

Client Service Handbook

For Credit Representative of
Connective Credit Services



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Stepping Through a Mortgage Transaction

USER GUIDE:

THIS SECTION OF THE HANDBOOK PROVIDES A CHECKLIST FOR A MORTGAGE BROKING TRANSACTION.

The steps in a typical mortgage broking transaction are summarised below. More information about each step can be found in later sections of this Handbook – as shown in the third column.

Step	Content	More info is in section
Ascertain the Client's Needs	Provide your ACL licensee's Credit Guide and your Credit Guide to the client.	1
	Complete a client profile or fact find to assist you to identify the client's needs.	
Source the Loan	Evaluate the loan products available to identify one or more that are appropriate for the client. Provide a Credit Quote.	2
	Discuss the options with the client and assist the client to select a loan.	
	Verify the information provided by the client to the extent required to satisfy yourself that the loan is "not unsuitable" for the client and the client can afford the loan - in effect, the first stage of the Preliminary Assessment.	
	If LVR > 80%, advise client that the lender is likely to require lender's mortgage insurance.	
Client wants to Proceed	Prepare a Credit Proposal. Have the client sign it. You sign it and give the client a signed copy.	3
Prepare Loan Application	Prepare the Loan Application on the lender's format.	4
	Give the Application to the client with a list of the supporting information and consent forms required by the lender.	
	Ensure the client checks the Application and verifies that all information is correct before the client signs it.	
	Do not sign the Application for the client.	
Receive completed Application	Obtain signed Application and all required consents supporting material from the client.	5
	Check and verify client's identity, using the MFAA AML Standard.	
	Complete and document a Preliminary Assessment that the loan is 'not unsuitable' for the client.	
	Check all supporting material to ensure that it is complete. Sight all originals – be alert for fraud "red flags".	
	Tell the client if lender's mortgage insurance is required.	
	If the loan is for business purposes, have the borrower sign a declaration to this effect (NCC will not apply to the loan).	
	NB: warn the client not to exchange contracts until unconditional loan approval is obtained in writing from the lender.	
Submit the Loan Application	Provide Application and supporting materials to lender.	6
	Delete TFN from any documents you hold after copies are provided to the lender.	

Step	Content	More info is in section
Lender Assessment	Lender conducts credit and other enquiries.	7
	Broker or lender organises a valuation of the security property.	
	Valuer organises to inspect property, then writes and submits report.	
	Valuation received/held.	
Lender Response	Lender provides approval.	8
	Check the Letter of Offer to ensure that the loan approved meets the client's requirements.	
	Give the client details of the loan approved promptly after receiving written confirmation of approval.	
	Conditional approval – Tell the client the conditions on the approval (usually that it will be subject to valuation). Tell the client not to exchange contracts until unconditional approval is obtained.	
	Pre- approval – Tell the client the details of the loan pre-approved, and that it is subject to satisfactory valuation.	
	Unconditional approval – Tell the client of the details of the loan approval.	
	Provide a copy of the lender's Letter of Offer to the client. Ensure that client has full details of the loan.	
Explain any differences between the loan approved and the loan applied for.		
Loan Documents Received from Lender	Check that the loan documents correctly reflect the loan which has been requested / approved.	9
	Do not advise on the terms of the loan. Recommend that client review the loan offer carefully and obtain legal advice if they are uncertain. Diarise this advice and/or confirm it in writing.	
	You may witness execution of the loan documents.	
	Disclose any additional remuneration to the client.	
Settlement	Loan funds are advanced and loan documents are given to lender – Mortgage is registered.	10
Post Settlement	Review the loan file to check that all required documents are on the file – including detailed file notes of all conversations with the client and messages.	11
	Keep the file for a minimum of 7 years.	

The Broking Process

USER GUIDE:

THIS SECTION OF THE HANDBOOK SUMMARISES THE STEPS IN A MORTGAGE BROKING TRANSACTION. MORE INFORMATION ABOUT KEY REQUIREMENTS IS CONTAINED IN THE COMPANION TO THE CLIENT SERVICE HANDBOOK.

1. Ascertain the client's needs

1.1 Initial Discussion

When you first meet with a client, find out what type of loan and services the client requires. Clarify which services you can and cannot provide. Suggest other people to assist the client with services that you cannot provide, if appropriate.

Give the client some preliminary information about who you are and your background and experience. Tell the client what types of loan products you can obtain, the differences between the various types of loan products and which credit providers you deal with. Also explain the process of arranging credit, including the likely time frame and problems that could be encountered.¹

FBAA Members must also tell both clients and credit providers that they are subject to the FBAA Code of Practice and Disputes Resolution Service (as well as make copies of these available and provide copies on request).²

1.2 Provide Credit Guide and Quote

As soon as it becomes apparent that you may assist the client with their loan, provide them a copy of your:

- Credit Guide (if you are a credit representative, also provide your ACL licensee's Credit Guide or a joint Credit Guide, if you have one).
- Once you have a better understanding of the services and assistance required, you should then prepare a Quote and give it to the client. This needs to be given before you provide the client assistance with their loan.

TIP

The Quote must also set out how much you will charge the client if the loan does not proceed.

See the Companion to this Handbook for more information about the required content of Credit Guides and Quotes.

The following additional requirements apply to MFAA and FBAA members:

- MFAA members must also make information about their IDR scheme available to consumers³; and
- FBAA members must tell clients that they are subject to the FBAA Code of Practice and the Disputes Resolution Service, make these available to clients (e.g. on your website or in your office) and provide copies on request.⁴

1.3 OBTAIN A CLIENT PROFILE

To assist you in ensuring that the loan is appropriate and affordable for the client, you will need to collect information about the client's needs, objectives and financial circumstances.

TIP

Using a template "Needs Analysis Form" or "Client Profile" to collect information from the client helps to ensure that important information is not missed.

It will also ensure that you have a record of the information provided by the client in case there is a later dispute

¹ This is required under the FBAA Code of Conduct
² FBAA Code of Conduct

³ Clause 11 MFAA Code of Practice (Effective 09.11.12)
⁴ FBAA Code of Conduct

Privacy – Remember too, that when you first collect personal information from a client, you need to tell them:

- Who you are and how to contact you;
- Why you are collecting the information and to whom you usually disclose it;
- Any law that requires the information to be collected;
- What will happen if they do not provide the information to you (e.g. that the loan you recommend may not be the best available for them);
- That your Privacy Policy contains information about accessing and correcting information and the process for making privacy related complaints;
- Whether you are likely to disclose the information to any overseas recipients and if so, what countries they will be in.

If you allow clients payment terms of more than 7 days and you are likely to disclose information about them to a credit reporting body, you also need to tell them the name and contact details of that body.

See the Companion to the Loan Writer Manual for detailed information about the privacy requirements that apply in this situation.

Reassure them that they can obtain access to their information at any time if they want to check or update it.

If you collect personal information about a person from someone other than the client (which you should only do if it is unreasonable or impracticable to obtain it from the client), you still need to tell the client these things.

TRAP

It's easy to overlook this requirement. Indeed, MFAA's 2007 Mystery Shopping indicated that only 27% of clients reported a discussion of their broker's privacy policy.

2. Source the loan

Having collected the information you need, the next step is to find loans which are appropriate for the client.

2.1 SUITABILITY

Once you have identified one or more loans that you believe meet the client's needs, discuss these with the client. Explain the differences between the features and costs of each loan. Ensure that you cover all aspects of the loans that are relevant to the client.⁵

Help the client to understand the benefits of each loan and also what obligations they will incur under the loan.⁶

TRAP

Do not make assumptions about what product is most appropriate for a client without consulting them directly. Ensure that you are fully familiar with all the features of the loan you feel is most appropriate.

Ensure that the client is comfortable with the loan they have selected and understands all of its features. Do not rush the client, even if they are under time or financial pressures.

Case Study⁷

A broker recommended a loan product that did not have a redraw facility. The clients went ahead with the loan due to time constraints and other financial pressures. They raised their concerns with the broker when they were signing the loan documents, but were assured the problem could be rectified at a later time. This was incorrect.

The broker was required to reimburse the clients the loss they would incur over the first few years of the loan by not having access to a redraw facility and to refund the \$600 application fee.

Discuss with the client whether they feel that they can afford the loan.

⁵ Australian Privacy Principle 6

⁶ For MFAA members, this is required under clause 7 of the MFAA Code of Practice (Effective 09.11.12)

⁷ This is required for FBAA members under the FBAA Code of Conduct

Case study

A consumer who is having short term difficulties in meeting bills should not be offered a loan secured by the equity in the consumer's house as the cost of the loan would not be warranted having regard to the short term nature of the financial difficulty.⁸

If the overall commitments of the client will increase as a result of refinancing, ensure that the client is aware of this and recommend in writing that they seek independent advice about their ability to service the loan.

TIP

If the client's debt servicing ability is borderline, help the client to work through their decision to take out the loan. Suggest that they consider issues such as:

- Their motivation for taking out the loan and, if it is for an investment, making the investment;
- Potential downside scenarios, e.g. they lose their jobs or become ill, an investment property is vacant for a time, or if the investment is in a business, the business revenues decline or it loses a major customer; and
- Their job security and plans for the future, e.g. children.

TIP

If you only represent one or a few credit providers, tell the consumer that they should rely on their own enquiries about the competitiveness and appropriateness of the credit that you propose.

Keep a file note of the loan(s) that you have found for the client, the reason these were considered, the loan selected by the client and why the client selected that loan. Also keep any background notes and calculations, so that you can later show that you presented loans which you believed to be appropriate and that the client could afford.

2.1.1. Preliminary Assessment

Do not suggest, negotiate or arrange a consumer loan (or an increase in a credit limit) unless you genuinely and reasonably believe it is appropriate for the needs of the borrower and that the borrower can afford it.⁹

TIP

Tell the client if they are eligible for government subsidies or other assistance.¹⁰

Undertake a Preliminary Assessment of whether the contract will be unsuitable for the borrower before you suggest the loan or increase. This requires you to¹¹:

- Make reasonable enquiries about the borrower's requirements and objectives in relation to the credit contract and their financial situation; and
- Take reasonable steps to verify the borrower's financial situation.

TIP

A loan will be unsuitable if:

- The client will be unable to comply with the financial obligations under the loan or will only be able to comply with substantial hardship e.g. by selling their principal place of residence; or
- It does not meet the client's requirement or objectives.

A small amount credit contract will also be unsuitable (unless the contrary is proven) if the borrower is already in default under another small amount credit contract or the borrower has already taken out 2 or more other small amount credit contracts in the preceding 90 days.¹²

Keep written notes and records of your research, enquiries and discussions with the client, particularly of any variations subsequently sought by the client or imposed by the lender.¹³

See the section on Preliminary Assessment in the Companion to this Handbook for more information about what enquiries must be made, the extent to which they must be verified and when a loan will be unsuitable.

⁸ Credit Ombudsman Service Limited's website at www.cosl.com.au

⁹ s116 National Consumer Credit Protection Act 2009 (Cth), clause 7 MFAA Code of Practice (Effective 09.11.12)

¹⁰ For FBAA members, this is required under the FBAA Code of Conduct

¹¹ s117 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units applies to a failure to do so (one penalty unit is equal to \$170 – s4AA Crimes Act 1914 (Cth)).

¹² s118(3) and s123(3) National Consumer Credit Protection Act 2009 (Cth)

¹³ For FBAA members, this is required under the FBAA Code of Conduct

2.1.2. Incomplete Or Inaccurate Information

If you suspect that the information provided by the client may be incomplete or inaccurate, caution the client that the lenders canvassed and the recommended loan(s) was (were) based on the information that the client provided to you.

Tell the client that if the information was incomplete or inaccurate, before entering into the loan, they should consider whether the loan is appropriate for them in their financial and personal circumstances. Recommend that they obtain independent advice.

TIP

It is a good idea to confirm all of this information to the client in writing so that the client also has a record – and has an early opportunity to correct any incorrect information.

TRAP - Churning

Churning occurs when a loan is refinanced with a different lender and the borrower is no better off as a result of the refinance, but the broker receives a commission, payment or other incentive from the new lender. Mortgage and finance brokers must not engage in churning.¹⁴

Also see the section on Brokers' Obligations to Clients in the Companion to this Handbook.

2.1.3. What To Do When All Contracts Are Unsuitable

If after making reasonable enquiries, you believe that all of the credit contracts that you can arrange are unsuitable for the consumer, do not suggest any of these credit contracts to the consumer and do not assist the consumer to apply for them.¹⁵

It is better to walk away from the transaction than put a client into a loan they cannot afford and you will avoid a complaint about your behaviour in presenting inappropriate finance.

Do not suggest a credit contract or assist a client to enter into a credit contract or increase their credit limit which you have assessed to be unsuitable.¹⁶ If you have assessed the client's existing credit contract as unsuitable, but you reasonably believe that there is no other credit contract that is not unsuitable for the client, then you can suggest that consumer remain in that contract. However you must tell them about the procedures for consumers in hardship.¹⁷

2.2 Other "Financial" Services

2.2.1. Advising or Arranging Financial Products

Clients may sometimes ask you about life or general insurance, deposit accounts or for investment advice at the time of applying for a home loan.

These are "financial products". Do not provide any services in relation to these products unless you either hold an Australian Financial Services (AFS) Licence (also known as an AFSL) or you are an Authorised Representative of an AFS licensee. You cannot even make a recommendation or express an opinion about these types of products that could influence a client to purchase them (or could reasonably be regarded as doing so).

TIP

Remember that the overall impression and circumstances are just as important as what is actually said. If the client has the impression that what you say is a recommendation or it could reasonably be regarded as influencing them to buy a financial product, you will have provided financial advice, whether you intended to do so or not.¹⁸

TRAP

Clients often ask about consumer credit insurance when arranging a loan. This is a financial product and you cannot provide any advice about it unless you are licensed or authorised under the AFS legislation.

However, you can provide factual information to clients about financial products – this is not a financial service. As long as the statement can be supported by fact, it is factual information.

Use the content of any brochures you have when giving factual information or answering questions about a financial product. This will enable you to give accurate information. It is a good idea to tell the client that you are not giving them advice and that they will need to decide for themselves if the product suits their needs.

¹⁴ See also Clause 7 MFAA Code of Practice (Effective 09.11.13)

¹⁵ s123 National Consumer Credit Protection Act 2009 (Cth) – It is an offence to suggest or assist a client to enter into or increase their credit limit under an unsuitable credit contract, this attracts a civil penalty of 2000 penalty units and/or a criminal penalty of 100 penalty units or 2 years imprisonment (one penalty unit is equal to \$170 – s4AA Crimes Act 1914 (Cth)).

¹⁶ The procedures are set out in sections 72 and 94 of the National Credit Code. This will be a defence to a criminal prosecution (s124(7) National Consumer Credit Protection Act 2009 (Cth))
¹⁷ s766A-766C Corporations Act 2001 (Cth)

Case Study: Advice to Factual Information

Do not say – “We recommend that our clients take out consumer credit insurance in case they become sick or disabled and are unable to continue to work”. This is advice.

You may say – “Consumer credit insurance provides cover for your repayments if you become sick or disabled and are unable to continue to work. You might want to consider whether you need it.” This is factual information.

If you want to do more than this, you may need to be appointed as a distributor or an authorised representative of an AFS licensee.

More information about this is contained in the Credit Services Management Manual.

2.2.2. Referrals

You can refer a client to a financial services adviser – but there are limits on what you can say and do. You may only:

- Tell the person what services the adviser can provide; and
- Provide the adviser’s contact details.¹⁸

If you receive any remuneration for the referral, you must tell the client what remuneration you will receive at the same time and in the same way as you make the referral, i.e. if it is oral, then tell them orally, if it is in writing, disclose the remuneration in writing.¹⁹

3. Client Wants to Proceed

3.1 Credit Proposal

When you suggest that the client apply for a loan or an increase in a loan with a particular lender, or even suggest that the client remain in their existing loan, provide the client with a Credit Proposal for your services.²⁰

The Credit Proposal must contain the following information in relation to the credit contract:

- The total fees or charges that you will charge and how they are worked out;
- An estimate of any commission you or your credit representatives will receive and how it is worked out including any trail commissions and volume bonuses;
- An estimate of the application or other fees charged by the lender or any other person and how they are worked out;
- Any referral fees that you pay to others to introduce the client and when it may be paid; and
- If the credit is to be used to pay for any of these amounts, an estimate of the amount that will be available after these payments (other than commission) are made.

See the section on Credit Proposals in the Companion to this Handbook for more information about the required content of Credit Proposals.

4. Prepare the Loan Application

The next step is to prepare the Loan Application in the format required by the lender. Give the Application Form to the client with a list of all the supporting documents and consent forms that the lender requires.

Tell the client about all information and documents that the credit provider, their solicitor or valuer may need to obtain approval, prepare the loan documentation – including the certificate of title or ownership and evidence of insurance.²¹

You may assist the client to complete the Loan Application, but it is essential that, before the client signs the Application, you go through it carefully with the client and ask the client to confirm that all the information is correct.

TRAP

Never ask the client to sign an incomplete Loan Application. Never sign an Application for the client.

While you are preparing and submitting the Loan Application, keep the client informed about all relevant information that you know about the loan – at least to the extent that that information applies to the client.

¹⁸ s916A(3) Corporations Act 2001 (Cth)
¹⁹ Reg7.6.01(1)(e) Corporations Regulations 2001 (Cth)

²⁰ s121 National Consumer Credit Protection Act 2009 (Cth)
²¹ This is a specific requirement of the FBAA Code of Conduct

5. Receive Completed Application

Once the Application has been signed by the client and the client has provided all the consents and supporting material that the lender requires, check the supporting material to ensure that it is complete. Submitting an incomplete application can cause significant delays and upset for the borrower.

Tell the client not to exchange contracts until unconditional loan approval has been received from the lender.

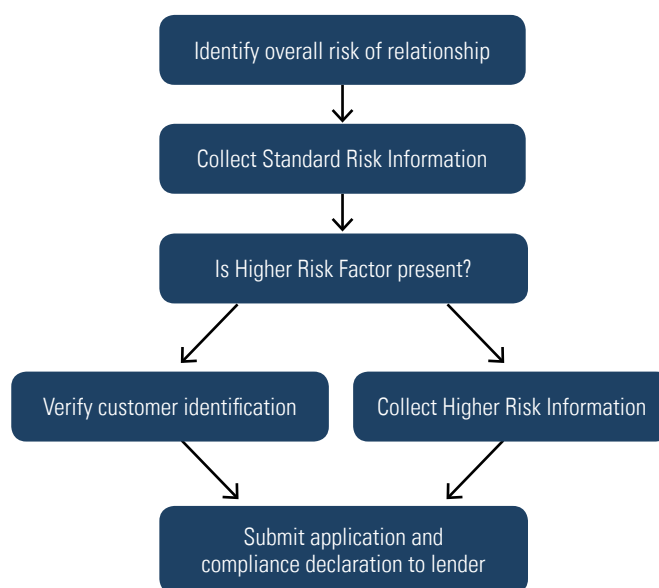
TIP

Ensure the client understands the difference between pre-approval and unconditional approval.

5.1 Identity Checks

Check the borrower's identity in accordance with the MFAA AML Standard.²²

The following diagram illustrates the process for checking and verifying borrower identity in accordance with that standard.



5.1.1. Identify the Overall Risk of the Relationship

Assess the Jurisdiction and Product Risks according to the criteria set out below.

Jurisdiction (Location) Risk – Some geographical locations have different levels of money laundering and terrorism financing risk. For example, countries with significant levels of corruption, low levels of regulation, sanctions or embargoes or have been associated with drug trafficking are considered as Higher Risk jurisdictions.

The MFAA AML Standard classifies Australia and New Zealand as low or Standard Risk and all other countries as Higher Risk. This standard has been developed by the MFAA in collaboration with credit providers. The procedures in the Handbook embody this standard.

Use the following table to assess jurisdiction risk:

Criteria	Standard Risk	Higher Risk
Location of the client	Client is in Australia or NZ	Client lives outside Australia or NZ
Location of security	Security is in Australia or NZ	Security is outside Australia or NZ
Location of the asset to be financed	Asset is in Australia or NZ	Asset is in a country other than Australia or NZ
Location of funds to repay the loan	Loan will be repaid from an Australian or NZ source	Loan will be repaid from an offshore source

²² This has been developed by the MFAA in consultation with credit providers for the mortgage and finance industry to enable compliance with the Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth).

Product Risk – Some products, because of certain features and benefits, may make it easier and therefore more attractive for money launderers. The table below shows the level or risk associated with common lending products according to the MFAA AML Standard.

Level of Risk	Product
Standard Risk	<ul style="list-style-type: none"> • Standard Variable Rate Residential Mortgage • Standard Fixed Rate Residential Mortgage • Equity Finance / Shared Appreciation Mortgage • Novated lease (vehicle) • Business Loan • Offset Residential Mortgage • Hire Purchase • Partnership commercial loan • Commercial Overdraft • Commercial Line of Credit • Equity Release Mortgage • Standard Capped/Floored/Belted Residential Mortgage • Residential Mortgage with tied credit card facility • Bank Guarantee • Construction Loan • Chattel mortgage • Novated lease (property) • Reverse Novation • Lo-doc Residential Mortgage*
Higher Risk	<ul style="list-style-type: none"> • Letter of Credit • Residential line of credit • Pre-shipment finance

* Lenders may monitor the activity associated with lo-doc residential mortgages as they are regarded as being on the cusp between Standard Risk and Higher Risk.

The following characteristics may indicate that a client is Higher Risk; they should be taken into account when assessing risk.

Characteristic	Reason
Loan repayments from third parties	Facilitates layering
Increased anonymity for customer	Facilitates multiple laundering events
Value churn through product	Facilitates layering
Early repayment with no/minimal penalties	Allows rapid movement of funds
Rapid access to funds at customer request	Allows rapid movement of funds
Cross border asset flows (as inherent part of product)	Facilitates complex asset trails

Identify whether the risk is either a Standard Risk or a Higher Risk having regard to the jurisdiction (or location) of the client and the type of product using the matrix below.

