

Passed by both Houses



New South Wales

Consumer Credit Administration Amendment (Finance Brokers) Bill 2003

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2003*



New South Wales

Consumer Credit Administration Amendment (Finance Brokers) Bill 2003

Act No , 2003

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.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Consumer Credit Administration Amendment (Finance Brokers) Act 2003*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Consumer Credit Administration Act 1995 No 69

The *Consumer Credit Administration Act 1995* is amended as set out in Schedule 1.

4 Amendment of Consumer, Trader and Tenancy Tribunal Act 2001 No 82

The *Consumer, Trader and Tenancy Tribunal Act 2001* is amended as set out in Schedule 2.

5 Repeal of Credit (Finance Brokers) Act 1984 No 96

The *Credit (Finance Brokers) Act 1984* is repealed.

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.

secured—see subsection (4).

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).

[3] Section 3 (1), definition of “finance broker”

Omit the definition. Insert instead:

finance broker means a person who engages in finance broking.

[4] Section 3 (1), definition of “finance broking”

Omit the definition.

[5] Section 3 (3) and (4)

Insert after section 3 (2):

- (3) For the purposes of this Act, a person *engages in finance broking* 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.
- (4) For the purposes of this Act, consumer credit is *secured* 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.

[6] Part 1A

Insert after section 4:

Part 1A Regulation of finance broking

Division 1 Preliminary

4A Object of Part

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:

- (a) are given adequate information before entering into finance broking contracts, and
- (b) are protected from unfair practices engaged in by finance brokers, and
- (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.

4B Application of Part

- (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 *Consumer Credit (New South Wales) Code*.
- (2) This Part does not apply to or in respect of a finance broker of a class prescribed by the regulations.

Division 2 Finance broking contracts

4C Finance broking contract must be in writing and must be given to client

- (1) A finance broker must not engage in finance broking on behalf of a particular client unless:
 - (a) the finance broker has first entered into a written finance broking contract with the client, and
 - (b) that contract has been signed by the client, and
 - (c) the contract contains the matters required by subsection (3), and
 - (d) a copy of the contract has been given to the client.

Maximum penalty: 50 penalty units.

- (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.
- (3) The matters required by this subsection are:
 - (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
 - (b) if the consumer credit is to be for a fixed term—the term of the consumer credit desired by the client, and
 - (c) if the consumer credit is intended to be repaid at regular intervals—the maximum periodic repayments the client is prepared to make in respect of the consumer credit (including the repayment of any credit application fee, credit establishment fee or other fee), and

- (d) if the consumer credit is not intended to be repaid at regular intervals—the repayment arrangements acceptable to the client (including for the repayment of any credit application fee, credit establishment fee or other fee), and
- (e) the maximum interest rate that will be payable in respect of the consumer credit, and
- (f) the date by which the finance broker is to have secured the consumer credit for the client, and
- (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
- (h) the name and address of the finance broker, and
- (i) if the finance broker is a company—the Australian Company Number (ACN) of the company, and
- (j) if the finance broker trades under a business name—the name and address of the principals of the relevant business, and
- (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.

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- (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
 - (c) in the case of consumer credit intended to be repaid at regular intervals—the periodic repayments exceed the maximum periodic repayments specified in the contract, or
 - (d) in the case of consumer credit not intended to be repaid at regular intervals—the repayment arrangements are more onerous than the repayment arrangements specified in the contract, or
 - (e) the consumer credit is secured at a rate of interest that exceeds the maximum rate specified in the contract, or
 - (f) the consumer credit is not secured by the date that is set out in the contract.

Maximum penalty: 50 penalty units.

- (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.
- (3) A finance broker is not prevented by this section from demanding, receiving or accepting any commission in respect of finance broking merely because of the potential for an increase in the periodic repayments or interest rate, or for repayment arrangements that are more onerous, that arises because of a variation of the interest rate in accordance with the consumer credit contract.

