, order the finance broker to refund:	7 8 9
(a)	any amount received or accepted by the finance broker in contravention of this Act, and	10 11
(b)	interest payable, at the rate fixed by the court, for the period from the time of the receipt or acceptance of the amount until the time it is refunded.	12 13 14
(2)	The rate fixed by the court under subsection (1) (b) must not exceed the rate prescribed by the regulations.	15 16
<b>[7]</b>	<b>Part 2, heading</b>	17
	Insert “and finance broking” after “credit”.	18
<b>[8]</b>	<b>Schedule 2 Savings and transitional provisions</b>	19
	Insert at the end of clause 1 (1):	20
	<ul style="list-style-type: none"><li><i>Consumer Credit Administration Amendment (Finance Brokers) Act 2003</i></li></ul>	21 22
<b>[9]</b>	<b>Schedule 2, Part 3</b>	23
	Insert after clause 7:	24
<b>Part 3</b>	<b>Provisions consequent on enactment of Consumer Credit Administration Amendment (Finance Brokers) Act 2003</b>	25 26 27
<b>8</b>	<b>Consumer action</b>	28
	An application may be made against a finance broker under section 4J, and may be dealt with by the Tribunal, in respect of one or more transactions even if the transaction or	29 30 31

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transactions concerned was or were entered into before the  
commencement of the section.

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**9 Court action**

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An order may be made against a finance broker under section  
4K, in respect of one or more transactions even if the  
transaction or transactions concerned was or were entered into  
before the commencement of the section.

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**Schedule 2 Amendment of Consumer, Trader and  
Tenancy Tribunal Act 2001**

(Section 4)

**[1] Section 5 Establishment of Consumer, Trader and Tenancy  
Tribunal**

Omit “*Credit (Finance Brokers) Act 1984*” from the note to the section.

**[2] Schedule 1 Divisions of the Tribunal**

Omit clause 1 (b) (iv).

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