Risk Matrix	Standard Product Risk	Higher Product Risk
Standard Jurisdiction Risk	Standard	Higher
Higher Jurisdiction Risk	Higher	Higher

TIP

If you have previously dealt with clients, you may be in a position to identify any suspicious (or inconsistent) client behaviour, i.e. you may be able to identify when a client’s behaviour is inconsistent. Even if your initial risk assessment of a client identifies them as a “Standard Risk,” be alert for, and act upon, any warning signs of suspicious behaviour.

5.1.2. Collect and Verify Information

Lenders are required to identify and verify their clients so that they are reasonably satisfied that the client is the person that he or she claims to be.

Identification means collecting material from the client, (or other sources) that provides information about the identity of that client. It can be provided in an application form, via face to face conversation, on-line data submission or otherwise.

Verification means checking and confirming the information provided by the client from independent and reliable sources.

Because the client is your contact, you will need to collect and verify information from the client for the lender.

Depending on the information collected, you may need to collect additional information for Higher Risk clients. Lenders may also ask you to request additional information on certain clients, e.g. if the lender deems the client as Higher Risk or has different requirements for client verification and identification from the MFAA AML Standard. Lenders may also need to contact the client directly.

The information that you need to collect depends on the type of client and the level of risk. The tables in the Appendix to this Handbook (which are hyperlinked below) set out what information you must collect and verify for Standard and Higher Risk clients of the following types. Use them as your checklist:

- Individual or Sole Trader;
- Listed Public Companies;
- Private Companies;
- Trusts;
- Partnerships and Incorporated Businesses;
- Associations (Incorporated and Unincorporated);
- Registered Cooperatives; and
- Public Sector Bodies, Governments, State Owned Companies and Supranationals.

Documentation – Follow these rules when collecting documentation:

Issue	Rule
Current	All documents must be current (except Australian passports, which may have expired up to 24 months ago).
Originals	<ul style="list-style-type: none"> • Where possible, sight original documents; certified copies are permitted where this is impossible. • Confirm whether originals or certified copies were provided – failure to produce an original might trigger suspicion. • Provide any certified copies to the lender so that they can trace the certifier. • Include reference numbers, dates of issue, types of documents, issuing organisations and dates of expiry of documentation within applications (lenders who also require certified copies will make this clear on their application forms).
Translations	Documents in a language that you do not understand must be accompanied by an English translation prepared by an accredited translator.
No photographic documents	<p>If clients do not have photographic documents, collect and verify one of the following in addition to the Standard Risk information:</p> <ul style="list-style-type: none"> • Collect a birth certificate or birth extract issued by a State or Territory and verify that document to the date of birth that you collected in the Standard Risk Information; • Collect a birth certificate issued by a foreign government, the United Nations or an agency of the United Nations that should be accompanied by an English translation prepared by an accredited translator where necessary; and • Collect a pension card issued by Centrelink that entitles the person in whose name the card is issued to financial benefits and verify that information to the names that you collected in the Standard Risk information.
Certified copies	<p>Certified copies are copies which have been compared with the original and endorsed as a true copy by one of the following accepted certifiers:</p> <ul style="list-style-type: none"> • Judge of a court; • Justice of the peace; • Solicitor; • Police officer; • Permanent employee of Australia Post with 2 or more years of continuous service; • Chartered accountant, CPA or member of the National Institute of Accountants with 2 or more years of continuous membership; and • An officer with, or representative of, a holder of an AFS Licence, with 2 or more continuous years of service with one or more ACL licensees.

5.1.3. Red Flags

Look for the following “red flags” to assist with your evaluation of the money laundering / terrorism financing risk and to identify suspicious transactions:

- An application from a client in a distant place where a comparable service could be provided “closer to home”;
- Any lack of information, reluctance to provide normal information, provision of minimal or fictitious information or information that is difficult to verify, or a delay in the provision of information that does not allow verification to be completed;
- An application for a loan that exceeds the client’s apparent means;
- Any transaction involving an undisclosed party including:
 - a request for a transfer of a ‘benefit’ to an apparently unrelated third party; or
 - attempts to use a third party payment to purchase a product or service;
- Lack of apparent concern for the performance of a product – and an interest in early cancellation;
- An attempt to use cash to complete a transaction which would normally be handled by other forms of payment; and
- The way in which funds are to be paid on settlement. If money is not paid in accordance with the stated purpose, the loan might be unsuitable, or even fraudulent²³.

The best question to ask is: “If I was in the client’s shoes would I be acting in the same way?” If not, ask yourself, “Why?”

5.1.4. Suspicious Matter Reporting

If you have reasonable grounds to suspect that the customer or activity may be related to money laundering or terrorism financing or if you suspect that the person, or agent of the person, is not who he or she claims to be, consider making a Suspicious Matter Report to the lender.²⁴

See the Appendix to this Handbook (on page 42) for what information to collect and report when reporting a Suspicious Matter.

The lender is responsible for verifying identification information and investigating any Suspicious Matter before forwarding any reports to AUSTRAC.

5.1.5. Tipping off

After submitting a Suspicious Matter Report, do not give any information that could indicate that you suspect money laundering or counter terrorism financing to anyone other than the lender and AUSTRAC. Talking to the borrower/client, other brokers, the MFAA or others about your suspicions is a breach of the law.

Similarly, if the lender verifies the client’s identification and rejects the application and you suspect that the lender has reported a Suspicious Matter to AUSTRAC, do not tell the client. Instead, refer the client to the lender.²⁵

5.2 Fraud

Many other types of fraud are commonly associated with mortgage transactions, including misrepresentation of financial, employment or identity information, false valuation or intentional default.²⁶

Any of the participants can be involved in fraud - from the borrower to the originator, broker, valuer, accountant, legal adviser or lender.

Fraud can have a significant impact on your business – there can be damage to personal and brand reputation, which can limit opportunities for new business and damage existing business relationships. It can also result in the loss of upfront and trailing commissions as well as significant legal costs if you are caught up in civil or criminal action.²⁷

Lenders’ Mortgage Insurance does not cover losses suffered as a result of a fraud by the lender or anyone acting on behalf of the lender in the origination chain. Lenders are therefore likely to seek to recover the losses from anyone who has been involved in the fraud.

Client identification and verification will assist you to detect fraud, but there are other “red flags” that should alert you. Fraud detection is part of your role – the lender relies on you because they do not have direct contact with the client or the opportunity to see original documents.

If you are assisting a customer with a home loan application, the mortgagee may have stricter identification verification requirements depending on the State in which they operate (or a secured property is situated).²⁸

²³ Mortgage Industry ‘All in One Guide’ 18 April 2011, Gadens Lawyers

²⁴ You can register for access to AUSTRAC Online in order to submit suspicious matter reports electronically. Paper forms can also be obtained by calling the AUSTRAC Help Desk on 1300 021 037.

²⁵ s123 Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) – the offence of tipping off attracts a criminal penalty of up to 2 years imprisonment and/or a fine of up to \$13,000.

²⁶ Genworth Financial Spotlight Series issue 2 – Managing Fraud in the Mortgage Market

²⁷ Genworth Financial Spotlight Series issue 2 – Managing Fraud in the Mortgage Market

²⁸ Queensland, New South Wales, Western Australia and South Australia have introduced legislation specifically targeting identity fraud in mortgage transactions.

Here are some do's and don'ts for brokers when reviewing applications:

DO ²⁹	DON'T
<ul style="list-style-type: none"> • Be thorough and take time to complete the identification process. • Verify employment details against all available documentation (payslips, account statements, tax information). • Contact the employer direct. • Ensure that all documents that the client has filled out are fully completed. • Check that the Certificate of Title is not fraudulent. • Be alert for signs that the borrower is not bona fide, e.g. they won't attend your office, or the solicitor's, to sign documents. • Check the transaction carefully if there is a power of attorney or the title is unencumbered. • Check salary deposit information and bank account details. • Pick up the phone. 	<ul style="list-style-type: none"> • Let the client rush the identification process – be suspicious and question the process. • Agree not to call the employer to verify the client's occupation. • Start an application process that the customer says will be completed at a later date. • Tell the client not to get independent legal advice. • Ignore alterations in documents and signatures that are different between documents or look traced. • Accept a postal address that is other than a GPO Box. • accept a mobile phone number. Insist that the client gives you a land line for work or home. Check it.

Here are some red flags indicating potential fraud:³⁰

<p>Mode of purchase</p> <ul style="list-style-type: none"> • Property being purchased directly, not through an agent. <p>Source of funds</p> <ul style="list-style-type: none"> • Excessive funds to complete coming from a non-repayable gift. <p>Documentation</p> <ul style="list-style-type: none"> • No ABN on pay slips. • Anomalies in the documents, e.g. inconsistent information, different font types or spelling errors on bank statements or other official documents, indicating that the document has been altered. • Different handwriting on the application. • Rounded numbers. • Unknown payees on the disbursement list. • Illegible photocopies of identification documents. • Supporting documents that are of little or no value. • Unsubstantiated high rental returns. • Value of net assets is high compared to applicant's age and living conditions. • No previous employer or address on loan application. 	<p>Assets</p> <ul style="list-style-type: none"> • Salary inconsistent with the position / job. • Unsubstantiated large salaries. • High amount of credit card debt, but substantial savings claimed. • Whole of weekly salary is deposited on bank statement with minimal withdrawals for living expenses. • Assets appear over inflated and/or liabilities understated. <p>Enquiries</p> <ul style="list-style-type: none"> • Minimal credit record entries for a mature person. • White or yellow pages search does not find the person or entity. • ATO records show the business is not registered for GST, but the business income is greater than \$50,000. • Friends or associates vouching for applicant.
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Case Study

A broker who did not insist on sighting original documents or make any other enquiries to guard against fraud, seeing herself only as a conduit for information to the client, had her accreditation cancelled and was found guilty of misconduct by the MFAA Disciplinary Tribunal.

TRAP

If a client has not been declaring all their income for tax purposes, they may be in breach of the Tax Act. As a reporting entity under the AML-CTF laws, the lender may be required to report this to AUSTRAC. Warn any client that you suspect of under declaring their income of this risk.

29. First Title Mortgage Fraud Alert
30. Genworth Financial – Red Flag Fraud Checklist

5.3 Insurance

5.3.1. Lenders Mortgage Insurance (LMI)

Usually, where the loan to valuation ratio (LVR) is less than 80%, the lender will require lender's mortgage insurance to be obtained as a condition of granting a loan. This insurance protects the lender if the borrower fails to repay the loan by paying any shortfall between the amount owed under the mortgage and the amount for which the property can be sold.

A one-off premium is usually paid at the time of settlement. Advise the client that the cost of the lender's mortgage insurance will either be added to the principal loan amount or is required to be paid up front by the client (at the discretion of the lender). If it is to be added to the principal, tell the client what effect that this will have on the loan term or repayments.

TRAP

Remember to always tell clients that lenders mortgage insurance only protects the lender. It does not protect the borrower. If clients want to be covered if they are unable to meet their mortgage instalments due to unforeseen circumstance such as unemployment, illness or death, then suggest that they consider talking to someone about mortgage protection insurance.

DO NOT give advice about mortgage protection insurance – this would be a financial service.

5.3.2. Other Insurance

Credit providers can also require borrowers to take out or pay the cost of any compulsory insurance, lender's mortgage insurance or insurance over mortgaged property (i.e. home and contents insurance).

Credit providers cannot require borrowers to take out any other type of insurance; if they do so, the borrower can recover the premium from the credit provider.³¹

5.4 Valuations³²

If the lender asks you to obtain a valuation, either instruct the valuer nominated by the client or credit provider or select an independent licensed valuer. Take reasonable steps to ensure that the valuer has no financial or other interest in the property to be valued or the loan.

Provide the valuer with all information that they reasonably need to be able to value the property or security.

Instruct the valuer that the valuation is to be carried out for the purpose of secured lending and require the valuer to extend liability for the report to the client and the credit provider so that both may rely on it.

TRAP

Do not accept any financial or other benefit as a result of instructing the valuer. It is misconduct for a mortgage broker to have a business relationship with a valuer – other than as instructing the valuer as agent for the client and/or credit provider.

5.5 Investment or Business Loans

If the loan is for investment or business purposes, the borrower will need to sign and date a standard declaration to this effect, and this will confirm that the National Credit Code will not apply. Credit will only be presumed not to be provided for Code purposes if the debtor does this before entering into the credit contract.³³

The required form is:³⁴

I/We declare that the credit to be provided to me/us by the credit provider is to be applied wholly or predominantly for:

- Business purposes; or
- Investment purposes other than investment in residential property.

IMPORTANT

You should only sign this declaration if this loan is wholly or predominantly for:

- Business purposes; or
- Investment purposes other than investment in residential property.

By signing this declaration you may lose your protection under the National Credit Code.

³¹ s143 National Credit Code

³² This guidance is derived from the FBAA Code of Conduct

³³ s13(2) National Credit Code

³⁴ Reg 68 National Consumer Credit Protection Regulations 2010 (Cth)

The declaration must be signed by each person who makes the declaration and be dated either on the date on which it is signed or the date it is received by the lender.

TRAP

Do not allow the borrower to sign this declaration if you know or have reason to believe that the credit is wholly or predominantly for personal, domestic or household purposes. If this is the case, the declaration will not be effective.³⁵ It can also trigger regulatory action against you as the broker.

TRAP

As this declaration is not effective unless it is substantially in the above form, ensure that you only use a declaration in this form.

6. Submit The Loan Application

Be careful not to submit too many loan applications for clients as this can adversely affect the client's credit record. Tell the client about this and do what you can to avoid unnecessary notations on the client's credit record.³⁶

Wherever possible, submit applications for credit to the lender within five business days (but in any case promptly) after receipt of a completed application, together with all information the lender needs in order to decide whether to grant the loan.³⁷ This includes any Privacy and disclosure documents required by the lender.

Tell the credit provider about:³⁸

- Any extenuating circumstances affecting the client's ability to meet their obligations under the proposed loan;
- All available information relating to the proposed security to assist in correctly identifying the property or goods.

Delete or black out the tax file number from any documents that you are holding after they have been submitted to the lender.

7. Lender Assessment

Depending upon the complexity of the application, the loan approval process (from the initial meeting to a final approval) can take anything from a few days to a couple of weeks. Larger loans and more complex situations can take longer. Simpler scenarios can be much faster.

If a conditional approval is requested, the lender will assess the application and provide it quite quickly (often within 24 hours, if there are no issues or concerns).

The lender will make a number of enquiries before providing unconditional approval, some of which are described below.

7.1 Valuation

The lender will arrange a valuation of the security property, or may ask you to do so. The valuer will usually need to inspect the property and will also undertake various searches and research recent sale prices of similar properties.

Generally a valuation report can be obtained within 4-5 days of request.

7.2 Credit Reports

Lenders will often obtain a credit report from a credit reporting agency to check on the client's credit history, as this will affect their decision on the capacity of the client to service a loan. In some circumstances you may be requested to obtain the report.

As they contain such sensitive information, the activities of credit reporting agencies are heavily regulated.³⁹ It is important for brokers to understand the limits on what they can and cannot do, so that you can assist your client to protect their credit reputation and maximise the likelihood of obtaining a loan.

The Companion to this Handbook contains more information about the content of credit reports, who may apply for them, how they may be used and borrowers' rights to access their credit report.

³⁵ s13(3) National Credit Code. This is a strict liability offence and carries a criminal penalty of 100 penalty units or 2 years imprisonment (one penalty unit is equal to \$170 – s4AA Crimes Act 1914 (Cth)).

³⁶ For FBAA members this is required by the FBAA Code of Conduct

³⁷ For MFAA Members this is required by Clause 7.5 MFAA Code of Practice (Effective 09.11.12). For FBAA members, this is required by the FBAA Code of Conduct.

³⁸ For FBAA members, this is required by the FBAA Code of Conduct

8. Lender Response

8.1 Types of Approval

There are three main types of lender approval:

Type of Approval	Implications	What to tell the Borrower
Pre-qualified	<p>The borrower's income, employment history and available deposit qualify them as an approvable borrower. However they still need to satisfy the lender's consideration and approval of an application, credit check and valuation.</p> <p>This only tells the borrower that they can begin to look at suitable purchase options.</p>	"You are likely to be able to obtain a loan. Do not exchange contracts until you obtain unconditional approval."
Pre-approved	<p>The lender has reviewed the application, undertaken credit checks and given an in principle approval to lend a specified amount. This will usually be subject to valuation, the availability of mortgage insurance and any missing documentation.</p> <p>This type of approval is not binding on the credit provider. However it enables the borrower to commence searching for a property within their price range.</p>	"You have pre-approval of a loan of \$amount. Do not exchange contracts until you obtain unconditional approval."
Unconditional	All the lender's requirements are satisfied and the lender may commit to purchase the property.	"Your loan has been approved and you may exchange contracts."

TIP

Always tell the client not to exchange contracts until they have an unconditional loan approval.

Case Study

A broker assured a consumer that he would be able to obtain a loan. He later told the consumer that the application had been approved, that he would be signing documents within the week and could settle shortly afterwards.

A week later the broker asked the consumer to provide more documents. A number of times, he falsely told the consumer that the loan had been approved. Eventually preliminary approval was granted for less than the amount required. The consumer withdrew his loan application.

The broker sent the client an invoice for broker fees, about which the client, not surprisingly, complained to COSL.

COSL found that the broker had provided confusing and inconsistent information to the client and had given little or no advice about what issues needed to be resolved or the reasons for the delay in obtaining approval.

COSL commented that because many home finance applicants have limited understanding of the loan process, brokers have an obligation to provide adequate information about the loan application and its progress.

The brokerage was not entitled to recover its fees.

8.2 Approval Process

Keep the client informed about any delays in the lender's consideration of the application or deferral pending the supply of further information.⁴⁰

Promptly tell the lender if the client withdraws their application during the approval process.

If the lender asks for more information to assist it to consider the application, (e.g. about the clients identity, personal circumstances, business, credit history or financial position) take reasonable steps to obtain and submit that information promptly. Tell the lender if there will be any delay in the provision of the information.⁴¹

Tell the client about the outcome of the loan application. Do this promptly after the lender tells you in writing.⁴²

TRAP

Do not tell the client that a loan has been approved until you receive final written confirmation from the credit provider.

⁴⁰ For MFAA members, this is required under clause 7.6 of the MFAA Code of Practice (Effective 09.11.12). For FBAA members this is required under the FBAA Code of Conduct – Responsibilities of the Finance Broker to the Client.

⁴¹ FBAA Code of Conduct

⁴² MFAA members must do this within 5 business day (but in any case promptly) of the decision being notified to them Clause 8 MFAA Code of Practice (Effective 09.11.12). See also FBAA Code of Conduct.

Case Study

A broker who told a borrower that a loan had been approved (when it had not) was found liable for penalty interest charged by the vendor when a sale fell through due to the lack of finance.⁴³

Once unconditional approval is obtained, ensure that the client is provided with full details of the loan that has been approved. Provide the following information to the client:⁴⁴

- Amount of loan;
- Term of loan;
- Purpose of loan;
- Full name and address of all borrowers and guarantors;
- Amount of the loan that is to be used to repay existing loans and the transaction costs that apply to that repayment;
- The security to be provided;
- Any existing mortgage that will need to be discharged and any charge of encumbrance over the proposed security that will be necessary to effect settlement.
- If a second mortgage is required, the process for this, in particular the need to obtain the prior consent of the first mortgagee or chargee in a timely manner.
- Date by which finance is to be obtained;
- Interest rate and whether the rate may increase;
- Default interest rate and any other penalty for late payment or non-payment;
- Terms of the drawdown, redraw and repayment of principal and interest;
- Lender's fees and charges (showing your fees separately);
- Rights of early repayment including any exit or deferred establishment fees;
- Any insurance requirements imposed by the lender; and
- If not previously disclosed, any fees or other amounts that the broker or any associate will charge to the client and the manner in which these are to be paid (e.g. upfront or drawn down from the proceeds of the loan). If the amount is unknown, you must disclose the method of calculation of the amount(s).

Provide the client with copies of any financial approval correspondence, indicative offers of finance, loan contracts or security documentation as required by the lender.

TIP

It is quite acceptable to provide this information by referring to (or providing copies of) other documents, e.g. the Finance Broking Contract or the credit provider's Loan Offer (which will normally contain most of this information).

8.3 Declined Loans

If a loan is declined wholly or partly as a result of information in the client's credit report, the credit provider must tell the client so in writing, provide the client with the name and address of the credit reporting agency and tell the client that they have the right to obtain access to the credit reporting agency's file.⁴⁵ Similarly, the credit provider must tell the applicant if an application is declined as a result of a guarantor's adverse credit report.

If this information is provided to you, pass it on to the client promptly.⁴⁶ Help the client to check their credit information – if it is incorrect, it may be possible to re-submit the loan application.

See the Companion to this Handbook for more details on Credit Information.

Refunds – If the loan is declined, lenders must refund any amount due to the client promptly. Wherever for residential loans this should occur within 5 business days (but in any case promptly) of the decision to decline the credit application.⁴⁷

⁴³ COSL website

⁴⁴ MFAA Code of Practice (Effective 09.11.12), FBAA Code of Conduct

⁴⁵ s20R Privacy Act 1988 (Cth) as amended by the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)

⁴⁶ For MFAA members, this is required under clause 8 of the MFAA Code of Practice (Effective 09.11.12)

8.3.1. Variations to the Loan

If you have been unable to negotiate the loan that the client was seeking, explain the differences and what they mean to the borrower and offer to confirm this in writing.

Ask the client to confirm that they want to proceed. Keep file notes of the client's reaction and subsequent instruction.⁴⁸

TIP

Always warn borrowers to check that the terms of the loan are in accordance with their requirements and that if they are not, they should inform you immediately. You should seek this in writing.

If the client asks for a variation to the loan terms, record their instructions in writing and promptly seek the credit provider's consent.⁴⁹

9. Client Does Not Proceed with Loan

If a client decides not proceed with an approved loan that you have negotiated for them, tell the lender promptly that the application is withdrawn.⁵⁰

You will understandably want to be compensated for your time and effort.