4F Commission must not be greater than that disclosed or estimated in contract

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:

- (a) if an amount of commission is specified in the finance broking contract—any commission that is greater than the amount so specified, or
- (b) if the exact amount of commission is not specified in the finance broking contract:
 - (i) any commission that is greater than the amount calculated by the method specified in the contract, or
 - (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

- (1) 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:

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- (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 intended to be repaid at regular intervals—involves periodic repayments that do not exceed the maximum periodic repayments specified in the contract, and
 - (iv) if the consumer credit is not intended to be repaid at regular intervals—involves repayment arrangements that are not more onerous than the repayment arrangements specified in the contract, and
 - (v) is secured at a rate of interest that does not exceed the maximum 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 into a credit contract for the consumer credit that the finance broker has secured in the circumstances referred to in paragraphs (a) and (b).

Maximum penalty: 50 penalty units.

- (2) A finance broker is not prevented by this section from demanding, receiving or accepting any commission in respect of finance broking merely because of the potential for an increase in the periodic repayments or interest rate, or for repayment arrangements that are more onerous, that may have arisen because of a variation of the interest rate in accordance with the consumer credit contract.

Division 4 Records and fees

4H Finance broker to keep records

- (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.

- (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.
- (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.

Maximum penalty: 50 penalty units.

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

- (1) A finance broker must not demand, receive or accept from a client:
 - (a) any valuation fee, or
 - (b) any credit application fee, or
 - (c) any credit establishment fee,except in accordance with this section.

Maximum penalty: 50 penalty units.

- (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:
 - (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
 - (b) in the case of a valuation fee—the finance broker is authorised by the credit provider to instruct the valuer, or
 - (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

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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.
- (3) In this section:
- approved person* means:
- (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
- (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.

Division 5 Consumer action

4J Consumer action where contract breached, unjust conduct or excessive commission

- (1) The client of a finance broker under a finance broking contract may apply to the Tribunal for an order that the finance broker:
- (a) has not complied with the contract, or
- (b) has engaged in, or is engaging in, unjust conduct in finance broking in relation to that contract, or
- (c) has charged an excessive commission in relation to that contract.
- (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:
- (a) order the finance broker to take specified action or refrain from specified action, or
- (b) order the finance broker to pay a specified amount to the client, or
- (c) order that a specified sum of money is not due or owing by the client to the finance broker, or

- (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).
 - (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.
 - (4) A person must not fail to comply with an order made by the Tribunal under this section.
- Maximum penalty: 100 penalty units or imprisonment for 12 months, or both.

Division 6 Court may take action

4K Court action where contract breached, unjust conduct or excessive commission

- (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:
 - (a) that the finance broker has not complied with the finance broking contract, or
 - (b) that the finance broker has engaged in unjust conduct in relation to the finance broking contract, or
 - (c) that the commission charged by the finance broker in respect of the transaction is excessive.
- (2) If this section applies, the court may:
 - (a) order the finance broker to take specified action or refrain from specified action, or
 - (b) order the finance broker to pay a specified amount to the client, or
 - (c) order that a specified sum of money is not due or owing by the client to the finance broker, or
 - (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).

4L Court may order refund

- (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:
 - (a) any amount received or accepted by the finance broker in contravention of this Act, and
 - (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.
- (2) The rate fixed by the court under subsection (1) (b) must not exceed the rate prescribed by the regulations.

[7] Part 2, heading

Insert “**and finance broking**” after “**credit**”.

[8] Schedule 2 Savings and transitional provisions

Insert at the end of clause 1 (1):

- *Consumer Credit Administration Amendment (Finance Brokers) Act 2003*

[9] Schedule 2, Part 3

Insert after clause 7:

**Part 3 Provisions consequent on enactment of
Consumer Credit Administration
Amendment (Finance Brokers) Act 2003**

8 Consumer action

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

9 Court action

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.

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).