Only charge the client the amount that you have specified in your Credit Quote.⁵¹

The Companion to this Handbook contains more information about the content of your credit quote and the information that needs to be provided about your fees and charges.

10. Loan Documents Received from Lender

10.1 Explaining and Witnessing Loan Documents

Mortgage and finance brokers should not take on the responsibility of explaining loan documentation such as credit contracts, mortgages and guarantees to clients. This is a technical task which is best left to lawyers.

Most mortgage clients (and some finance clients) are represented by a solicitor or licensed conveyancer and they will explain the documents to the client.

However, if you receive the documents, check their accuracy to ensure they are in accordance with the client's requirements.⁵²

47 FBAA Code of Conduct, MFAA Code of Practice (Effective 09.11.12)

48 FBAA Code of Conduct

49 FBAA Code of Conduct

50 s114(4) National Consumer Credit Protection Act 2009 (Cth)

51 For FBAA members, this is required by the FBAA Code of Conduct

52 For FBAA members, this is required by the FBAA Code of Conduct

11. Settlement

11.1 Settlement Process

On settlement, the loan funds are made available to the borrower.

Where the transaction involves the purchase of land, settlement is the final step in buying a property - the loan is drawn down to enable the balance of the purchase money to be paid to the seller, or vendor, of the property.

The usual steps in the settlement process for purchasing land are as follows:

What	Who arranges	When
Transfer of Land document is signed by buyer / borrower.	Buyer's solicitor / conveyancer	2 weeks prior
The lender, seller's solicitor / conveyancer and any other parties are contacted to arrange settlement date, time and place.	Buyer's solicitor / conveyancer	10 days prior
The buyer (and their lender) is advised of the settlement date and the exact amount of funds required.	Buyer's solicitor / conveyancer	1 week prior
Bank cheque for the amount of the purchase price (less any deposit which is usually being held by the real estate agent) is provided to the buyer's solicitor / conveyancer.	Buyer	1 day prior
Settlement – a Transfer of Land document, signed by all parties is handed to the lender.	Buyer's solicitor / conveyancer	Settlement
For residential property, the real estate agent is instructed to hand the keys to the buyer.	Seller's solicitor / conveyancer	Same day
Settlement is confirmed to the buyer.	Buyer's solicitor / conveyancer	Same day
A Statement of Adjustment is sent to the buyer.	Buyer's solicitor / conveyancer	1 week
The lender registers the Transfer of Land and Mortgage documents with the State or Territory Registrar or Land Titles Office. The land is transferred to the buyer's name, subject to the mortgage held by the lender.	Lender's solicitor	As soon as possible

Assist the settlement process by providing copies of any information or assistance that the valuers, lawyers, mortgage insurers or credit providers require.⁵³

11.2 Copies of Documentation

Credit providers must provide borrowers who sign and return a consumer credit contract with a copy of the contract within 14 days after it is made (unless they have previously done so).⁵⁴

12. Post Settlement

12.1 Review

Once the loan has been finalised, it is good practice to review the loan file to check that all the required documents are on it – including detailed file notes of all conversations with the client and credit provider.

Assist with any post settlement liaison between the client and the lender as required, in particular, tell the client about any permissible variations in the loan contract, renewal of the term or discharge of the security.⁵⁵

⁵³ s20 National Credit Code

⁵⁴ For FBAA members, this is required by the FBAA Code of Conduct

⁵⁵ Clause 5.16-5.17 Finance Brokers Control (Code of Conduct) Regulations 2007

12.2 Retain Records

Retain loan files for 7 years after settlement of the loan. You should retain – at a minimum:

- Original, signed Preliminary Assessment, Quote and Credit Proposal;
- Details of the client's financial and personal circumstances;
- Details of the basis for the selection of loan products offered; and
- All emails and correspondence with the client and lenders to whom applications have been made.

For loans written before 1 October 2011, you must comply with the following requirements to keep copies of Finance Broking Contracts:

State	Requirement
WA ⁵⁵	Brokers must keep and maintain copies of all records of business and the forms and documents required by the Code of Practice in relation to a loan transaction for at least 7 years after the date on which the authority to act is signed, even after the finance broker has ceased to carry on business. TIP: Ensure that you retain sufficient documentation to show that you have assessed the borrower's needs and have verified the appropriateness of the loan. ⁵⁷
NSW ⁵⁶	Brokers must retain "full particulars" of a transaction, including a copy of the relevant FBC for 7 years after settlement of the loan.
VIC ⁵⁷	Brokers must retain the signed original FBC for 7 years from the date it was first signed by the client.
ACT ⁵⁸	Same as for NSW except that the records need only be kept for 3 years after the date of the transaction.
QLD, NT, TAS, SA	No relevant requirements.

TIP

These are overridden by the Anti Money Laundering requirements which require all documents to be retained for 7 years after the last transaction. The MFAA recommends that as the lender's agent, you should comply with this requirement.

12.2.1. Hardship

If the borrower tells you that they are in financial difficulty and cannot repay the loan in accordance with its terms, refer them to their credit provider (or the person responsible for making credit and management decisions for the credit provider).

If you become aware or are advised by the borrower that they are or may be in financial difficulties, consider whether it is reasonably appropriate to seek to vary the payment terms of the loan. Suggest that the borrower request the credit provider to vary the repayment terms.⁵⁹

See the Companion to this Handbook for more information about credit providers' and mortgage managers' obligations on receiving a hardship request.

⁵⁶ s4H Consumer Credit (Administration) Act 1995 (NSW)
⁵⁷ s37Q Consumer Credit (Victoria) Act 1995 (VIC)

⁵⁸ s34 Consumer Credit (Administration) Act 1996 (ACT)
⁵⁹ Clause 13 MFAA Code of Practice (Effective 09.11.12)

Appendix: Aml Identification and Verification

When identifying and verifying clients, collect and verify information in accordance with the following tables:

- Individual or Sole Trader;
- Listed Public Companies;
- Private Companies;
- Trusts;
- Partnerships and Unincorporated Businesses;
- Associations (Incorporated and Unincorporated);
- Registered Cooperatives;
- Public Sector Bodies, Governments, State Owned Companies and Supranationals.

Individual or Sole Trader

Information	Collect	Verify	Verification Methods
Standard Risk Client			
Full name (incl. middle name), date of birth and residential address	C	V	<ul style="list-style-type: none"> • Drivers licence (photographic) • Passport (Expired Australian passports up to 24 months are acceptable) • Photo ID card officially issued by a State or Territory, or • Other officially issued documentation which includes a photo and residential address.
Any other names known by	C		
Location of asset	C		
Location of security	C		
Source of repayment funds	C		
Type of product of interest to the client	C		
Higher Risk Client			
Declared source of wealth	C		
Declared occupation	C		

Listed Public Company

Information	Collect	Verify	Verification Methods
Standard Risk Client			
Full company name	C		
Address of registered office	C		
Address of principal place of business	C		
A.C.N. or equivalent	C	V	Confirm the regulated status, e.g. by searching the ASIC register http://www.asic.gov.au/asic/asic.nsf
Exchange on which listed	C	V	Confirm the company is listed. Search the ASX website http://www.asx.com.au/asx/research/CompanyListed.jsp
Location of asset	C		
Location of security	C		
Source of repayment funds	C		
Type of product of interest to the client	C		
Higher Risk Client			
None			

Private Companies

Information	Collect	Verify	Verification Methods
Standard Risk Client			
Full company name	C		
Address of registered office	C		
Address of principal place of business	C		
A.C.N. or equivalent	C	V	Confirm the regulated status, e.g. by searching the ASIC register http://www.asic.gov.au/asic/asic.nsf or relevant state body such as Office of Fair Trading
Full names (incl. middle name), date of birth and residential address of all directors	C	V 1 only	As for Individuals above
Names of all >25% shareholders (i.e. the beneficial owners). For individuals, collect their full names (incl. middle name), date of birth and residential address	C		
Location of asset	C		
Location of security	C		
Source of repayment funds	C		
Type of product of interest to the client	C		
Higher Risk Client			
Full names, date of birth and residential address of all directors	C	All	As for Individuals above
Names of all >25% shareholders (i.e. the beneficial owners). For individuals, collect their full names (incl. middle name), date of birth and residential address	C	All	<ul style="list-style-type: none"> • For Individuals – as for Individuals above • For Companies – as for Private Companies above
<small>NB: You may need to contact your lender for additional requirements</small>			

Trusts

Information	Collect	Verify	Verification Methods
Standard Risk Client			
Name of trust	C		
Type of trust e.g. fixed, unit, discretionary, hybrid, bare, superannuation charitable etc <small>NB Check with your lender if you are unsure of the type of trust involved</small>	C		
Country in which trust established	C		
Full names (incl. middle name), date of birth and residential address of trustees	C	V 1 only	<ul style="list-style-type: none"> • For Individuals – as for Individuals above • For Companies – contact your lender for their requirements
Names of beneficiaries	C		
Full names (incl. middle name), date of birth and residential address of individuals with authority to change trustees	C		
Location of asset	C		
Location of security	C		
Source of repayment funds	C		
Type of product of interest to the client	C		
Higher Risk Client			
Full names (incl. middle name), date of birth and residential address of all trustees	C	All	<ul style="list-style-type: none"> • For Individuals – as for Individuals above • For Companies – contact your lender for their requirements
Full names (incl. middle name), date of birth and residential address of all individuals with authority to change trustees	C	All	<ul style="list-style-type: none"> • For Individuals – as for Individuals above

Partnerships and Un-Incorporated Businesses

Information	Collect	Verify	Verification Methods
Standard Risk Client			
Client name	C		
Full names (incl. middle name), date of birth and residential address of all partners / owners	C	V 1 only	<ul style="list-style-type: none"> • For Individuals – as for Individuals above • For Companies – contact your lender for their requirements
Registered address	C		
Business address	C		
Address of operation	C		
Registered number (if applicable)	C		
Location of asset	C		
Location of security	C		
Source of repayment funds	C		
Type of product of interest to the client	C		
Higher Risk Client			
Full names (incl. middle name), date of birth and residential address of all partners / owners	C	All	<ul style="list-style-type: none"> • For Individuals – as for Individuals above • For Companies – contact your lender for their requirements
<small>NB: This may not be suitable for large partnerships – contact your lender for their requirements.</small>			

Associations (Incorporated and Un-Incorporated)

Information	Collect	Verify	Verification Methods
Standard Risk Client			
Client name	C		
Registered address	C		
Business address	C		
Nature and legal status of entity	C		
Name of registration body and registered number (if applicable)	C		
Full names (incl. middle name), date of birth and residential address of Chairman, Secretary, Public Officer and Treasurer	C	V Public Officer only	As for Individuals above NB: Your lender will advise you of any further information it requires.
Location of asset	C		
Location of security	C		
Source of repayment funds	C		
Type of product of interest to the client	C		
Higher Risk Client			
None			

Registered Cooperatives

Information	Collect	Verify	Verification Methods
Standard Risk Client			
Full cooperative name	C	V	<ul style="list-style-type: none"> • Copy or certified extract of a Register maintained by the Cooperative; or • Confirm the registered status, e.g. by searching the ASIC register http://www.asic.gov.au/asic/asic.nsf or a state body such as Office of Fair Trading.
Unique identifying number (if appropriate)	C	V	
Registered address	C		
Business address	C		
Full names (incl. middle name), date of birth and residential address of Chairman, Secretary, Public Officer and Treasurer	C		
Evidence of any agent's authorisation to act on behalf of the cooperative	C		
Location of asset	C		
Location of security	C		
Source of repayment funds	C		
Type of product of interest to the client	C		
Higher Risk Client			
None			

Public Sector Bodies, Governments, State Owned Companies and Supranationals

Information	Collect	Verify	Verification Methods
Standard Risk Client			
Client name	C	V	<ul style="list-style-type: none"> Obtain authorisation from a person with appropriate authority to act on behalf of the entity, and Obtain evidence of the organisation's presence from appropriate website or official documentation
Address	C	V	
Registered address	C		
Business address	C		
Nature and legal status of entity (including how the body sits within a government of public sector structure)	C		
Nature of home state authority	C		
Full names (incl. middle name), date of birth and residential address of all directors or controllers of the organisation	C		
Location of asset	C		
Location of security	C		
Source of repayment funds	C		
Type of product of interest to the client	C		
Higher Risk Client			
None			

Suspicious Matter Reporting

Collect and provide as much of the following information when providing a Suspicious Matter Report (see also section 5.1.4).

Information on the client:

- Full name of the client;
- Client's business and/or residential address;
- Client's occupation, business or principal activity;
- Client's date of birth;
- Client's country of citizenship;
- Sources relied on to verify the client's identity, including type of document and its unique number and who produced it; and
- Full details of any other name used by the client.

Trigger for Suspicion:

- Details of the matter that has triggered the suspicion;
- Any information that appears to be false or misleading, as well as an explanation of why you believe it is apparently false or misleading;
- Type of services or transactions which are the subject of the suspicious matter;
- Date/s of the service/s or transaction/s;
- Whether the client was the recipient or beneficiary of the transaction, or the person who initiated the transaction;

- Total amount of the transaction/s. If the transaction/s is in a foreign currency, both the foreign currency amount and the amount converted to Australian dollars must be reported;
- The amount of each component of the transaction, if relevant. For example, if the transaction is comprised of part cash and part cheque, then the amount of the cash and the cheque components must each be reported;
- Details of any beneficiary to the transaction/s – including, where possible, the beneficiary's full name and address and, where available or relevant, the beneficiary's bank account details and the country to which the funds are being sent;
- Details of the person who initiated the transaction - including the person's full name and address and, where available or relevant, the person's account details and the country to or from which any funds are being sent;
- If another institution or intermediary was involved in the transaction:
 - the full name of the other institution or intermediary;
 - the branch name or branch location of the other institution or intermediary; and
 - the country of the branch of the institution or intermediary involved in the transaction – if the country is not Australia.
- If it appears that any other transaction may be related to the transaction in relation to which the suspicion has arisen, provide as many details as possible in respect of each of the related transaction/s; and
- Any other detail that you consider may be relevant.

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Companion to Client Service

For Credit Representative of
Connective Credit Services

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1. Marketing

USER GUIDE:

THIS SECTION OF THE COMPANION PROVIDES GUIDANCE ON THE RESTRICTIONS THAT THE LAW IMPOSES ON MARKETING ACTIVITIES. REVIEW AND CUSTOMISE IT BY CHANGING OR DELETING MATERIAL SO THAT IT IS RELEVANT TO YOUR BUSINESS AND MARKETING STRATEGIES.

1.1 GENERAL PRINCIPLES

Marketing is an important strategic component of any business because it is the main method by which you obtain your clients. There are many techniques suitable for marketing mortgage and finance assistance services. Some of the most common include:

- Advertising;
- Referrals; and
- Direct marketing through publications and events such as newsletters and seminars, and through personal connection such as telemarketing and door to door sales.

There are many legal requirements and restrictions on marketing activities and you need to be aware of these to ensure that your marketing does not break the law.

In this section we first look at some general principles that apply to all marketing activity and then examine some specific requirements.

1.1.1. Misleading and Deceptive Conduct

When marketing your business and providing services do not mislead or deceive clients (or potential clients) or say or do anything likely to do so.¹

Misleading someone may include:

- Lying to them;
- Leading them to a wrong conclusion;
- Creating a false impression;
- Leaving out (or hiding) important information; or
- Making false or inaccurate claims.

Many misleading advertisements are not calculated attempts to deceive; they are often caused by mismanagement, inadvertence or naivety.

Advertising and marketing can be innovative, exciting and competitive; but it must also be honest, balanced and accurate. Following the guidelines² below will help you to do this.

Seek legal signoff if in doubt.

Issue	Guideline
When is a person misled?	If you "lead a person into error", then you have misled them. It does not matter whether the person has actually been misled. If your conduct or the words or other material in an advertisement are capable of misleading or are likely to mislead the target audience, it is misleading - even if no actual person was misled.
Overall Impression	The overall impression created by the advertising will determine whether it is misleading. Even if you think it is clear, the intended audience may not, e.g. because they are operating on different assumptions or preconceptions. Alternatively, a strong positive statement may not be overcome by qualifications or exceptions included in the fine print or at the bottom of the page. Hint: Take great care when approving advertising copy to ensure that the overall impression is correct and that any claims or statements are clear and unambiguous.

¹ s12DA ASIC Act 2001 (Cth), s154 National Credit Code. See Clause 4.7(c) MFAA Code of Practice (December 2012)

² These are based on the Advertising Guidelines developed by the MFAA Version 10 March 2013

Issue	Guideline
True Statements	<p>Even true statements can be misleading, e.g. "Every economic report I have seen recently indicates that interest rates are going up" when you have only seen one economic report. Statistics can be factually correct, but presented in such a way as to create an erroneous impression or conclusion. This is one of the most common types of misleading and deceptive conduct.</p> <p>This can occur when important information is omitted and, as a result, the overall impression created is misleading.</p> <p>Hint: Leaving out crucial facts can be as misleading as including misleading or inaccurate statements.</p> <p>Hint: To ensure that you do not mislead or deceive:</p> <ul style="list-style-type: none"> • Only provide accurate information about lending products and your services; • Always tell the client about any limitations on products (such as minimum or maximum amounts, duration of any lower interest rate period, all qualifying criteria and the amount of any early payment or break fees); • Ensure that any assertions, especially about endorsements, sponsorships or approvals, are accurate; • Ensure that the information you provide is up to date and accurate; and • Do not leave out any important information.
Audience	<p>The target audience may be very different from the actual audience.</p> <p>If the audience that actually receives the message is misled by it, e.g. because they are unsophisticated or have limited knowledge of the mortgage and finance industry, this can be misleading and deceptive conduct itself.</p> <p>Hint: Put yourself in the audience's position and be objective.</p>
Intent	<p>It does not matter that you did not intend to mislead or deceive. The likely effect of the representation is what counts. And it is not necessary for someone to have been misled for a breach to occur.</p> <p>Hint:</p> <ul style="list-style-type: none"> • Be honest and forthright about what you say and do commercially; • Do not mimic another person's products or trade names.
Corrections	<p>Correcting the misleading effect of a representation or advertisement before the client signs up for a product or service may not protect you. It is enough that the consumer was likely to be misled at the time they initially received the misleading representation.</p>
Returns, features, benefits & risks	<p>Ensure your advertisements:</p> <ul style="list-style-type: none"> • Provide balanced information in relation to features, benefits and risks to enable consumers to understand the nature of the product or service advertised; • Do not overstate potential benefits or understate potential risks; and • Do not create unrealistic expectations.
Warnings, disclaimers, qualifications and fine print	<p>Your advertisements taken as a whole should not be inconsistent with warnings, disclaimers, qualifications or any headline claims. Do not direct consumers to another website or webpage to correct a misleading or deceptive headline claim.</p> <p>Warnings, disclaimers or qualifications included in an advertisement should be in a form similar to the main body of the advertisement so that the consumer can understand the warning, disclaimer or qualification.</p>
Fees and Costs	<p>Always give a realistic impression of the total fees and costs, and disclose any fees or costs associated with particular features or benefits you are advertising.</p>
Endorsements and testimonials	<p>Do not falsely represent that the product or product issuer has an endorsement or approval that it does not have.</p>
Responsible Lending	<p>Avoid stating or implying that a credit product is suitable for a particular class of consumers, unless the credit provider has actually assessed the suitability of the particular consumers targeted by the advertisement.</p> <p>If the credit provider has done so, ensure you still make it clear that a consumer within that class may, or may not, qualify or find the product suitable.</p> <p>Terms such as 'conditions apply' or 'find out if you qualify' may not always be sufficient to warn consumers that the advertised product may not be suitable for them. You need to include at least some information to alert the consumer to the nature of the condition or suitability criteria</p>
Credit assistance	<p>Do not mis-state the scope of credit assistance that will be provided to the consumer.</p>
Internet advertising	<p>Use caution when using a facility for a consumer to access additional information where an advertisement is on a third party site. Consumers who view an advertisement on a third party site will have less motivation to then consult additional information on the promoter's own website.</p>

1.1.2. Third Line Forcing

Third line forcing occurs where a supplier of a product or service will only supply their product or service, or supply it at a discount, on condition that the client acquire another product or service from a third party.³ This is prohibited.

An example of how this could occur is where a lender will only approve a loan on condition that the client purchases insurance from a specific insurer. If lenders attempt anything of this nature, advise your client that this is not permitted and that they can acquire the other product from a supplier that they choose.

1.2 ADVERTISING

1.2.1. Restrictions on Advertising

There are many restrictions on what mortgage and finance intermediaries may do when advertising.⁴

The main requirement is that business advertising must not be dishonest⁵ and must not mislead or deceive consumers (or be likely to do so).⁶ This applies not only to direct advertising, but also discussions during meetings, with clients or over the phone and statements in brochures, on websites etc.

See above for guidance on what constitutes misleading and deceptive conduct.

TRAP

If you use case studies in your advertising, ensure that they are real. A broker who used fictional case studies was found guilty of misleading and deceptive conduct.

1.2.2. Words used in Advertising

Advertising always needs to be carefully checked for accuracy and truthfulness, preferably by a legal or compliance adviser.

Certain words need to be used with care. Follow the guidelines⁷ in the table below.

Issue	Guidelines
"Independent" or "Impartial" or "Unbiased" Advice	<p>To use these words, the advice being given must be independent, impartial or unbiased and not influenced by factors other than the client's best interests.</p> <p>If you receive commissions or other benefits from a lender, there is potential for you to be influenced by factors other than the client's best interests.</p> <p>Do not use these words unless you and your licensee⁸:</p> <ul style="list-style-type: none"> • Rebate all commissions to your clients in full; • Do not receive any other gifts or benefits from credit providers that could influence you; • Are not restricted in the credit contracts and leases on which you provide services; and • Have no conflicts of interest arising from your associations or relationships with credit or lease providers that might influence you. <p>Possible alternatives for an aggregator might be "professional" or "MFAA-accredited".</p>
"Financial counsellor" or "Financial counselling" ⁹	Do not use these or any similar words when providing or offering to provide credit services.
"Reverse mortgage" ¹⁰	<p>Only use this term in relation to true reverse mortgages (as defined in the NCCP Act), i.e. a credit contract (other than a bridging finance contract) and mortgage where:</p> <ul style="list-style-type: none"> • The consumers total liability may exceed the maximum amount of credit that may be provided under the contract due to interest, fees and charges; and • The consumer is not required to reduce the liability to below the maximum amount of credit.
The "best" deal	<p>It is impossible in the large and competitive finance market to demonstrate that a deal is the "best" deal at any point of time, so avoid such terminology, and similar expressions like "cheapest" or "lowest rates".</p> <p>Possible alternatives could be – "We help you find the most suitable loan for you from our panel of over <insert number> lenders".</p>
"Guaranteed"	<p>This term should be avoided. Only use it if you intend to make a contractually binding promise. Ensure that you specify the precise terms of the promise.</p> <p>Do not use this term in the context of 'guaranteed acceptance'.</p>

3 The supplier can notify the Australian Competition and Consumer Commission (ACCC) or, if there is a public benefit, apply to it for Authorisation to do so. A notification protects the supplier unless and until removed by the ACCC, which can only be done if the conduct substantially lessens competition and there is no public benefit.

4 See Competition and Consumer Act 2010 (Cth), the ASIC Act 2001 (Cth) and the MFAA Code of Practice (December 2012)

5 Clause 4.7 MFAA Code of Practice (December 2012)

6 s154 National Credit Code s12DA, ASIC Act 2001 (Cth), Clause 4.7(c) MFAA Code of Practice (December 2012)

7 MFAA Advertising Guidelines 10 March 2013

8 s160B of the National Consumer Credit Protection Act 2009 (Cth). From 1 March 2013. A civil penalty of 2,000 penalty units applies (one penalty unit equals \$170 – s4AA Crimes Act 1914 (Cth)).

9 s160C National Consumer Credit Protection Act 2009 (Cth)

s13A and 133DE National Consumer Credit Protection Act 2009 (Cth). From 1 March 2013. ASIC may declare some types of mortgages to be reverse mortgages, but has not done so at the time of publication.

10 s13A and 133DE National Consumer Credit Protection Act 2009 (Cth). From 1 March 2013. ASIC may declare some types of mortgages to be reverse mortgages, but has not done so at the time of publication.

Issue	Guidelines
"Free"	<p>Only use this term if the product or service you are providing is really free. It will not be free if the client might incur other costs, such as an application or valuation fee, or if the client will give up other benefits.</p> <p>Also you will receive a commission from the lender which is built into the cost of the loan, so unless you rebate the commission to the borrower, the service is not truly free.</p>
"Subject to conditions"	<p>Use of terms such as "subject to conditions" and similar phrases is unlikely to protect you from misleading your audience if the terms of the loan being promoted are less favourable than the advertising suggests.</p> <p>If an understanding of the terms and conditions is likely to change the perception of the product or service, you probably need to reconsider your advertising strategy.</p> <p>If an attractive offer is subject to conditions that are likely to be unattractive from the client's perspective, present the conditions as prominently as the offer itself.</p>
Subjective statements	Avoid subjective statements such as "We believe that interest rates will rise in the next three months" unless you hold the opinion in good faith and you have a reasonable basis for it.
Use of charts, graphs, images, on-line calculators	Charts, graphs, images or on-line calculators can be confusing and care is needed to ensure that the likely audience is not misled. Always look at the material as a whole. If a calculator or chart is based on specific assumptions, clearly describe the assumptions, particularly if they differ from those that the audience might otherwise assume.
Comparative Advertising	<p>Comparative advertising is allowable, but it is essential that the claims being made about competitors' products and services, as well as your own, are 100% accurate and that relevant information is not omitted.</p> <p>Ensure that you compare like with like. For instance, it is misleading to say that a line of credit or offset account product can be paid off more quickly than a standard product if this result can only be achieved by making larger or more frequent payments.</p> <p>Hint: Be very careful – competitors are highly likely to be watching and will be the first to complain to the regulator!</p>

1.2.3. Advertising Credit Products¹¹

When advertising credit products, consider the following issues:

Issue	Guidelines
Features	<p>If an advertisement states or implies a particular benefit is likely, it must also identify the risks associated with that benefit, or the product generally, and must explain the assumptions made in predicting the benefit. For example, where advertising home loan savings, any additional necessary repayments must be disclosed together with any other assumptions made in calculating those savings.</p> <p>Do not make claims about features of a product or service unless they will be available to the likely audience of the advertisement;</p> <p>If advertising the benefits of a credit product, and two or more features are mutually exclusive (i.e. the customer can choose one or the other of the benefits, but not both), you must make this clear in the advertisement.</p>
Benefits	<p>Do not include open-ended promises about how benefits will apply if this is likely to change in the future so the benefit is no longer available or does not apply in that way. Merely withdrawing the advertisement will not change the last impression made on customers. If the advertisement does contain this kind of promise, it must be qualified by a prominent statement; alerting the customer to the fact that circumstances may change.</p> <p>If advertising a product on the basis of a particular feature or benefit, that feature or benefit must remain available for a reasonable period of time. If it is not, it may be a breach of the Australian Consumer Law.</p> <p>Information about benefits should be shown net of fees and costs, and the effect of fees and costs on benefits over time should be clearly disclosed e.g. if calculating cost savings for reduced interest rates, don't forget to account for ongoing fees and charges.</p>

Risks	<p>Information about risks should be clear and not hidden. The tone of the advertisement should not detract from the important nature of the risks. For example, ASIC raised concerns about advertising of reverse mortgages that stated 'no repayments ever' and 'No need to make repayments', because ultimately the loan must be repaid, and this risk was not disclosed.</p> <p>Give prominence to any different or innovative features if the customer would not reasonable expect them, particularly if the customer is exposed to unusual risks.</p>
Qualifications	<p>Qualifications may be needed to temper the claims of a headline, in which case:</p> <ul style="list-style-type: none"> • The prominence of any qualifications you must make will depend on the information made in the headline claim. The more significant the need to qualify the headline (e.g. where a significant exception exists, such as the fact an attractive discounted rate is not available to borrowers of small amounts), then the more prominent the qualification. Ensure the headline is not itself misleading; • Qualifications should not be contained in the fine print, in a dense block of text, only displayed for a brief period of time, or placed together with simultaneous distracting content. • Statements referring customers to information contained in other documents or locations will not be sufficient to correct a misleading headline claim ; • The qualification must be published at the same time as the original message – subsequent disclosures are ineffective; and • Qualifications cannot be used to actually change the meaning of a headline. If this were to be the case, then the headline claim would be likely to be regarded as so strong, that the qualifications would be ineffective;
Fees and costs	<p>Provide a realistic impression of the overall fees and costs payable.</p> <p>If a headline claim is made about a fee or cost, include any qualification to that claim in the headline or prominently in the advertisement.</p> <p>Do not make claims of 'no fees' if fees are waived when the customer meets certain requirements.</p> <p>Do not state that only one fee applies, if other costs also apply. Customers cannot be expected to understand the distinction between costs and fees. If fees are mentioned, the advertisement should positively state if other costs do or do not apply.</p> <p>When promoting a product's features, disclose any fees applicable to those features.</p>
Suitability	<p>Do not state or imply a product is suitable for a class of customers unless you have actually assessed its suitability for the target audience of the advertisement. This includes not making statements such as 'no credit check required', 'guaranteed acceptance' or 'pre-approved';</p> <p>Even if the product is assessed as suitable for a class of customers, make it clear that further individual assessment is required and a customer within that class may qualify, but is not guaranteed acceptance.</p> <p>Terms such as 'conditions apply' or 'find out if you qualify' may not be sufficient to make it clear the product may not be suitable for, or available to, a given customer.</p>
Credit assistance	<p>Ensure that your advertisements are clear on the scope of service you provide. Do not:</p> <ul style="list-style-type: none"> • Advertise 'wide range of lenders available' if you routinely only consider products from one or two lenders.; or • Use the term 'broker' if you are only affiliated with one lender.

1.2.4. Use of Logos¹³

Be careful when using another person's logo to promote your services. There are restrictions on when and how this may be done.

TRAP

Do not use ASIC's name or logo, or the fact you hold a licence with ASIC, when promoting your business or the credit services.¹⁴

Generally, credit licensees can use a different entity's logo to promote your services in the following circumstances:

- You are not acting on behalf of the other entity;
- The other entity does not need a credit licence for the services that they provide; and
- It is obvious to a reasonable person that the other entity is not a credit licensee (or alternatively, the other entity must tell the consumer that you hold a credit licence and give them your credit licence number).

¹³ Reg 24 (7) National Consumer Credit Protection Regulations 2010 (Cth)

¹⁴ ASIC Media Release 11-174MR warned credit licensees against misuse of ASIC's name and logo

¹⁵ ASIC Regulatory Guide 234.

1.2.1. Interest and Comparison Rates¹⁵

If an advertised interest rate is only for a honeymoon or other temporary period, then the advertisement must also state the period for which the discount applies.

This information must be just as prominent as the interest rate and must state the rate or fee that applies after the expiry of the interim period - although this need not be shown with equal prominence. More prominent disclosure may be required where there are any unusual features of the discount rate or period, such as if the rate at the expiry of the period is different to the lender's standard variable rate.

Advertisements do not need to state the actual discounted rate, except where they emphasise savings without clarifying the savings will not continue after the discount period.

Comparison Rates help consumers to understand the true cost of a loan. They provide the interest rate, fees and charges for a loan, reduced to a single percentage figure.

For this reason, if an interest rate is advertised, a Comparison Rate must be included in the advertisement.¹⁶ The Comparison Rate must reflect the total cost of credit arising from interest and other specified fees and charges.¹⁷

If you prepare an advertisement of this type, follow these rules:

- If the advertisement states the amount of any repayment - show the annual percentage rate and the comparison rate¹⁸;
- If credit charges and fees are also payable - either say that charges and fees are payable, or specify the amount (or a combination of both)¹⁹;
- **Interest rates** – provide a nominal percentage rate per annum or the Comparison Rate calculated in accordance with the statutory formula (whether or not any repayment amount is included)²⁰;
- **Comparison Rate²¹**–
 - this must be for whichever of the following most closely represents the typical amount of credit and term initially provided for that product²²;

Amount	Term	Other Information
\$250	2 weeks	
\$1,000	6 months	
\$2,500	2 years	
\$10,000	3 years	Secured/unsecured
\$30,000	5 years	Secured/unsecured
\$150,000	25 years	

- It must be calculated in accordance with a standard formula that takes into account the amount and term of the loan, repayment frequency, interest rate and fees and charges (other than stamp duty, registration fees and conditional or unascertainable charges)²³;
- State that it is a Comparison Rate and show it as prominently as the advertised interest rate and the amount of repayments²⁴. A comparison rate will be less prominent if it is smaller or shown in a faded colour as compared to the interest rate, it is in a location that is easy to overlook, or is not in close proximity to the interest rate or, for online advertisements, requires the customer to click through or take some other action;
- Clearly state the name of the product;
- Warn that the comparison rate is only accurate for the example given. The warning must be given in the same manner as the Comparison Rate i.e. if the Comparison Rate is disclosed verbally, so must the warning. It may be acceptable to include the warning on a separate page where the Comparison Rate is disclosed in an online banner, provided there is a clear link or reference to the warning, and this is positioned as close to the interest rate as possible; and
- Follow the rules²⁵ (depicted below) about whether the Comparison Rates are displayed in text or in spoken form.

¹⁶ s160 National Credit Code

¹⁷ Part 10 National Credit Code – a penalty of 100 penalty units applies to a breach (a penalty unit is equal to \$170 – s4AA Crimes Act 1914 (Cth))

¹⁸ s150, s160 National Credit Code

¹⁹ s150 National Credit Code

²⁰ s160 National Credit Code and ASIC Regulatory Guide 234

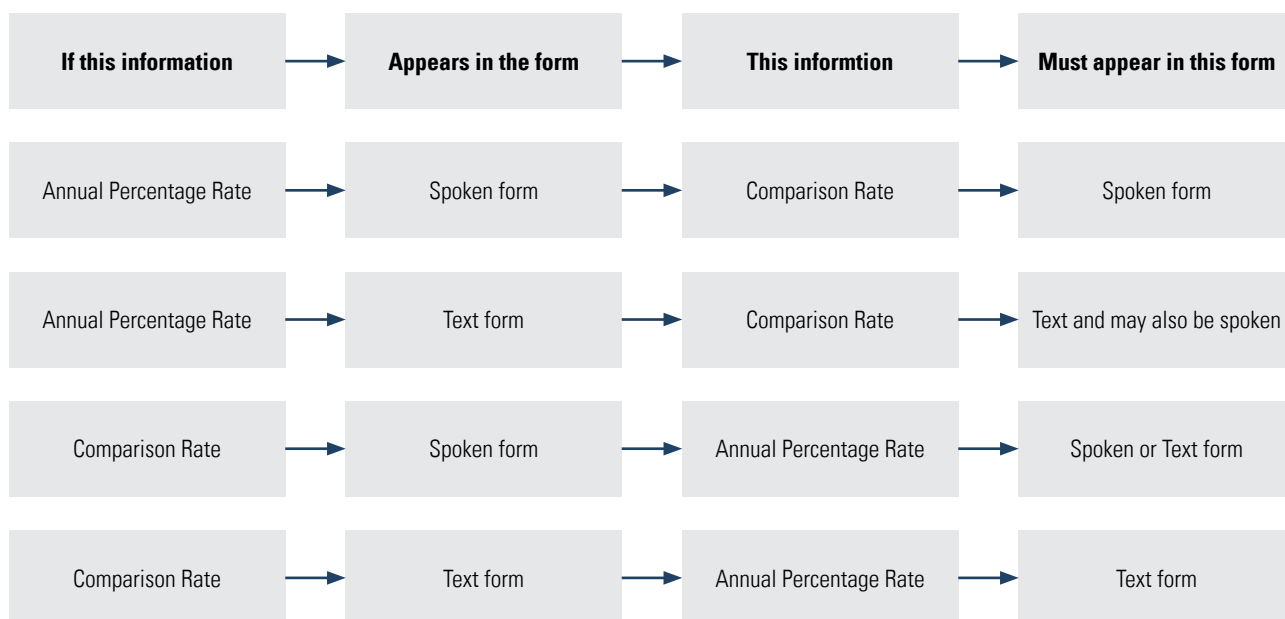
²¹ s157- 168 National Credit Code

²² s161 National Credit Code. These are set out in Reg 97 National Consumer Credit Protection Regulations 2010 (Cth)

²³ s160 National Credit Code

²⁴ s164 National Credit Code, ASIC Regulatory Guide 234.67

²⁵ s164 National Credit Code



Case Studies²⁶

1. An MFAA Member who mistakenly displayed an advertisement on its premises with no Comparison Rate was found guilty of misconduct even though they removed the advertisement after only a few days when it realised that it was defective. As the conduct had only lasted for a few days, the Member was only censured by the MFAA Disciplinary Tribunal and required to provide a written undertaking to take steps to ensure that it did not happen again.
2. In another case a Member who distributed 50 out of a proposed 500 letters omitting the Comparison Rate and the Comparison Rate Warning before realising the error and destroying the rest of the letters, was not found guilty of misconduct and no sanction was imposed by the MFAA Disciplinary Tribunal. This was because the Member had admitted responsibility and taken corrective action immediately.

TIPS

Some tips regarding Comparison Rates:

- While Comparison Rates are useful for comparing the cost of different loans, it is important to consider all of a loan's features, not just the Comparison Rate. The rate does not include government fees and charges or fees and charges which are only charged in certain circumstances, so it may not provide a complete picture of the total cost of a loan.
- Also Comparison Rates do not take into account some factors that may make a loan more attractive, such as fee free banking, or flexible repayment arrangements. Advise clients to carefully consider whether these features are important to them and the effect they will have on the cost of the loan.
- To get an idea of the Comparison Rate which applies to a loan, look at the Comparison Rate for the amount and term closest to the amount and term of the loan you are considering for your client.

Credit advertisements may sometimes state whether a Comparison Rate is based on a secured loan (that is, a loan for which the credit provider takes a mortgage over property) or an unsecured loan (where no mortgage is taken). This is because there can be a significant difference in the Comparison Rates for secured and unsecured loans of the same value, due to the higher interest rates usually charged for unsecured loans and the higher up-front fees for secured loans. A Comparison Rate for a secured loan is unlikely to be accurate for an unsecured loan, and vice versa.

TIP

Comparison Rates can be tricky. Consider obtaining legal signoff of any advertisement showing an interest rate.

²⁶ Mortgage & Finance Brief – Membership Disciplinary Tribunal Report

²⁷ Reg 25 National Consumer Credit Protection Regulations 2010 (Cth)

1.3 Referrals

Many brokers generate business through referral sources, e.g. solicitors, real estate agents etc. In some cases they pay a fee to the referrer, especially if the referral results in the broker being retained to arrange a loan.

Referrers who refer clients to a credit licensee or credit representative as an incidental part of their ordinary business do not need to be licensed or authorised.²⁷

There are two types of referrals – “upstream” and “downstream” and different requirements apply to each.

1.3.1. “Downstream” Referrals

A “downstream” referral is where the referrer gives the consumer the loan writer’s or credit licensee’s (or a credit provider’s) details and the client makes the contact.

In this situation, unless they hold a credit licence or are a credit representative, referrers may only:

- Inform the potential client that the credit licensee or credit representative can provide a particular type of service; and
- Give the potential client the credit licensee’s or credit representative’s contact details.

The referrer must tell the potential client about any fees, commission or other benefits that the referrer (or anyone associated with them) will receive for making the referral. This information needs to be provided in the same form as the information and contact details are provided²⁸. For example if the referral is provided orally, it is enough to simply tell the person about the remuneration.

1.3.2. “UPSTREAM” REFERRALS²⁹

An upstream referral is where the referrer provides the potential client’s name and contact details to a credit licensee or credit representative (or a credit provider) and the credit licensee or credit representative makes the contact with the potential client.

Many businesses and associations do this and receive a commission, fee or “sponsorship” in return. They do not need to hold a credit licence or be a credit representative to do this, provided the referrer:

- Only makes the referral incidentally to another business they are carrying on. In other words the referrer’s main business cannot be making contact with persons for the purpose of giving their names or other details to another person; or
- Is a representative of the credit licensee to whom they are referring the customer.

TIP

People who have been banned from engaging in credit activities under State, Territory or Commonwealth law may not provide upstream referrals.

However there are a considerable number of restrictions on what referrers can and cannot do. They must³⁰:

- Only tell the consumer that the credit licensee or credit representative can provide a particular type of credit product or service, i.e. that they are a mortgage broker, lender, etc;
- Obtain the consumer’s consent to pass their name, contact details and the purpose for which the credit is sought (if known) to the ACL licensee or credit representative;
- Not charge a fee to the consumer for the referral;
- Tell the consumer what commissions or other benefits they (or their associates) will receive for the referral; and
- Not conduct their business from temporary premises (such as a temporary stall in a shopping centre) or non-standard business premises (i.e. somewhere where a consumer would not normally expect to be contacted about the purchase of goods or services)³¹.

TIP

At this stage it is not clear whether the consumer’s consent must be express or whether it may be implied from the nature of the dealings or relationship between the referrer and the consumer. It is recommended that referrers obtain express consent and either obtain or confirm this in writing with the consumer or, at the very least, keep a file note of the consumers’ consent to the referral.

Time Limits – “Upstream” referrers must pass on the consumer’s contact details to the credit licensee or credit representative within 5 business days of obtaining the contact.³²

An ACL credit licensee or credit representative who makes contact with a consumer as a result of a referral must do so within 10 business days³³. After this they may not contact the consumer.

28 Reg 25(2) National Consumer Credit Protection Regulations 2010 (Cth)

29 Reg 25(5) National Consumer Credit Protection Regulations 2010 (Cth)

30 Reg 25(5) National Consumer Credit Protection Regulations 2010 (Cth)

31 Non standard business premises means “premises which are not physically separate

from premises that are regularly used by consumers for purposes other than being contacted in relation to the supply of goods or services”.

32 Reg 3 National Consumer Credit Protection Regulations 2010 (Cth).

33 Reg 25(5)(c)(ii) National Consumer Credit Protection Regulations 2010 (Cth)

1.3.3. Contacting the Client

Personal Contact – If the consumer is contacted in person, the ACL licensee or credit representative must first identify themselves and then say words to the following effect³⁴:

“I am contacting you because we have been provided with your contact details by <insert name of referrer>. Can you confirm that you agreed with <insert name of referrer> to have us contact you?”

If a commission or a financial benefit may be given to the referrer, the ACL licensee or credit representative must then say:

“Before we continue, I would like to let you know that if you take up any of our products or services, <insert name of referrer> may receive the following financial benefits <insert brief description>. Are you happy to continue this discussion?”

Letter or Email Contact – If the credit licensee or credit representative contacts the consumer by letter or email, statements to the following effect must appear at the beginning of the letter or email³⁵:

- The licensee is contacting the consumer as a result of being provided with their contact details by the referrer (identifying the referrer by name); and
- The referrer may receive a financial benefit or payment.

1.3.4. Managing your Referrers

Licensees must have a written agreement with referrers which sets out the commission they are to receive and what they may and may not do when dealing with and referring clients.³⁶

The agreement could also provide you with an indemnity in case the referrer does something that falls outside the agreement.

The Fold has a template Referrers Agreement available for separate purchase.

You may wish to provide your referrers with guidelines or a “script” to ensure that they know what they can and cannot say.

Take care to ensure that your referrers only refer clients to you and do not provide any advice about a particular lender or loan product or otherwise become involved in arranging credit. If they do, they will need to be authorised and comply with all the training and competency requirements.

Periodically monitor and review your referrers’ activities, in particular, that they are not providing any advice to consumers. These checks can be a mixture of regular meetings, client surveys (where the broker who receives the referral asks the client about the referral), or even “mystery shopping”(where the credit licensee arranges for someone to approach the referrer anonymously).

It is wise to check on your referrers at least annually.

1.3.5. Referral Register

Credit licensees who receive “upstream” referrals must keep, or have access to, a register of any person who refers consumers to either the credit licensee or their credit representatives.³⁷

The Register must contain the following information³⁸:

- The referrer’s name and contact details;
- The date and means by which the referrer was advised in writing of the way in which the referrer may engage in credit activities under the agreement (this can be done in the Referral Agreement); and
- The day on which the referrer commenced providing referrals.

Credit licensees must make their Referral Registers available to ASIC on request.

1.4 REFERRALS TO AFS LICENSEES

Mortgage and finance intermediaries can refer clients to an AFS licensee or an authorised representative of an AFS licensee without needing to be licensed or authorised under the AFS legislation.

When referring a client to an AFS licensee or authorised representative, you may only³⁹:

- Tell the person that the AFS licensee or its authorised representative can provide a particular financial service (or class of services); and
- Give the person the AFS licensee’s or authorised representative’s contact details.

You must also tell the client about any fees, commission or other benefits you (or anyone associated with you) will receive for making the referral. This information should be provided in the same form as the service information and contact details.

In any referral arrangement, take care to ensure that you only refer clients and do not provide any financial services (e.g. give advice). If you do, you will need to be appointed as an authorised representative and comply with minimum training and competency requirements.⁴⁰

34 Reg 9AB(6) National Consumer Credit Protection Regulations 2010 (Cth)

35 Reg 9AB(7) National Consumer Credit Protection Regulations 2010 (Cth)

36 Reg 25(5)(a) National Consumer Credit Protection Regulations 2010 (Cth)

37 Reg 9AB(2) National Consumer Credit Protection Regulations 2010 (Cth)38 Reg 9AB(3)

National Consumer Credit Protection Regulations 2010 (Cth)

39 Reg 7.6.01(1)(e) and (ea) Corporations Regulations 2001 (Cth)

40 Under the Corporations Act 2001 (Cth)

1.5 DIRECT MARKETING

Direct marketing involves the use or disclosure of a person's 'personal information' to communicate with them to promote goods or services. There are many types of direct marketing, including mail, email, SMS, online advertising and door-to-door selling and telephone sales. Direct marketing is full of pitfalls for the unwary, the most important of which is breaching the various laws that limit this type of activity.

1.5.1. Australian Privacy Principles⁴¹

An individual's personal information (e.g. their name and contact details) can be used individual's personal information for direct marketing if:

- They would reasonably expect you to do so;
- You collected their personal information from them; and
- You provide a simple means for them to request not to receive any more direct marketing communications.

If a person would not reasonably expect you to send direct marketing communications to them, or you collected their personal information from someone other than them, you must not use it for direct marketing unless:

- They consent to receiving direct marketing communications, or it is impracticable to obtain their consent;
- You provide a simple means for them to request not to receive any more direct marketing communications; and
- Each direct marketing communication:
 - If in writing - contains a prominent statement; or
 - If by telephone – makes them aware that,

they can request not to receive such communications in the future.

TIP

Don't assume that clients expect you to send direct marketing communications to them. The test is whether a reasonable person would expect this. Consider whether:

- They have consented;
- Your Privacy Policy explains that you will do this;
- You notified them that one of the purposes of collection of their information was for direct marketing purposes.

Opting Out – Your direct marketing communications must include a simple means for clients to 'opt out' of receiving marketing material, i.e.:

- A clear instruction on what to do;
- A quick and simple process that uses the same communication channel that you used to deliver a direct marketing material (e.g. by email if you sent an email).

Here is a suggested wording, which you can use on your promotional material.

Sample Opt Out Wording

"<Insert name, of broker> is delighted to provide this <insert type of promotional material, e.g. newsletter> as a service to you. Please let us know if you would rather not receive it and we will remove your name from our distribution list."

You can't charge clients to 'opt out' and if they have done so, you must not use their details for direct marketing again.

1.5.1. Lists

Generally direct marketing is undertaken using lists of potential clients. It is legal to rent or purchase mailing lists, but it is important to ensure that the list complies with the privacy and spam requirements.

The best way to do this is to only use lists from Members of the Australian Direct Marketing Association (ADMA) (<http://www.adma.com.au>).

You will still need to comply with the privacy requirements - and if you are asked to confirm the source of your information, in most circumstances, you must do so within 14 days.⁴²

⁴¹ Australian Privacy Principle 7 As from 12 March 2014, the Australian Privacy Principles expand on and replace the National Privacy Principles.

⁴² Australian Privacy Principle 7.6(e) and Draft APP Guideline 7 – Direct Marketing (September 2013)

1.5.2. No Contact / No Call

Establish and maintain a No Contact / No Call Register in order to comply with the various laws that relate to communications with clients and prospective clients.⁴³

Any person who asks not to receive further marketing communications must be removed from your calling list and entered into your No Contact / No Call Register. You may not charge for adding people to your No Contact/ No Call Register.

Do not send clients/prospects information about mortgage or finance matters or other marketing materials if they have asked you not to do so. Check your No Contact/ No Call Register before you send such materials to ensure that you do not send them to anyone who has asked not to receive this material.

More information about the privacy requirements is contained in the Section on Privacy in this Companion. See also information about the Federal Do Not Call Register Act below.

1.5.3. Newsletters and Promotional Material

Newsletters, special offers and similar publications are an excellent way of staying in touch with clients and keeping them up to date with relevant information.

When you send this type of promotional material you will be using personal information about the recipient, i.e. their name and address. You can distribute promotional material if you have their consent or you collected their information from them and they would reasonably expect it and you provide them with a simple way for them to ask you to remove them from your distribution list (and you do remove them from your distribution list on request). See our suggested 'opt out' wording above.

1.5.4. Electronic Marketing / Spam

Many businesses also use email and other forms of electronic marketing such as instant messaging, SMS, etc. because it is cost effective and direct.

As a result of the proliferation and ease of electronic marketing, this activity is quite heavily regulated. This means that some additional requirements apply – which are described below to the extent that they affect most credit services providers – if you use electronic marketing intensely you need to understand these laws more fully⁴⁴.

The basic rule is you may not send spam without the permission of the recipient⁴⁵ (unless it was sent by mistake).

What is Spam? – Spam is an unsolicited electronic message sent within or from Australia that has one of the following purposes:

- Offering to supply goods or services;
- Advertising or promoting goods or services or an investment opportunity; or
- Advertising or promoting a supplier of goods or services or a provider of an investment opportunity.

What is not Spam? – Emails containing factual information e.g. correspondence, advice etc are not spam.

These are known as “designated commercial electronic messages”⁴⁶. They can be sent freely provided they do not contain any marketing, advertising or promotional messages. However, they must contain the following information:

- Name, logo and contact details of the person / organisation authorising the message; or
- Name and contact details of the author; or
- Name, logo and contact details of the:
- Author’s employer (if there is one), partnership (if the author is a partner) or organisation (if the author is a director or officer); or
- Sponsor of the message.

TIP

This applies to almost all emails that your business sends. Ensure that every staff member has an approved signoff at the foot of their email.

43 Privacy Act 1988 (Cth), Spam Act 2003 (Cth), Do Not Call Register Act 2006 (Cth)
44 Spam Act 2003 (Cth), Telecommunications Act 1997 (Cth) and Australian eMarketing Code of Practice, March 2005 (which establishes industry rules for sending commercial

electronic messages).

45 s16 Spam Act 2003 (Cth)

46 Schedule 1 Spam Act 2003 (Cth)

What is Consent?⁴⁷ – Consent to send promotional messages can be “express”, in other words, you have asked the recipient if they are willing to receive electronic communications for marketing and/or communication purposes and they have agreed to do so.

A person’s consent to receiving promotional messages can also be reasonably inferred from the conduct, business and other relationships of the recipient. You may infer consent where:

- A particular e-mail address enables the public to send messages to a particular individual or an individual filling a particular role (e.g. enquiries@xyz.com.au, sales@xyz.com.au);
- The address has been conspicuously published (perhaps in an advertisement or the phone book);
- It is reasonable to assume that the person, or the organisation for whom the role is filled, consented to the publication; and
- There is no statement that the person does not wish to receive unsolicited e-mail ⁴⁸.

Some other circumstances where you may infer consent to receipt of promotional, marketing or advertising material by electronic means include: ⁴⁹

- The recipient has an ongoing relationship with you as a client, employee or contractor, and would have a reasonable expectation of receiving such material;
- While there is no ongoing relationship, there is the potential for one, the recipient has provided their contact information with the expectation that they might receive such material and has not withdrawn consent for the last 2 years; or
- The recipient’s email address has been conspicuously published in the public domain in a way that makes their job function or position readily apparent, the material is sent in their business or organisational capacity and relates to their functions and duties and they have not indicated that they do not wish to receive it.

TIP

Take care as this guidance on inferred consent only relates to promotional messages that are relevant to the work related business, functions or duties of the individual, or their position or function in their organisation. If the message is personal it is more difficult to infer consent.

TRAP

Consent cannot be inferred just from the fact that an electronic address has been published.

If consent is withdrawn, e.g. because a person notifies you that they do not want to receive any further messages at that electronic address, you have 5 business days in which to cease sending any messages.

Address Harvesting Lists – Address harvesting software searches the internet for electronic addresses and compiles them into lists.

Harvesting addresses in this way is illegal and so is using lists that have been obtained this way to send unsolicited promotional messages – even if you did not compile the list. It is also illegal to use address harvesting software or lists which have been obtained using such software ⁵⁰.

1.5.5. Door to Door and Telephone Sales⁴⁸

This area is also heavily regulated and has to be carefully managed.

TIP

As at 2008, the MFAA Disciplinary Tribunal was receiving an increasing number of complaints about telemarketing and how it is implemented and has real concerns about it.⁵²

Other than in the circumstances described below:

- Brokers must not make any uninvited approach to a consumer to acquire a credit services (worth more than \$100 or for an unascertainable price) either by telephone or at any place other than the broker’s premises. If you do, you may be subject to a fine and the consumer may be able to terminate the contract. This also applies to lenders ⁵³.
- Even if you have the consumer’s name or contact details; you must have obtained these for the purpose of entering into negotiations to provide credit services. The mere holding of these details does not constitute an invitation, neither does leaving a message following an unsuccessful attempt at contact.

If the consumer has contacted you about one product or service, you cannot then offer an unrelated product or service. Even an invitation to quote a price cannot be considered an invitation to enter into negotiations to supply the product or service.

47 Schedule 1 Spam Act 2003 (Cth)

48 Clause 4, Schedule 2 Spam Act 2003 (Cth)

49 Clause 2.4 Australian eMarketing Code of Practice, March 2005 Note that this Code only applies to those who use electronic marketing as their ‘sole or principal means’ of marketing, advertising and promoting whether themselves or through a third party, but the Spam Act applies to all forms of electronic marketing.

50 s21 Spam Act 2003 (Cth) The penalties for doing so are high and can range from 10 penalty units for a single contravention to 500 penalty units for 50 or more contraventions for corporations (2 and 100

contraventions respectively for individuals).

51 Division 2 Part 3-2 Schedule 2, Competition and Consumer Act 2010 (Cth)

52 Mortgage and Finance Brief - Membership Disciplinary Tribunal Report 2008

53 The maximum penalty is \$10,000 or 12 penalty units for an individual and \$50,000 or 60 penalty units for a company. It is a strict liability offence.

Unsolicited Telephone Agreements – The Australian Communications and Media Authority (ACMA) maintains the ‘Do Not Call Register’ - a public register in which individuals may register their private or domestic home or mobile number. Telemarketers are not permitted to call these numbers without the consent of the individual (unless the telemarketer is a public interest organisation, such as a charity, political party or educational institution).

Similar to spam (see above), telemarketing calls are voice calls, which offer, supply, provide or advertise goods or services or a business or investment opportunity.

If you plan to make telemarketing calls you need to comply with both the privacy and telemarketing requirements. You may access the Federal Do Not Call Register to check or “wash” your contact lists against the numbers listed on the register. Subscription fees generally apply.

Once contact lists have been “washed”, you can identify which numbers are not on the Register and therefore may be called, and which numbers are on the Register and must not be called.

You may only make unsolicited telephone calls for the purpose of negotiating an agreement for the supply of goods or services during the permitted times which are:⁵⁴

Days	Permissible Times
Weekdays	Between 9.00 am and 8.00 pm
Saturday	Between 9.00 am and 5.00 pm
Sunday	No calls permitted
National Public Holidays	No calls permitted

However you may make telemarketing calls outside these times if the recipient has consented in advance to receive the call during prohibited calling hours. Consent can either be given expressly, e.g. by the recipient ticking a box on a form agreeing to receive calls, or it may be inferred.

Inferred consent arises where it is reasonable for you to believe, on the basis of an established relationship with a person or by their conduct, that the person is willing to receive your calls. For example, if a person holds an account with a bank, the bank could infer that they are willing to receive calls about its products and services. Consent can be withdrawn at any time.

When telemarketing, you must also:

- Provide your contact information and the purpose of the call;
- On request, reveal the source from which you obtained the individual's telephone number;
- Terminate the call if the recipient asks for the call to be terminated or otherwise indicates that he or she does not want it to continue; and
- Ensure that calling line identification is enabled at the time that you make or attempt to make a call.

Case Study

A MFAA Member who continued to telemarket to a consumer after she had asked them not to call again was found to have inadequate processes for recording “do not call” requests and was found guilty of misconduct by MFAA's Disciplinary Tribunal.

The Member was required to:

- Make a financial contribution of \$500 to the MFAA;
- Take steps to ensure that the conduct did not happen again;
- Report to the Tribunal on the steps taken; and
- Have an external audit of its telemarketing processes undertaken in 12 months.

TIP

Do not telephone a person whose name is on the Do Not Call Register.

Unsolicited Face to Face Meetings – You can make an unsolicited face-to-face approach to a consumer on the following days:

Days	Permissible Times
Weekdays	Between 9.00 am and 6.00 pm
Saturday	Between 9.00 am and 5.00 pm

You may not do so on Sundays or public holidays.⁵⁵

⁵⁴ Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007

⁵⁵ The states and territories may vary these calling hours – s131C Competition and Consumer Act 2010 (Cth)

If you make wish to negotiate an unsolicited agreement at a face to face meeting, before commencing negotiations you must:⁵⁶

- Clearly advise consumer of your purpose for approaching them;
- Tell them that you are required to leave immediately if they ask you to; and is obliged to leave immediately on request; and
- Provide the following information about your identity:
 - your name;
 - if you are the supplier of the goods and services, your address (which can be a post office box or a business address); and
 - if you are not the supplier, the suppliers name and address (which may not be a post office box).⁵⁷

If the consumer asks you to leave, you must do so immediately.⁵⁸

If you negotiate an unsolicited consumer agreement, then you need to tell the person that:

- They may terminate the agreement during the “termination period” see below;
- How to terminate the agreement; and
- That you are not able to provide the goods or services for 10 days after the date that a face to face agreement was made or 10 days after the date that the contract for a telephone agreement was given to the consumer

This information must be provided in writing in a face to face agreement and orally for telephone agreements (but subsequently in writing). The information must be attached to the agreement document, be in plain language, legible and presented clearly and be in the most prominent text in the documents (other than the supplier's name or logo).⁵⁹

Unsolicited Agreement Documents – You must give the consumer a copy of the agreement:

- For agreements negotiated face-to-face, immediately after they have signed it; and
- For agreements negotiated by telephone, within five business days or any longer period you agree with the consumer.

The terms of the agreement must be set out in full, there must be a prominent cooling-off notice⁶⁰, a termination notice in the approved form, and the supplier's contact details must be shown. The agreement must be printed clearly or typewritten and must be expressed in reasonably plain language, legible and presented clearly. Agreements negotiated face-to-face must be signed by the consumer.

1.6 MANAGING YOUR MARKETING AND ADVERTISING OBLIGATIONS

To manage these obligations:

- Carefully review your promotional documentation, signage, stationery etc. before use;
- Train staff and loan writers in what they can and cannot say when describing the business and your services and the importance of doing so. It is good practice to provide them with scripts;
- Train your staff and credit representatives on what they can and cannot say when referring clients to AFS Licence holders, for example regarding insurances;
- Regularly review and wash your Do Not Call Register against the Federal Register to ensure that it is up to date;
- Do not add anyone to your marketing database unless you have express or inferred consent; and
- Add required identifying information as an automatic “signature” to all staff emails.

⁵⁶ s74 Australian Consumer Law , Sch 2 Competition and Consumer Act 2010 (Cth)

⁵⁷ Regulation 82 Competition and Consumer Regulations 2010 (Cth)

⁵⁸ S75, Sch 2 Competition and Consumer Act 2010 (Cth), Reg 83 Competition and Consumer Regulations 2010 (Cth). The maximum penalty is \$10,000 or 12 penalty units for an individual and \$50,000 or 60 penalty units for a company. It is a strict liability offence.

⁵⁹ Regulation 84 Competition and Consumer Regulations 2010 (Cth)

⁶⁰ See regulation 85-87 Competition and Consumer Regulations 2010 (Cth) for details

2. Obligations to Clients

USER GUIDE:

TO ASSIST YOU TO UNDERSTAND WHAT YOU CAN AND CANNOT DO WHEN DEALING WITH CONSUMERS, THIS SECTION PROVIDES GUIDANCE ON YOUR DUTIES AND OBLIGATIONS DUTIES TO CLIENTS.

2.1 DUTIES TO CLIENTS

2.1.1. Duty Of Care

Legislation, the common law and industry codes of practice all impose similar but slightly different duties of care on mortgage and finance brokers. You also have a fiduciary duty to clients, which generally arises out of the special position of influence that you occupy in relation to the client.

What is the duty? All mortgage and finance brokers have a duty to clients to exercise reasonable care and skill⁶¹. If this duty is breached, you will be liable for the foreseeable loss suffered by the client due to that breach.

What is the standard of the broker's duty? The standard of the care you are expected to provide is assessed by comparing it to the level of care that a competent, experienced, well-informed loan writer would have provided in the same circumstances (unless a higher standard has been agreed between you and the client, in which case the higher standard would apply).

(Brokers with specialist areas of expertise may be held to a higher standard in their area of expertise. Conversely, a less onerous duty may be owed to a client with a high level of knowledgeable or expertise, as opposed to one who has no mortgage knowledge or experience).

2.1.2. Legal and Code Requirements

It goes without saying that mortgage and finance brokers must comply with all the laws and codes of practice that apply to a loan transaction from the time of the client's first enquiry until the loan is discharged. These laws are described in detail throughout the Handbook and this Companion.

Some duties are also imposed by various pieces of legislation and codes of practice.⁶²

For example, You must:

- Provide your credit services honestly efficiently and fairly; and
- Not suggest that a consumer apply for or assist a consumer to apply for credit (or an increased credit limit which is unsuitable for the consumer).⁶³

TIP

The MFAA Code of Practice goes further than this and requires its members to only negotiate or arrange finance which they genuinely and reasonable believe are appropriate for the borrower after undertaking an appropriate assessment of the borrower's capacity to service the loan.

- Act with all due skill, care and diligence in your dealings with clients and other parties to loan transactions;
- Treat all parties honestly, fairly and with integrity;
- Take all reasonable steps to ensure that the finance applied for is obtained and the property settlement completed in a timely fashion; and
- Ensure that you and your associates and staff hold the relevant licenses and authorisations and have the qualifications and experience necessary to deal competently and professionally with consumers;
- Not engage in acts or omissions of a misleading, deceptive, dishonest or fraudulent nature;
- Act in the best interest of the client;
- Fully disclose any apparent or potential conflict of interest of which you are or reasonably ought to be aware to the extent that it may reasonably concern a consumer - see section 8 on Conflicts of Interest for more information on how to do this;
- Act in a professional and courteous manner towards consumers; and
- For MFAA members, refrain from any conduct which may embarrass, impugn or discredit the MFAA or bring it into disrepute.

⁶¹ This duty rises at common law but is also a specific requirement of the FBAA Code of Conduct

⁶² For example s47 National Consumer Credit Protection Act 2009 (Cth), Clause 4 MFAA Code of Practice (December 2012) and the FBAA Code of Conduct s123 National Consumer Credit Protection Act 2009 (Cth)

2.1.3. False Representations⁶⁴

Take care that you do not make any false representations in connection with your services or the loan products which you are discussing with clients. In particular, do not falsely describe any of the following:

- The cost of a loan e.g. fees and interest rates;
- The cost of your services e.g. your commission or fees;
- The client's need for a product or service, e.g. do not recommend that a client consolidate their borrowings if there is no benefit in doing so;
- The standard, value or quality of particular lender's products or services;
- The existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in a loan product;
- That a particular lender's products or services have sponsorship, approval, performance characteristics, features, uses or benefits that they do not have; or
- That someone else (e.g. a person who is known to the client) has agreed to acquire a particular lender's products or services.

When providing credit services, do not give information to any one which you know (or are reckless as to whether) is false or misleading.⁶⁵

2.1.4. Unconscionable Conduct⁶⁶

Do not take advantage of potential borrowers who are 'weak', disadvantaged or gullible. This could include people with mental incapacity, the aged, those who lack commercial experience or understanding, those who lack comprehension of spoken or written English, or those who lack education. With clients such as these, it is easy to exert undue influence or pressure which leads to the client's decision to enter into a finance agreement.

Conduct is unconscionable if it is unfair, unethical or immoral, for example it would be unconscionable to proceed with a transaction if a reasonable person would think that it was morally wrong to do so. This applies even if a client has consented to a transaction (as the consent would not have been fully informed and voluntary).

TIP

Ensure that the client fully understands the terms of the loan and the consequences of defaulting on the loan. Merely having the client sign a piece of paper to this effect will not protect you if they do not properly understand.

If you are concerned that a client does not understand, recommend that they obtain independent advice. Keep file notes of your recommendation for your own protection. If the client wishes to seek independent advice, do not proceed with the loan until they have done so (and keep a file note to that effect as well).

TRAP

Be especially careful of situations where:

- The security and/or guarantee is being provided by a third party; or
- One of the parties may be able to influence the other party - e.g. husband and wife, parent and child, patient and carer, etc.

2.1.5. Harassment or Coercion⁶⁷

Do not use physical force or unduly harass or coerce a client to use your services or take up a loan.⁶⁸

Examples of this include excessive uninvited telephone calls, uninvited calls after hours and uninvited visits to potential client's homes.

Case Study⁶⁹

A broker arrived at the consumers' home unannounced on several occasions to ask them to sign the broker agreement. On one occasion the broker arrived on a weekend while the client had visitors and refused to leave until the documents were signed.

The clients signed the documents and later contacted the broker to withdraw from the agreement. The broker then charged an application fee and a broker's fee.

The clients were aware that they would be liable for application fees after withdrawing from the loan but complained to COS about the broker fee. The complaint was resolved when the broker offered to waive his fees.

⁶⁴ s151 Schedule 2 Competition and Consumer Act 2010 (Cth), FBAA Code of Conduct

⁶⁵ s160D National Consumer Credit Protection Act 2009 (Cth). A breach attracts a civil penalty of 2000 penalty units and/or a criminal penalty of 100 penalty units or 2 years imprisonment (one penalty unit is equal to \$170 – s4AA Crimes Act 1914 (Cth).

⁶⁶ s12CB ASIC Act 2001 (Cth), clause 4.7(f) MFAA Code of Practice (December 2012)

⁶⁷ s50 Schedule 2 Competition and Consumer Act 2010 (Cth)

⁶⁸ s155 National Credit Code – this is a criminal offence that attracts up to 100 penalty units (i.e. a \$17,000 fine)

⁶⁹ COSL website www.cosl.com.au

2.1.6. Fiduciary Duties

All mortgage and finance brokers are placed in a position of trust and influence by their clients. Therefore, you must not abuse that position.

You must always act in the best interest of your client and give the client undivided loyalty. Do not take improper advantage of that trust in order to obtain a benefit to yourself or a third party. Treat all clients and fulfil all of your commitments to clients honestly, fairly and competently.

You should have honest and honourable relationships with all persons with whom you come into contact in the course of your professional and commercial activities. You must provide all parties to a transaction with all relevant information that is in your possession that could influence either their decision (or a reasonable person's decision) to enter into a loan transaction, or their consent for you to act for more than one person in the transaction.

2.2 PRIVACY

The privacy laws ⁷⁰ protect personal information which belongs to individuals by placing restrictions on how that information may be collected and used.

Clients are entitled to confidentiality in their affairs. Never discuss a client's affairs with any person for any purposes that are not authorised by the client. Follow the privacy procedures in this section to comply with the Australian Privacy Principles.

TIP

While the privacy legislation does not apply to all businesses ⁷¹, any business can opt in to it. Since you are likely to be required to comply with it by your lenders, MFAA recommends that mortgage and finance brokers opt in and observe all of its requirements.

Special requirements apply to sensitive personal information. This is information or an opinion about a person's racial or ethnic origin, political opinions, Membership of a political, trade or professional association or a trade union, religious or philosophical beliefs or affiliations, sexual preferences, criminal record or health information.

2.2.1. What is personal information?

Personal information is information or an opinion about an identified individual or an individual who is reasonably identifiable. It does not matter whether it is true or recorded in a material form.

In effect, it is information or an opinion that can identify a person, for example, their name, physical description, address, employer / place of work, salary and employment details, business activities, investments, and assets and liabilities – or any combination of these.

It does not matter whether it is true or whether it is oral or in writing.

TIP

While the privacy legislation does not apply to all businesses, any business can opt in to it. Since you are likely to be required to comply with it by your lenders, MFAA recommends that mortgage and finance brokers opt in and observe all of its requirements. This is also a signal to your clients that you comply with best business practices!

2.2.2. What is sensitive information?

Special requirements apply to sensitive personal information. This is information or an opinion about a person's racial or ethnic origin, political opinions, Membership of a political, trade or professional association or a trade union, religious or philosophical beliefs or affiliations, sexual preferences, criminal record or health information (including biometric and genetic information).

2.2.3. Collection and Use of Personal Information

Only collect personal information that is reasonably necessary for the functions and services that you provide, e.g. to evaluate suitable loan products, support the loan application and assist the client to arrange the loan. You must only collect personal information by lawful and fair means and not in an unreasonably obtrusive way ⁷².

You should only collect personal information from the individual to whom it relates unless it is unreasonable or impracticable to do so. If you do collect information from someone else, make the individual concerned aware that you have done so.

When personal information is collected, you need to tell the person from whom you collect it the following things:

⁷⁰ Privacy Act 1988 (Cth)

⁷¹ It applies to businesses with an annual turnover of more than \$3 million, health service providers, government agencies, credit providers, credit reporting agencies and anyone that holds an individual's health information or personal tax file number and some small businesses.

⁷² Australian Privacy Principle 3

- The name and contact details of your organisation;
- The fact your privacy policy contains information about how they can access or correct their personal information or make a privacy related complaint;
- The purpose(s) for which the information is collected;
- To whom you will usually disclose the information;
- Whether you are likely to disclose the information to overseas recipients and if so, the countries that they will be in;
- Any law that requires the information to be collected; and
- What can happen if the person does not provide the information, e.g. that the loan you recommend might not be suitable or you may not be able to complete their application⁷³.

Use the following Collection Statement as a guide to what to say when you collect personal information. It should be incorporated into your, Credit Guide, Letter of Engagement, and your first correspondence with any person about whom you collect personal information. Alternatively, you can give them a copy of your Privacy Policy.

PRIVACY COLLECTION STATEMENT

We are committed to protecting your privacy. We use the information you provide to advise about and assist with your finance needs. We provide your information to the lenders or other companies with whom you choose to deal (and their representatives). We do not trade, rent or sell your information or disclose it to overseas recipients [OPTIONAL: replace the words "or disclose it to overseas recipient" with this sentence...] We may disclose your information to recipients in <insert countries> for the purpose of <insert purpose>. If a recipient is not regulated by laws which protect your information in a way that is similar to the Privacy Act, we will seek your consent before disclosing your information to them.

If you don't provide us with full information, we can't properly advise or assist you with your finance needs. For more information about how to access the information we hold about you, how to have it corrected and how to complain if you think we have breached the privacy law, ask us for a copy of our Privacy Policy by contacting us on <insert contact telephone number> or visiting our website <insert website url>.

If you have collected information from someone other than the person concerned (which you should only do if it is absolutely necessary), you need to make the person to whom it relates aware that you have collected their information, how you did this, and you still need to give them the information listed above.

Credit providers who collect personal information that they are likely to disclose to a credit reporting body, must also notify the individual of the name and contact details of the body.

TIP

Many brokers provide clients with a Privacy Consent form which tells the client this information. They have the client sign the form and provide them with a copy. Always keep a signed copy of this form.

2.2.4. Sensitive Personal Information

Stricter requirements apply to sensitive personal information. It must not be collected unless it is reasonably necessary for one of your functions or activities and the individual has consented (except in limited circumstances such as where it is required by law).⁷⁴

Always ensure that you obtain consent when you collect or disclose sensitive information.

2.2.5. Unsolicited Personal Information⁷⁵

If you receive personal information that you have not requested, you can only retain it and use it if it is information that you would have been permitted to collect in the first place – i.e. because you need it for the functions and services that you provide.

You must do the following within a reasonable timeframe:

- Decide whether you could have lawfully collected the information if you had requested it; and
- If not, destroy or de-identify it as soon as practicable (unless it is contained in a Commonwealth record).

⁷³ Australian Privacy Principle 5

⁷⁴ Australian Privacy Principle 3

⁷⁵ Australian Privacy Principle 4

2.2.6. Use or Disclosure of Personal Information⁷⁶

Only use or disclose personal information for the primary purpose for which you collected it ⁷⁷.

For example, loan writers loans may need to disclose it to:

- Other members of your firm who need to use the information to arrange the loan;
- Your employer;
- The lenders to whom application(s) are to be made;
- Credit reporting agencies and other organisations (in some cases you will need written consent) ; and
- Anyone to whom the client consents to the information being disclosed.

Only use or disclose personal information for other (“secondary”) purposes where: ⁷⁸

- The individual has consented to that use or disclosure; or
- The individual would reasonably expect it to be used or disclosed for that purpose and the secondary purpose is related to the primary purpose (if it is sensitive information it must be directly related);The use or disclosure is required by law; or
- You have reason to believe it is necessary for one of the following:
 - Prevent a serious threat to life, health or safety;
 - Take action in respect of serious unlawful activity or misconduct;
 - Locate a missing person; or
 - Establish or defend a legal claim or engage in a confidential alternative dispute resolution process; or
 - It is necessary for legal enforcement related activities.

Do not:

- Trade, rent or sell personal information; or
- Provide personal information to anyone other than the organisations to whom the client has expressly or impliedly authorised you to provide it to.

TRAP

Don't rely on your credit provider's or aggregator's privacy consent forms because they do not automatically cover you. For example, if you do not obtain the client's consent for you to use their personal information, this could hamper your ability to service and market to the client in the future and your right to retain their records if you change aggregators.

TRAP

Different rules apply if you intend to use personal information for direct marketing purposes. See the Direct Marketing section of this Companion for more information

2.2.7. Overseas Disclosure⁷⁹

If you intend to disclose personal information to anyone overseas, before doing so you need to take reasonable steps to ensure that either they will not breach the Australian Privacy Principles or they are subject to laws which provide similar protection and can be enforced by the individuals whose personal information is being disclosed. This might extend to including this obligation in the contracts and other arrangements you have with that person.

If you are unsure about the laws that apply to an overseas recipient and you don't have an arrangement under which you can require them to comply with the Australian privacy laws:

- Inform anyone about whom you collect personal information, that you cannot give any assurances about how the information will be used, stored or disclosed if you disclose it overseas; and
- Obtain express written consent before you disclose it overseas.

Disclosure overseas is permitted in other limited circumstances including where it is required by Australian law or an Australian court or tribunal.

TRAP

If you disclose personal information overseas and the recipient breaches an Australian Privacy Principle, you may be deemed to have breached the law.

TIP

Ensure that your contracts with overseas recipients require them to comply with the Australian Privacy Principles.

⁷⁶ Australian Privacy Principle 6

⁷⁷ This is also required under the FBAA Code of Conduct

⁷⁹ Australian Privacy Principle 8

2.2.8. Tax File Numbers

Because financial institutions will often need a client's tax file number (TFN) (particularly if a deposit account is opened), you may need to collect TFNs from clients.

Collection⁸⁰ - You can only request or collect a TFN from clients if it is necessary and relevant for the services you provide and /or for a purpose which is authorised by taxation, personal assistance or superannuation law.

When requesting a TFN, inform the client:

- Of the law which authorises you to request or collect it;
- Of the purpose for which it is collected;
- That declining to provide a TFN is not an offence; and
- Of the consequences of declining to provide a TFN (e.g. that money will be withheld from interest and investment income).

Ensure that the way you request or collect a TFN does not unreasonably intrude on the owner's affairs.

Use or Disclosure⁸¹ - Do not use a client's TFN for any purpose other than the legal purpose for which it was obtained. For example, do not use or disclose the number to establish or confirm the identity of a client.

Storage and Destruction⁸² - If a client's TFN is collected, or incidentally appears on documents relating to an application for a loan, you must:

- Protect it from misuse, loss and unauthorised access; and
- Ensure that access to the TFN is restricted to people who need to access it for the legal purpose for which it was collected.

If you do not need the TFN either because you did not request it or it is no longer required by law or for the legal purpose for which it was collected, take reasonable steps to securely destroy or permanently de-identify it (e.g. with permanent white-out, black ink or similar).

Best practice client file security must be employed to protect TFN information.

2.2.9. Other Requirements

Data Quality and Security of Information

You need to take reasonable steps to ensure that the personal information your staff collect, use or disclose is accurate, up-to-date, complete and relevant. Take care to keep it protected from misuse, interference and loss or from unauthorised access, modification or disclosure.

Regularly:

- Review the information you hold to ensure that it is complete and relevant; and
- Ask your clients to confirm that the information you hold about them is correct and up to date.

If information has become irrelevant destroy or de-identify it.

Access to and Correction of Personal Information

If a person requests access to personal information you hold about them, respond within a reasonable period and where possible allow access in the manner they have asked for (e.g. send copies of records or allow the person to inspect them at your office). You can refuse access in some circumstances. Check if you have grounds to do so with your Privacy Officer and let them manage the refusal.

2.3 CONFIDENTIALITY

Keep information provided by loan applicant's confidential at all times and only disclose it if law the law requires you to do so or the client authorises you to do so.⁸³

TIPS

- When working in an open plan environment, try to minimise the opportunity for conversations about clients or transactions to be overheard.
- Don't leave client information where it can be seen by others.
- Don't discuss or speak about a client's personal information or situation outside of work.

⁸⁰ Guideline 3 Office of the Australian Information Commissioner Tax File Number Guidelines 2011
⁸¹ Guidelines 5 Office of the Australian Information Commissioner Tax File Number Guidelines 2011. A breach of the Tax File Number Guidelines is an interference with privacy under the Privacy Act 1988 (Cth).

⁸² Guideline 6 Office of the Australian Information Commissioner Tax File Number Guidelines 2011
Clause 9 MFAA Code of Practice (December 2012)
Clause 9 MFAA Code of Practice (December 2012)

3. Remuneration

USER GUIDE:

ANYONE WHO PROVIDES A CREDIT SERVICE MUST DISCLOSE INFORMATION ABOUT THEIR REMUNERATION IN VARIOUS DISCLOSURE DOCUMENTS, INCLUDING THE CREDIT GUIDE, QUOTE AND CREDIT PROPOSAL. MORE INFORMATION ABOUT THESE REQUIREMENTS IS CONTAINED IN THE NEXT SECTION OF THIS MANUAL.

3.1 COMMISSIONS AND FEES

Mortgage brokers may receive commissions from lenders and charge fees to their clients for the services you provide. There are some restrictions on when and how much may be received or charged.

Fees may not be charged for assistance with small amount credit contracts (loans issued by a non-ADI (other than continuing contracts) for \$2,000 or less and for between 16 days and 1 year).⁸⁴

3.1.1. Non-refundable fees

Non-refundable fees may not be charged for credit applications if the broker knows or suspects that there is little or no chance of the credit being approved. However:

- MFAA members may charge a fee for providing credit assistance provided they clearly:
 - Describe the nature of the credit assistance for which the fee will be charged;
 - State the amount of the fee; and
 - Specify when this will be payable;⁸⁵ and
- FBAA members may charge non-refundable upfront fees provided you have first told the client in writing that it is improbably or unlikely that they will be able to obtain a credit facility.⁸⁶

3.1.2. Refinancing

MFAA members can only receive a commission, payment or other incentive for negotiating refinancing of credit for a consumer where the consumer is not better off as a result of the refinance, if you have advised the consumer that that is likely to be the case and the consumer has requested you to proceed with the refinancing application.⁸⁷

3.1.3. Collecting your Fees⁸⁸

You cannot require a consumer to:

- Pay for credit assistance before it is provided;
- Pay for credit assistance if you have not provided a quotation; or
- Pay more than the maximum amount that has been quoted to the consumer in your Credit Quote.

Loan writers may not lodge or threaten to lodge a caveat over land to induce a consumer to pay your fees and charges.

3.2 DISCLOSING COMMISSION AND FEES

3.2.1. General Law

Brokers generally act as the borrower's agent when arranging a loan – this gives rise to a fiduciary duty to disclose all commissions (upfront and trailing) and any other benefits that you receive or pay as a result of the relationship, irrespective of who is paying or receiving the commission.⁸⁹

Commission and fee information should always include GST.

Good News: MFAA's 2007 Mystery Shopping indicated that 62% of brokers disclosed their commissions and how they were paid, even though they were not required to do so at the time of the mystery shop.

TRAP

25% of all complaints received by COS in 2005-2006 related to failure to disclose fees or commissions.

⁸⁴ Reg 79AB National Consumer Credit Protection Regulations

⁸⁵ Clause 6.2 MFAA Code of Practice (December 2012)

⁸⁶ Responsibilities of the Finance Broker to the Client, FBAA Code of Practice

⁸⁷ Clause 7.2 MFAA Code of Practice (December 2012)

⁸⁸ s114(4) - (6) National Credit Act. A civil penalty of 2,000 penalty units applies to each of these.

⁸⁹ See also FBAA Code of Conduct

3.2.2. MFAA Code of Practice

Commissions – MFAA members are also required to always disclose the following information to clients who are applying for a loan, regardless of the source of the commission:⁹⁰

- The fact that a commission or other benefit will or may be paid;
- By whom it is paid;
- To whom it is payable;
- The amount of the commission or other benefit, if ascertainable; and
- If it is not ascertainable, the basis of or formula if ascertainable.

This also applies to benefits received as a result of the client entering into any general or life insurance that you arrange for the client (or a referral to an insurance provider).⁹¹

You also need to disclose any commission which is paid to employees who advise on the loan.

TIP

Commission or other benefits need not be disclosed by managers or services providers who supply their own product.

Fees – If you charge fees, tell the client about the following (in a written contract signed by both parties)⁹²:

- The nature of the credit assistance to be provided for which the fee will be charged;
- The amount of the fee; and
- When the fee is payable.

3.2.3. National Credit Act

The National Consumer Credit Protection Act 2009 (Cth) (NCCP Act) imposes additional obligations for brokers to include remuneration details in their Credit Guides, Quotes and Proposals. Section 4 details the information required in document.

Where there is any inconsistency, the NCCP Act disclosure requirements override the general obligations in the MFAA Code of Practice⁹³.

3.2.4. Lenders

Lenders do not need to disclose the margin that they earn between the cost of funds and the interest paid by borrowers.

3.2.5. Mortgage Managers

Mortgage managers also derive income from the margin between the cost of funds and the interest rate paid by borrowers. Mortgage managers do not need to disclose the dollar amounts of these margins if they:⁹⁴

- Tell the client that they do have an agreement with the lender where the lender pays the mortgage manager commissions on the margin;
- Do not act for the client in relation to the loan;
- The maximum cost of the loan, including the applicable interest charges are published on the lender's website at the time credit assistance is provided; and
- The mortgage manager does not increase the interest rate above the published rates.

3.3 ALTERNATIVE REMUNERATION

Alternative remuneration is usually a non-monetary benefit. There are many situations in which this type of benefit could influence your presentation of the most appropriate option. Non-monetary benefits must be disclosed in your Credit Proposal.

In addition, the MFAA has also developed the following guidelines for disclosing non monetary benefits.⁹⁵ The FBAA does not have a similar guideline. As the MFAA guidelines are similar to the accepted practices in the financial planning industry, all mortgage and finance brokers would be well advised to follow them.

⁹⁰ This is required for MFAA members under clause 10 MFAA Code of Practice (December 2012)

⁹¹ This is a specific requirement of FBAA Code of Conduct – Responsibilities of the Finance Broker to the Client

⁹² Clause 6.2 MFAA Code of Practice (December 2012)

⁹³ Clause 4.2 MFAA Code of Practice (December 2012)

⁹⁴ Reg 28H National Consumer Credit Protection Regulations 2010 (Cth)

⁹⁵ MFAA Alternative Forms of Remuneration Version 1, 1 Feb 2007 - this is generally based on the NSW Consumer Credit Administration (Finance Brokers) Regulations 2004.

3.3.1. Individual Loan Writers

All non-monetary benefits received by loan writers must be disclosed.⁹⁶

Some typical benefits that are paid to loan writers include, gifts, payment of office rental, accommodation and entertainment, travel, cash payments and/or goods, computer hardware and software and competitions in which a broker/loan writer might be eligible to win a prize subject to achieving certain volume-related targets.

3.3.2. Broker Groups

Benefits such as bonus commissions and sponsorship of group conferences, seminars, training or other events are also typically received by broker groups. All these benefits must also be disclosed in your Credit Proposal.⁹⁷

For example, potential volume bonus commissions that may be received from a particular lender needs to be disclosed, even though the commission may not apply if the specific group target is not achieved.⁹⁸ A sample disclosure would be:

“Your credit provider will also pay us a volume bonus if we place more than a certain amount of loans with them. Usually the volume bonus is calculated as x% of the total amount of loans that we write over the threshold amount. If we exceed the threshold this year, then the maximum amount of “bonus” commission that we may receive on your loan amount of \$<insert amount> is approximately \$<insert amount>.”

Register – Broker groups are recommended to maintain a Register containing details of all such payments or benefits (including the name of the payee and the amount and purpose of the payment). There is no minimum monetary threshold or requirement that the payment be likely to influence loan writers’ recommendations. The Register should be kept at the broker group’s office for 7 years.

3.3.3 A suggested format for the Alternative Remuneration Register is provided in the templates to this Manual.

4. Responsible Lending - Disclosure

USER GUIDE:

MORTGAGE AND FINANCE BROKERS MUST PROVIDE CREDIT GUIDES, QUOTES AND CREDIT PROPOSALS FOR ALL CONSUMER LOANS. THIS SECTION SUMMARISES WHEN AND HOW TO PROVIDE THESE DOCUMENTS AND WHAT INFORMATION THEY MUST CONTAIN.

4.1 CREDIT GUIDE

A Credit Guide is intended to assist consumers to decide whether to use your mortgage or finance broking services.

4.1.1. When must a Credit Guide be given?

Loan writers and anyone else who provides credit services must give consumers their Credit Guide as soon as reasonably practicable after it becomes apparent that they are likely to provide credit assistance to the consumer in respect of a consumer credit contract⁹⁹ or a consumer lease¹⁰⁰.

Credit representatives should give their Credit Guide to the consumer at the same time as they provide your Credit Guide. These documents can be combined.

You do not have to give the client a Credit Guide if you have done so in the past 12 months, unless the contact details for access to your EDR scheme have changed.¹⁰²

Credit assistance – You provide credit assistance when you deal directly with a consumer (or their agent) in the course of, or as a part of or incidentally to a business that you (or your employer) carry on and you¹⁰³:

- Suggest that the consumer apply for (or apply for an increase in the credit limit of);
- Suggest that the consumer remain in; or
- Assist the consumer to apply for (or to apply for an increase in the credit limit of)

a particular credit contract or lease with a particular credit provider.

96 MFAA members are also required to disclose to consumers in writing all material alternative forms of remuneration (i.e. worth more than \$300) paid by a lender that can be reasonably expected to influence their recommendation.

97 Reg 28G(2)(a) and (b) National Consumer Credit Protection Regulations 2010 (Cth)

98 Reg 28G(8) National Consumer Credit Protection Regulations 2010 (Cth)

99 s113(1) National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty

units and a strict liability criminal penalty of 50 penalty units apply to a failure to do so.

100 s136(1) National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units and a strict liability criminal penalty of 50 penalty units apply to a failure to do so.

101 s158(1) National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units and a strict liability criminal penalty of 50 penalty units apply to a failure to do to.

102 Reg 28P(2) National Consumer Credit Protection Regulations 2010 (Cth)

Suggesting that a consumer apply for or remain in, or assisting a consumer to apply for a particular consumer lease with a particular lessor is also credit assistance. Generalised advice about credit is not “credit assistance” and a Credit Guide does not need to be provided before providing such advice. It does not matter whether you provide the credit assistance on your own behalf, or on behalf of another person.

TIP

Lenders must also provide their Credit Guide to a borrower as soon as it becomes apparent to the credit provider that it is likely to enter into provide 104 It is likely that the credit provider will ask you to provide their Guide to the borrower.

TIP

Franchisees¹⁰⁵ do not need provide individual Credit Guides.

4.1.2. Content of Credit Guides

A credit licensee and credit representative’s Credit Guides are essentially similar in content – they both require the following:¹⁰⁶

- Name and contact details;
- Credit licence or credit representative number;
- Information about remuneration including:
 - fees and charge payable by the consumer for the credit assistance and matters associated with it;
 - commissions to be received in relation to the credit contracts for which assistance has been provided; and
 - volume bonuses
- The credit providers with whom the credit licensee conducts business; and
- For credit representatives – details of the their credit licensees;
- Payments to referrers; dispute resolution arrangements; and
- Information about the responsible lending obligations.

This is only a summary of the requirements for Credit Guides – the detail is quite complex. The Fold’s Credit Disclosure Document Templates and Content Guides will help you to prepare a compliant Credit Guide.

TIP¹⁰²

Two or more of your Credit Guide, Quote or Proposal can be combined in one document¹⁰⁷.

4.1.3. Updating your Credit Guide

If the contact details for consumers to access your EDR scheme change, you must update your Credit Guide immediately. You have 93 days in which to change any other information required to be in it.¹⁰⁸

4.2 QUOTATION FOR CREDIT ASSISTANCE

The purpose of the Quote is to inform clients about any fees you will charge for assisting them to obtain a loan.

103 s8 National Consumer Credit Protection Act 2009 (Cth)

104 s126 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units and a strict liability criminal penalty of 50 penalty units apply to a failure to do so.

105 Reg 28P(1) National Consumer Credit Protection Regulations 2010 (Cth) – but the franchise agreement must require the franchisee to comply with the licensee’s credit licensing policies and the licensee’s Credit Guide must explain that the licensee takes responsibility for the credit activities of the franchisee.

106 s113(2), 136, 158(2) National Consumer Credit Protection Act 2009 (Cth)

107 Reg 28L (9) National Consumer Credit Protection Regulations 2010 (Cth)

108 Reg 28B National Consumer Credit Protection Regulations 2010 (Cth)

4.2.1. When the Quote is Required

Mortgage and finance brokers who are credit licensees must give the consumers a written Quote before providing credit assistance to a consumer in relation to a credit contract¹⁰⁹ or consumer lease.¹¹⁹

The consumer must sign and date the Quote or otherwise indicate that they accept the Quote (and the date of acceptance) and you must give the consumer a copy of the accepted Quote.

TIP

General advice about credit, i.e. advice which does not relate to a particular credit contract with a particular credit provider, is not credit assistance – so no Quote is required.

Credit licensees are technically responsible for providing Quotes to clients, but as a matter of practice, credit representatives will prepare and provide them.

4.2.2. When a Quote is not Required

No Quote is required if you do not charge a fee – even if you receive a commission. If you don't not charge fees:

- Your Credit Guide must state that you do not charge fees for credit assistance; and
- Your Proposal must state that no fee has been imposed for the credit assistance and other services you have provided to the client¹¹¹.

4.2.3. Content of a Quote

The Quote must clearly identify that it is a quote and must set out:

- What credit assistance and other services it covers;
- The maximum amount payable by the consumer to you for the credit assistance and other services that you will provide including any fees or charges incurred for matters associated with providing your services;
- The maximum amount of fees and charges that you will pay to another person, on the customer's behalf; and
- The amount payable by the consumer to you or any other person, even if the transaction does not proceed, i.e. if a credit contract is entered or a limit is not increased.

You should also set out when the fee is payable.¹¹²

This is a summary of the requirements for Quotes – the detail is quite complex. The Fold's Credit Disclosure Document Templates and Content Guides will help you to prepare compliant Quotes.

4.3 CREDIT PROPOSAL

If you are a credit licensee, then at the same time as you provide credit assistance to a consumer in relation to a credit contract or a lease, you must give them a Credit Proposal or Lease Proposal.¹¹³

Credit licensees are technically responsible for providing Proposals to clients, but as a matter of practice, credit representatives will prepare and provide them on your behalf. There is no separate requirement for a credit representative to prepare and provide a Proposal for themselves i.e. there is no need for two Proposals to be given, one for the licensee, and one for their credit representative.

¹⁰⁹ s114(1) National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units applies to a failure to do to

¹¹⁰ s137 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units applies to a failure to do to.

¹¹¹ Reg 28C(a) National Consumer Credit Protection Regulations 2010 (Cth)

¹¹² Clause 6.2 MFAA Code of Practice (December 2012)

¹¹³ s121, 137, 144 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units applies to a failure to do so

4.3.1. Content of a Credit Proposal

The Credit Proposal or Lease Proposal must contain the following information:

- Fees or charges payable to the credit provider any other person in respect of the credit contract or lease;
- Fees or charges payable to you (or your ACL licensee) in relation to the credit contract or lease;
- An estimate of the total upfront commission, highest amount of trail commission and other benefits to be received (for MFAA members, you must also disclose by whom and to whom it is paid¹¹⁴); and
- (for loans) if the credit is to be used to pay for any of these amounts, a reasonable estimate of the likely amount of the credit that will be available to the consumer after these payments (other than commission) are made.

This is a summary of the requirements for Credit Proposals – as the detail is quite complex. The Fold’s Credit Disclosure Document Templates and Content Guides will help you to prepare compliant Credit Proposals.

TRAP

It is an offence to require a consumer to pay more than is required to reimburse you for any amount that you pay to another person on behalf of the consumer.¹¹⁵

Some suggested disclosures for various types of remuneration are:

Remuneration Type	Sample Disclosure
No Remuneration	We will not receive any remuneration or other benefits for helping you to obtain credit.
Commission	When the loan settles, we receive an upfront commission of between x% - z% of your loan amount. For every year of the loan we receive a “trail” commission of between x% - y% of that amount.
Volume bonuses	Your credit provider will also pay us a volume bonus if we place more than a certain amount of loans with them. Usually the volume bonus is calculated as x% of the total amount of loans that we write over the threshold amount. If we exceed the threshold this year, then the maximum amount of “bonus” commission that we may receive on your loan amount of \$<insert amount> is approximately \$<insert amount>.
Fees	For helping you to obtain credit we will charge a broker fee of \$<insert amount> - this fee will be payable by you even if you do not proceed with the loan.
Remuneration Type	Sample Disclosure
Payments made to Referrers	We will pay <insert amount> to <insert name of referrer> for referring you to us.
Payments received from Referees	We will receive a <commission / fee> of \$<insert amount> for referring you to <insert Name>.
Hospitality	Your broker may qualify to attend hospitality events such as tennis and football to the value of \$<insert amount> per annum for helping to arrange a loan with <insert name of credit provider>.
Competitions	Your broker is eligible to win a prize to the value of \$<insert amount> for helping to arrange a loan with <insert name of credit provider>.
Conferences	Your broker may be eligible to attend a conference to the value of \$<insert amount> for helping to arrange a loan with <insert name of credit provider>.

4.3.2. Services Agreement (MFAA Members only)¹¹⁶

MFAA members are required to record the essential terms of their agreement to provide services to a consumer in a contract. If you charge a fee, the contract must:

- Describe the nature of the credit assistance to be provided for which the fee will be charged;
- Set out the amount of the fee; and
- Specify when the fee is payable.

Your Credit Proposal could be adapted for this purpose by including any other essential terms of your agreement with the client.

The contract must be signed by both you and the consumer and you must retain a copy for 6 years and also provide the consumer a copy.

¹¹⁴ Clause 10 MFAA Code of Practice (December 2012)

¹¹⁵ s122 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units and a criminal penalty of 25 penalty units and/or 6 months imprisonment apply to a breach of this requirement.

¹¹⁶ Clause 6 MFAA Code of Practice (December 2012)

4.4 GIVING THE DISCLOSURE DOCUMENTS

4.4.1. Who must give the Disclosure Documents

Essentially, the person who deals with the consumer must provide the disclosure documents. The requirements vary depending on the licensing/authorisation structure:

Credit Services Provider	Requirements
Employees and Directors of Licensed Broker	The employees and directors do not need to be appointed as credit representatives. They must give the disclosure documents of the licensed broker.
Contractors to Licensed Broker	The contractors must be appointed as credit representatives. They must provide disclosure documents for themselves and for the licensee.
Licensed Member of Licensed Aggregator	The member provides its own disclosure documents as the aggregator does not provide credit assistance. If the Aggregator provides any credit assistance, it must provide its own disclosure documents.
Credit Representative of Licensed Aggregator	The credit representatives must provide disclosure documents for themselves and for the licensed aggregator.

4.4.2. How to Provide the Disclosure Documents¹¹⁷

You can give any of the disclosure documents to the client in any one or more of the following ways:

- In person;
- By post, email or fax (it must be properly addressed); and/or
- With the client's consent, by making it available for a reasonable period on your information system for electronic retrieval by the client. You must notify the client that the document is available for retrieval and give them the ability to do so.¹¹⁸

When you ask for the client's consent to receive documents electronically, tell them that they can withdraw their consent at any time but until they do so, you will no longer give them paper documents. Also tell them that they need to regularly check for electronic communications.

TIP

Documents sent by email or made available in electronic form must be able to be printed and saved to an electronic file. Do not provide disclosure documents in these ways unless you reasonably expect that the recipient can save and print them.

TRAP

Do not provide any further credit services until you are reasonably satisfied that the client has received the appropriate document. You can be satisfied if the client tells you that they have received a document sent or made available electronically or if you have properly addressed documents sent by post, email or fax.

4.5 Collecting your Fees¹¹⁹

You cannot require consumers to:

- Pay for credit assistance before it is provided;
- Pay for credit assistance if you have not provided a Quote; or
- Pay more than the maximum amount that has been quoted to the consumer in your Quote.

Loan writers may not lodge or threaten to lodge a caveat over land to induce a consumer to pay your fees and charges.

¹¹⁷ Reg 28L National Consumer Credit Protection Regulations 2010 (Cth)

¹¹⁸ Reg 28L(3) National Consumer Credit Protection Regulations 2010 (Cth)

¹¹⁹ s114(4) - (6) National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 applies to each of these.

5. Preliminary Assessment

USER GUIDE:

THIS SECTION PROVIDES GUIDANCE ON HOW TO ASSESS WHETHER A LOAN IS “NOT UNSUITABLE” FOR A CLIENT, PREPARE A PRELIMINARY ASSESSMENT AND PROCEDURES FOR PROVIDING THESE TO CLIENTS.

5.1 CREDIT POLICY

Whether you hold an Australian credit licence or operate as a credit representative, you must not provide credit assistance in relation to any credit contract or consumer lease that will be unsuitable for a consumer.¹²⁰

This puts the onus on you as the broker to ensure that the loan is “not unsuitable” for the client. You cannot simply assume that the loan will be suitable for the client if it meets the lender’s credit criteria.

For this reason, it is advisable for mortgage and finance brokers to establish a policy regarding the criteria that you will use to determine if a loan is suitable. The key elements to consider are:

- The client’s ability to repay the loan – this includes a consideration of the client’s financial position and ability to service the loan and the loan to valuation ratio; and
- Whether the features of the loan meet the client’s requirements and objectives

You can either establish your own criteria, adapt credit criteria from your credit providers or a combination of both. An easy way to do this is to review the credit assessment criteria of the lenders that you deal with and decide which of those criteria you will adopt to determine that a loan is “not unsuitable” for your clients. Then make a list of those criteria and provide it to your loan writers.

However, ensure that you follow the guidance set out below regarding when a contract or lease will be unsuitable.

TRAP

- Do not assist consumers to obtain short term credit contracts (<\$2,000 and <15 days) with any lender other than an ADI.¹²¹
- Do not assist consumers to obtain credit with a non-ADI where the annual cost rate of the contract exceeds 48%¹¹⁸ or if it is a small amount credit contract, the fees and charges exceed the permitted amount – see section 12.1

TIP

If you assist consumers to apply for small amount credit contracts (<\$2,000, between 16 days and 1 year and issued by a non ADI lender), you will need to display a warning about the cost of the loan on your premises and website.¹²³

5.2 PRELIMINARY ASSESSMENT

There is also a formal requirement which requires loan writers to make a Preliminary Assessment that the contract not will be unsuitable for the consumer.¹²⁴

You must do this within 90 days before suggesting that a consumer apply for, or assist the consumer to apply for a particular credit contract with a particular credit provider (or an increase in the credit limit of such a contract).

The Preliminary Assessment must cover the period in which the consumer will either enter into or remain in the credit contract or in which the credit limit will be increased. It must specify the period which it covers.

TIP

Credit providers must also make a “not unsuitable” assessment within 90 days before the day the contract is entered into or a credit limit increased or before making any unconditional representation to the consumer, that they are eligible to enter into or increase their limit under such a contract.¹²⁵

For loans for residential property that will be secured by a mortgage over the property, credit providers have 120 days to make the assessment.¹²⁶

120 Division 6, Part 3-1 National Consumer Credit Protection Act 2009 (Cth)

121 s5(1), s124A National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2000 penalty units and a criminal penalty of 50 penalty units apply.

122 s32A(1)-(3) National Credit Code. A civil penalty of 2000 penalty units and a criminal penalty of 50 penalty units apply and the consumer will be able to recover any fees or charges paid to you.

123 s5(1), s124B National Consumer Credit Protection Act 2009 (Cth). See also regulation

28XXA -28XXB National Consumer Credit Protection Regulations 2010 (Cth). A civil penalty of 2000 penalty units and a criminal penalty of 50 penalty units apply.

124 s115, s116 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 applies to a failure to do so.

125 s128, s129 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units applies to a failure to do so.

126 Reg 28J National Consumer Credit Protection Regulations 2010 (Cth)

TRAP

Redo the Preliminary Assessment if there is a delay in arranging the loan and more than 90 days has passed since you undertook the assessment.

Loan writers do not need to do undertake the preliminary assessment if an Australian credit licensed ADI has branded its credit product with your logo and you have provided the client's information to the credit provider to enable them to assess the suitability of the loan or the limit increase.¹²⁷

TIP

While a preliminary assessment is not required for a loan variation that does not increase the principal sum, in practice many lenders will effect a variation by issuing a new contract rather than a loan variation agreement. Where this occurs, the responsible lending obligations apply again and you will need to again make reasonable enquiries and verifications and make a preliminary assessment. This is also required if you recommend that a consumer remain in an existing credit contract. Be sure your preliminary assessment procedures cover these situations.

5.3 WHEN IS A CONTRACT OR LEASE UNSUITABLE¹²⁸

A credit contract or consumer lease, an increased limit or advice to remain in a credit contract or consumer lease will be unsuitable if at the time of the preliminary assessment:

- The consumer will be unable to comply with their financial obligations under the contract, i.e. the consumer does not have the capacity to repay, or the consumer could only comply with their financial obligations under the contract with substantial hardship. Note that such a contract may also be unjust.
- The contract will not meet the consumer's requirements or objectives.

TIP

Credit providers must take into account the same factors when assessing the unsuitability of a credit contract for a consumer.¹²⁹

TRAP

Two or more small or medium amount loans that are arranged together will always be unsuitable for the client if the credit could have been provided under a single loan and providing multiple loans is more expensive.¹³⁰

5.3.1. Ability to Repay

When determining a consumer's capacity to repay, look at the maximum amount to be repaid under the credit contract (including fees). Also include any cost of changing contracts and your fees.

Substantial Hardship - When considering whether a transaction is likely to result in substantial hardship, take into account:¹³²

- The available funds after payment of living expenses;
- Whether the loan can be repaid from income, rather than equity in an asset (although this would not apply to products such as reverse mortgages and bridging loans)¹³³;
- The source of the consumer's income (including if any part of the income is sourced from welfare payments);
- The consistency and reliability of the consumer's income, having regard to the size of the loan;
- Any significantly higher than average expenses (e.g. because they live in a remote area);
- Other debt repayment obligations;
- Other commitments (e.g. child support);
- The extent of the buffer between disposable income and the repayments - to assess the consumer's vulnerability to an increase in interest rates, or the impact of the end of a 'honeymoon' rate or a "balloon" payment at the end of the loan;
- The likelihood that the consumer would have to sell assets to repay the loan; and
- The consumer's willingness to change lifestyle in order to afford the loan, e.g. cutting back on non-essential expenses.

¹²⁷ Reg 28Q National Consumer Credit Protection Regulations 2010 (Cth). Loans writer will still be jointly and severally liable with the credit provider if the credit provider does not make the preliminary assessment or recommends a loan that is suitable for the consumer. However the loan writer can claim indemnity from the credit provider for any such liability.

¹²⁸ s118, s119, s141 and s142 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units applies to a failure to properly assess the unsuitability of the credit contract or consumer lease.

¹²⁹ s131 National Consumer Credit Protection Act 2009 (Cth)

¹³⁰ Reg 28XXF National Consumer Credit Protection Regulations 2010 (Cth)

¹³¹ ASIC Regulatory Guide 209.91

¹³² ASIC Regulatory Guide 209.95-209.97, FBAA Code of Conduct

¹³³ ASIC Regulatory Guide 209.102

TIP

Substantial hardship is assumed if the consumer could only comply with the obligations by selling their principal place of residence (unless there is evidence to the contrary, e.g. other assets that can be sold).¹³⁴

Substantial hardship is also assumed for small amount credit contracts, if the borrower is already in default under another small amount credit contract or has had 2 or more other small amount credit contracts in the last 90 days.¹³⁵

Whether a loan is unsuitable depends on the circumstances of the case. What is unsuitable for one type of borrower, may be suitable for another, e.g. unsophisticated or low income borrowers cannot be treated the same as sophisticated or financially well off clients.

For example, a conservative view is that all home loans for borrowers over 45 are unsuitable, because the borrower is likely to retire before the loan is repaid, leaving the borrower in a position of needing to sell the principal place of residence. However, the loan may still be suitable if:

- The consumer has other assets they can sell e.g. investment properties;
- The repayments are at a level that can still be comfortably sustained from the consumer's post-retirement income; or
- The consumer already intended to sell the principal place of residence irrespective of the need to do so to repay the loan e.g. an intention to downsize at retirement.

Always consider the circumstances carefully and document the reasons why you consider loans like this are suitable for the client – this helps to refute the assumption of substantial hardship.

It is more likely that a consumer can establish substantial hardship in repaying the loan if their income is below ¹³⁶ :

- A level where they do not have funds to meet realistic living costs;
- An objective indicator (e.g. the Henderson Poverty Index or the Household Expenditure Measure plus a certain margin); or
- The maximum applicable level of government benefits for a person in the financial and family situation of the consumer.

Depending on the consumer's objectives, you may also need to compare the proposed contract to contracts that are commonly available.

TIP

When assessing whether the credit contract is unsuitable, you need to take into account only the results of your enquiries that you reasonably believe to be true¹³⁷ (and any other enquiries that you would have reasonably believed had you made reasonable enquiries or verification).

Do not factor in any information that you have been given, that you know to be untrue.

TRAP

You are not limited to these indicia. Think about whether there are any other circumstances that could make a credit contract unsuitable for a consumer.

5.3.2. Meeting the Consumer's Requirements and Objectives

Assess whether the proposed credit contract will meet the consumer's stated requirements and objectives. If you are unsure what these are, then make further enquiries with the client.

Consider whether the loan you are recommending meets the consumer's stated objectives for the credit and the type of credit that the consumer asked for. Some examples of factors that you need to take into account when making this assessment include:¹³⁸

- The complexity of the credit facility – is it simple or complex, short or long term, secured or unsecured, could a simpler product meet the consumer's needs?;
- The purpose of the credit – is it for personal, residential, bridging, refinance, loan consolidation;
- The type of credit – is it a credit card, store card, mortgage, guarantee, linked credit contract, lease or reverse mortgage;
- The features of the facility – interest only, principal and interest, fixed or variable interest, split option, redraw option, offset account option, line of credit, prepaid interest that is either capitalised or deducted at settlement, balloon payment;
- The term of the loan – how does it relate to the likely useful life of the asset;
- The type of security;

¹³⁴ s118(3) and s141(3) National Consumer Credit Protection Act 2009 (Cth)

¹³⁵ s118(3A) and s123(3A) National Consumer Credit Protection Act 2009 (Cth).

¹³⁶ ASIC Regulatory Guide 209.100

¹³⁷ s118(4), s119(4), s141(4) and s142(4) National Consumer Credit Protection Act 2009 (Cth)

¹³⁸ ASIC Regulatory Guide 209.117

- The cost of obtaining the credit – whether it is deducted from the loan or capitalised; and
- The cost of exiting the credit – termination fees, exit fees or break cost;

Generally consumers should be able to meet their obligations from income rather than from equity in an asset, however, there will be circumstances where it is not unreasonable to rely on the sale of an asset for repayment, e.g. bridging loans or reverse mortgages.

Care is also required with balloon payments to ensure that the consumer understands and has the capacity to make the final repayment.

5.3.3. Refinancing and Debt Consolidation

You may need to make additional enquiries into the suitability or otherwise of the loan when you are recommending debt consolidation or that an existing loan be refinanced. Consider the following:

- Will the overall cost savings override any lost benefits; or
- If not, then despite the additional cost, will the new loan better meet the consumer's requirements and objectives, e.g. because it is more convenient, more flexible or has more suitable features (such as a redraw facility on a mortgage).

When assessing cost savings take into account all the circumstances, including the cost of refinancing and all associated charges and transaction costs. If details of the existing credit contract are not available from the lender, then make reasonable enquiries with the client so that you fully understand its features and can determine whether the new credit is "not unsuitable".

Ensure you take the consumer's long-term objectives into account when assessing the suitability of a loan for debt consolidation - both current and long-term objectives need to be considered. Avoid recording a consumer's objectives solely as 'debt consolidation' as this is a process for meeting objectives, not the objective itself. The consumer's objectives might include (but are not limited to) reducing the size or number of repayments or reducing interest rates.

More extensive enquiries will be needed if the consumer is having difficulty in making repayments under their existing credit contract or if they are in arrears. Any contract for which repayments are at the same or similar level is likely to be unsuitable for the client.

TIP

If a consumer seeking to borrow more money or refinance is in arrears on a small amount credit contract, consider if the assumption of financial hardship now exists.¹³⁹

If the current contract is unsuitable, but you reasonably believe that there is no other credit contract that is 'not unsuitable' (after making reasonable enquiries), you may suggest the consumer remains in the current contract, if you inform them of the available hardship variation procedures.

If the cost of credit is higher post-refinancing or debt consolidation, you must clearly document why the new contract is not unsuitable.¹⁴⁰

5.3.4. Reverse Mortgages

When providing credit assistance in relation to reverse mortgages, if ¹⁴¹:

- The youngest borrower is 55 or younger, and the loan-to-value ratio of the mortgage is higher than 15%; or
- The youngest borrower is older than 55, and the loan-to-value ratio of the mortgage is higher than the sum of 15% and 1% for each year that the borrower is older than 55; then

the reverse mortgage is assumed to be unsuitable, unless the credit provider can prove otherwise ¹⁴².

A higher level of enquiries about the consumer's financial situation, and their requirements and objectives in relation to the credit contract (including meeting possible future needs) is required for reverse mortgages to prove that the mortgage is not unsuitable. ¹⁴³

Where you assess that a higher loan-to-value ratio is not unsuitable, you must ¹⁴⁴:

- Fully inform the consumer of the implications of the higher loan-to-value ratio on the consumer's indebtedness over time i.e. the increasing amount of credit to be repaid;
- Confirm that the consumer understands these implications; and
- Confirm with the consumer that a reverse mortgage on these terms will meet their requirements and objectives in relation to their possible future needs (including their capacity to leave equity in the reverse mortgaged property to their estate).

¹³⁹ ASIC Regulatory Guide 209.131

¹⁴⁰ ASIC Report 358 'Review of credit assistance providers' responsible lending conduct relating to debt consolidation'

¹⁴¹ ASIC Regulatory Guide 209.122

¹⁴² ASIC Regulatory Guide 209.123

¹⁴³ ASIC Regulatory Guide 209.125

¹⁴⁴ ASIC Regulatory Guide 209.126

5.4 WHAT ENQUIRIES AND VERIFICATION ARE REQUIRED

When making the Preliminary Assessment, you will need to:¹⁴⁵

- make reasonable enquiries about the consumer's requirements and objectives in relation to the credit contract or consumer lease¹⁴⁶;
- make reasonable enquiries about the consumer's financial situation; and
- take reasonable steps to verify the consumer's financial situation.

Note that if the consumer's objectives and requirements change during the assessment process (e.g. they change the amount of credit, or repayment period or amounts etc.) the preliminary assessment must be performed again based on the new requirements.¹⁴⁷

5.4.1. Type of Enquiries Required¹⁴⁸

The following table describes the types of enquiries that may be required to assess whether a loan is "not unsuitable" for a client. As part of your credit policy, decide which of these (if not all of them) you will require your loan writers to undertake:

Type	Enquiries
Financial Situation	<ul style="list-style-type: none">• Age and personal circumstances, i.e. marital status, number of dependants;• Current amount and source of income or benefits;• Nature and length of employment—e.g. full-time, part-time, casual or self-employed);• Occupation and industry type;• Fixed expenses e.g. rent, repayment of existing debts, child support and recurring expenses such as insurance;• Variable expenses and the drivers of variable expenses e.g. number of dependants;• The extent to which any existing debts are to be repaid from the credit advanced;• Savings and credit history;• Nature and value of existing assets;• Any reasonably foreseeable significant changes to financial circumstances e.g. the end of a 'honeymoon' interest rate; period, seasonal employment, impending retirement, etc); and• Geographical factors e.g. living expenses in remote areas can be higher than urban areas.<ul style="list-style-type: none">– When assessing a small amount credit contract, look at: ¹⁴⁹– Whether the consumer is, or was during the previous 90-days, a debtor under any other small amount credit contracts;– Whether the consumer is in default under any small amount credit contract; and– Obtain copies of any other small amount credit contracts under which the consumer was a debtor in the 90-days before the assessment;• When assessing a reverse mortgage, make enquiries about the information you must take into account when making the required equity projections, or that will affect whether unsuitability will be presumed. These include:<ul style="list-style-type: none">– The amount of credit required and why;– Preferred form of payment e.g. lump sum payments, regular payments or both;– The age of each consumer who will be a borrower under the reverse mortgage;– How much equity the consumer would like to retain in their home; and– The current value of the dwelling or land that will become reverse mortgaged property.

145 s117, s140 National Credit Act. A civil penalty of 2,000 applies to a failure to do so.

146 This is also required by clause 7.4 of the MFAA Code of Practice (December 2012)

147 ASIC Report 358 'Review of credit assistance providers' responsible lending conduct relating to debt consolidation'

148 ASIC Regulatory Guide 209.33-209.33 and ASIC Report 262: Review of credit assistance providers' responsible lending conduct, focusing on 'low doc' home loans.

149 ASIC Regulatory Guide 209.53-66

Type	Enquiries
Requirements and Objectives	<ul style="list-style-type: none"> • The amount of credit needed or the maximum amount of credit sought e.g. credit card limit, is any additional credit being offered that the client does not require; • The timeframe for which the credit is required; • The client's medium to long term objectives; • The purpose for which the credit is sought and the benefit to the consumer; • Any particular product features or flexibility required, including the client's knowledge of the costs and additional risks of these features; • The type of security required and available; • The cost of obtaining the credit (whether deducted from the loan amount or capitalized); and • The cost of exiting the current facility (termination fees, exit fees, break costs). • When assessing a reverse mortgage, the consumer's requirements and objectives in meeting possible future needs, such as the need for aged care or whether the consumer prefers to leave equity in the property for their estate.

5.4.2. Scalability of enquiries¹⁵⁰

While you need to assess both the credit risk of the consumer and their capacity to repay, it is up to you to determine what enquiries need to be made. The extent of the enquiries can be scaled up or down depending on the circumstances.

Some of the factors to take into account when assessing the consumer's requirements and objectives are as follows. Again, you can decide how far you require your loan writers to go as part of your credit policy.

Relevant factor	Effect
Potential impact of entering into an unsuitable credit contract on the consumer	<p>More extensive enquiries about the consumer's requirements and objectives are needed if the potential negative impact on the consumer could be relatively serious if the credit contract is unsuitable.</p> <p>Examples include:</p> <ul style="list-style-type: none"> • If the loan is large compared to the consumer's capacity to repay, because even small loans can cause financial difficulties to low income consumers; • Reverse mortgages where the client is likely to be a senior using their primary residence and only significant asset and where the client's eligibility for Centrelink payments, can be adversely impacted; • Advice on debt consolidation would require extensive enquiries to ensure that you comprehensively understand the client's financial situation.
Complexity of the credit contract	<p>Less extensive enquiries are required for simple contracts which most consumers can understand such as a small personal loan.</p> <p>More extensive enquiries are required for complex contracts such as a mortgage and particularly reverse mortgages.</p>
Capacity of the consumer to understand the credit contract	<p>More extensive enquiries could be needed if you are aware that:</p> <ul style="list-style-type: none"> • The consumer has limited capacity to understand the credit contract; • The consumer either has conflicting objectives, is confused about their objectives or cannot readily explain their objectives; or • The consumer's objectives do not appear to match the product being considered by the consumer. <p>NB: It is not always necessary to assess the consumer's ability to understand the credit contract. This is only required if it is apparent that this could be a problem.</p>
Existing or new customers	<p>Less extensive inquiries and verification of information may be appropriate if the consumer is an existing client about whom you already hold information.</p> <p>More extensive inquiries and verification would be required for a new customer.</p>

TIP

So that you can demonstrate that reasonable enquiries have been made, use a fact find to document the information that you collect.

5.4.3. Verification of information

Loan writers must also take reasonable steps to verify the information provided by the consumer, including steps to verify the client's living expenses and fixed expenses. In particular, any inconsistencies when verifying the client's living expenses against benchmark figures should prompt further inquiries.¹⁵¹

You could use the following types of information to verify a consumer's financial situation:¹⁴²

	Type of Information	Responsibility for collection
PAYG employees	<ul style="list-style-type: none"> Recent payroll receipts or pay slips Confirmation of employment with the employer (subject to privacy obligations) 	<ul style="list-style-type: none"> Loan writers Credit providers
Self-employed consumers	<ul style="list-style-type: none"> Recent income tax returns Accountant's statement Business Activity Statements 	<ul style="list-style-type: none"> Loan writers Credit providers
All consumers	<ul style="list-style-type: none"> Credit report Information/reports from other lenders (subject privacy obligations) Bank account, credit card records and other information held by the credit provider about existing customers 	<ul style="list-style-type: none"> Credit providers

TIP

For small amount loans (<\$2,000, between 16 days and 1 year in duration and issued by a non-ADI) if the borrower has an account with an ADI, you must review the last 90 days of account statements when verifying the borrower's financial situation.¹⁵³

Note that you do not need to verify all the financial information you collect. The extent to which you need to do this can be scaled up or down depending on the circumstances and the available information and resources.¹⁵⁴ You can provide guidance on the extent of the verification your loan writers should undertake as part of your credit policy.

TRAP

Self declarations by the client with no verification of the financial information will not be adequate.

Loan writers' assessments are preliminary, because you will not have access to some information that is available to credit providers such as credit report and, account information for existing customers.

If the information that has been provided to you is inconsistent with other information that you hold, or is outside what would be expected from the consumer, e.g. income is greater than is usual for the consumer's type of employment, then continue to check and verify that information until you are satisfied about the true position.

5.4.4. Reverse Mortgages

Make the additional enquiries needed for reverse mortgages to calculate the equity projections you are required to give the consumer. Use the calculator on the ASIC MoneySmart website at www.moneysmart.gov.au.

You must prepare projections on three scenarios, to demonstrate the potential impact of a decrease in house prices or an increase in interest rates on the consumer's equity in the property over a 15-year period. You may also use the calculator to make additional projections using variables that more specifically reflect the consumer's circumstances, in which case will also need to collect the information necessary to make these additional projections.

Also enquire about the consumer's requirements and objectives in relation to the reverse mortgage including¹⁵⁵ :

- The amount of credit required and why;
- The preferred form of payment i.e. lump sum payments, regular payments or both;
- The age of each consumer who will be a borrower under the reverse mortgage;
- How much equity the consumer wants to retain in their home; and
- The current value of the home or land that will become reverse mortgaged property.

151 ASIC Report 262: Review of credit assistance providers' responsible lending conduct, focusing on 'low doc' homes loans.

152 ASIC Regulatory Guide 209.45

153 s117(1A) National Consumer Credit Protection Act 2009 (Cth).

154 ASIC Regulatory Guide 209.42

155 ASIC Regulatory Guide 209

Verify the current value of the property, e.g. through an independent valuation, council rate assessments or recent sales history of similar properties in the area.

You may need to have further discussions with the consumer if the equity projections cause them to change their requirements, e.g. the amount of credit or payment method. If this happens, further inquiries about the consumer's financial situation, and their requirements and objectives, may be needed.

You may also identify circumstances outside the calculator's assumptions e.g. the assumed annual increase in the value of the property is set at 3%, but you may learn of some circumstance that justifies using a higher or lower rate, in which case you can adjust the calculator to take account of this. Only use a higher rate of interest if further inquiries and verifications demonstrate that the higher rate is reasonable.

5.4.4. Credit Providers' Obligations

Credit providers must also verify the consumers' financial situation.¹⁵⁶ They are prohibited from entering into or increasing the limits of a credit contract if it would be unsuitable for the consumer.¹⁵⁷

As the services provided by lenders and loan writers are different, the extent of the enquiries that each should make will also be different. For example, it would be reasonable for a lender to obtain a credit report, but it is not generally reasonable for loan writers who may not have access to these reports.

Credit providers may use information collected by a loan writer as part of a preliminary assessment. However, they must still make reasonable enquiries and verify the information. This could include:

- Spot checks to re verify information;
- Only using information from loan writers that have demonstrated that they have robust compliance arrangements; and
- Actively discouraging inappropriate practices e.g. through incentives focused on appropriate information collection and verification.

5.5 Provide the Assessment on Request¹⁵⁸

Provide a written copy of the Preliminary Assessment to the consumer if they request it. You must do this at any time within 7 years after the Quote is provided.

You may also wish to provide copies of the following information to the consumer if they ask for the assessment:¹⁵⁹

- Loan application form;
- Fact find, if any;
- Verification;
- Signed assessment that the loan is not unsuitable; and
- Any principles used in making the assessment which are not commercially sensitive.

This assists the consumer to check the factual basis on which your Preliminary Assessment was made and to question any inaccuracies.

The Preliminary Assessment must be provided to the customer within 7 business days if the request is made within 2 years after the Quote and within 21 business days thereafter. The Preliminary Assessment does not need to be supplied to the client if you did not provide any credit assistance.¹⁶⁰

You may not charge to provide the Preliminary Assessment.¹⁶¹

¹⁵⁶ s130 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units applies to a failure to do so.

¹⁵⁷ s133 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units and criminal penalties of 100 penalty units or 2 years imprisonment apply to a breach.

¹⁵⁸ s120, s143 National Consumer Credit Protection Act 2009 (Cth). A civil penalty of 2,000 penalty units and a strict liability penalty of 50 penalty units apply to a breach of these requirements.

¹⁵⁹ This is recommended in MFAA NCCP Disclosure Module 1 November 2011

¹⁶⁰ Credit providers are under similar obligations to provide a final assessment to the consumer unless no contract is entered into or the credit limit is not increased. s132 National Consumer Credit Protection Act 2009 (Cth).

¹⁶¹ s120(3), s143(3) National Consumer Credit Protection Act 2009 (Cth)

5.6 REVERSE MORTGAGES

When assisting a client with a reverse mortgage, before you make the Preliminary Assessment, you must:¹⁶²

- Prepare and give the client a written projection that relates to the value of the dwelling or land and the client's indebtedness over time if they take out the reverse mortgage. You can show these projections to the client in person, or provide them by mail, email or some other electronic means to which they have agreed. Regardless of the method you use, you must also provide the consumer with a printed copy of the projections. The projections must be made using the reverse mortgage calculator on ASIC's MoneySmart website (www.moneysmart.gov.au), and in accordance with the calculator's instructions. You need not do this if you reasonably believe another person has given substantially similar projections to the client.
- Provide the consumer with a Reverse Mortgage Information Statement. You do not have to do this if you reasonably believe the client has been given this Statement by someone else within the last 90 days. If you have a website containing information about reverse mortgages, you must make the reverse mortgage information statement available through the website ¹⁶³. If the consumer asks for this Statement, you must also give it to them ¹⁶⁴
- Tell the client in writing if the reverse mortgage contract does not enable the property to be tenanted. ¹⁶⁵

See section 11.2 for more information about your obligations in relation to reverse mortgages.

5.7 FORM OF PRELIMINARY ASSESSMENT¹⁶⁶

Because you may have to give the Preliminary Assessment to the consumer, it is advisable to record the Preliminary Assessment in a form that allows it to be provided to the consumer promptly on request. It should be:

- Concise and easy for consumers to understand;
- Refer to the financial information and information about their requirements and objectives provided by the consumer that the broker used to assess the credit contract as "not unsuitable";
- Assist the consumer to understand that the credit contract was assessed as "not unsuitable" for them; and
- Assist you to demonstrate compliance with the responsible lending obligations.

TIP

When providing the consumer with the Preliminary Assessment, you do not have to disclose commercially sensitive lending criteria.

5.8 LOW DOC AND NO DOC LOANS

No doc lending to consumers is probably not possible under the new credit laws because loan writers must make reasonable enquiries about a borrower's financial situation and objectives and take reasonable steps to verify that information. It would never be reasonable to make no enquiries.

However, because the extent to which you need to identify and verify a consumer's circumstances when making a preliminary assessment is scalable, low doc lending is still possible in some circumstances.

Examples of situations where low doc lending might be appropriate are:

- A low LVR loan to an experienced consumer; or
- Where stated income is supported by an accountant.

TRAP

A common problem arises where the consumer has not declared all their income for taxation purposes. If you seek to rely on the undeclared income, you could be aiding and abetting tax evasion. Lenders have a duty to report to AUSTRAC if they have reasonable grounds to suspect tax evasion.¹⁶⁷

Counsel clients about the risks of relying on undeclared income when applying for loans.

You may wish to include the following requirements when developing your low doc loans guidelines¹⁶⁸:

- Independently, verify the client's income; don't rely only on the client's verbal assurances;
- Ensure that any accountant's statement confirms the actual level of regular income and the basis on which the statement is made; comments on

¹⁶² s133133DB National Consumer Credit Protection Act 2009 (Cth). Regulations regarding the content of the projection, the Reverse Information Statement and the approved websites have yet to be made. Civil and criminal penalties apply.

¹⁶³ S133DC of the National Consumer Credit Protection Act 2009 (Cth)

¹⁶⁴ S133DD of the National Consumer Credit Protection Act 2009 (Cth)

¹⁶⁵ s18B National Credit Code – there may be a prescribed form for this notice, but it had not been released at the time of publication. – A criminal penalty of 50 penalty units applies.

¹⁶⁶ ASIC Regulatory Guide 209.83-209.84, Pro Forma 224 – Australian credit licence conditions

¹⁶⁷ s41 Anti Money-Laundering and Counter-Terrorism Financing Act 2006 (Cth)

¹⁶⁸ This list is based on the potential compliance risks that were identified by ASIC in their Report 262: Review of credit assistance providers' responsible lending conduct, focusing on 'low doc' homes loans

previous earnings; identifies the underlying information supporting the statement; and identifies the relevant time period for which the client has engaged the accountant; and

- For self employed clients, look at their previous work history, level of earnings and field of expertise, particularly where they have only been self-employed for a short time.

Remember the onus is on you to assess that the loan is not unsuitable for the client. Significant penalties apply to brokers who suggest or arrange unsuitable loans or leases for consumers.

6. Stationery and Documentation

USER GUIDE:

THIS SECTION PROVIDES GUIDANCE ON WHERE VARIOUS REGULATORY NUMBERS NEED TO APPEAR ON YOUR STATIONERY AND OTHER DOCUMENTS. REGULARLY REVIEW YOUR STATIONERY AND OTHER DOCUMENTS USED IN THE BUSINESS TO ENSURE THAT THEY REMAIN COMPLIANT.

6.1 WHERE MUST THE CREDIT LICENCE NUMBER APPEAR? ¹⁶⁹

Credit service providers must show their credit licence number on all the required disclosure documents i.e. the Credit Guide, Quote, Proposal and Preliminary Assessment. When referring to your credit licence for the first time in a document, make sure to use the full term 'Australian Credit Licence' and not the abbreviated 'ACL'.¹⁷⁰

Credit representatives need only show their Credit Representative Number in their Credit Guide.¹⁷¹ Again, do not use the abbreviation 'CR'; use 'Credit Representative Number'.

Lenders must also show their credit licence number on the following documents:

- Printed advertisements relating to the provision of any credit to which the Code applies. These include flyers, billboards, "boxed out" advertisements in newspapers and any words or pictures that are more than a simple listing in the white or yellow pages;
- Any other document that they are required to create, produce, give or publish under the Code; and
- Any document that they lodge with ASIC that relates to the provision of credit to which the Code applies.

6.2 Use of ABN/ACN on Documents¹⁷²

Every company in Australia is issued with an Australian Company Number (ACN) once it is registered by ASIC. The ACN is a unique, nine-digit number that identifies the company and must be set out on all its public documents.¹⁷³

6.2.1. Where is the ACN required to appear?

The ACN¹⁷⁴ must appear on the following types of documents:

- All documents required to be lodged with ASIC;
- Statements of account, including invoices;
- Receipts (which are not machine produced);
- Orders for goods and services;
- Business letterheads (and, by inference, business emails);
- Official company notices;
- Cheques, promissory notes and bills of exchange;
- Written advertisements making a specific offer which is capable of being accepted (such as by the completion of an order form); and
- Although not technically a "document", if your company has a common seal, its name and ACN (or ABN) must be set out on the seal.¹⁷⁵

The ACN is not required on the following documents:¹⁷⁶

- Packaging and labelling, including envelopes and transport documents;

¹⁶⁹ s52 National Consumer Credit Protection Act 2009 (Cth), Regulation 13 National Consumer Credit Protection Regulations 2010 (Cth)

¹⁷⁰ ASIC Information Sheet 103

¹⁷¹ s158(2) National Consumer Credit Protection Act 2009 (Cth)

¹⁷² The penalty for failing to comply with the ACN requirements includes a fine of \$1,700 or 3 months imprisonment, or both

¹⁷³ s153(2) Corporations Act 2001 (Cth)

¹⁷⁴ www.asic.gov.au, "Australian Company Numbers"

¹⁷⁵ s123 Corporations Act 2001 (Cth)

¹⁷⁶ www.asic.gov.au, "Australian Company Numbers"

- Advertisements which do not make a specific offer which is capable of being accepted (such as advertisements promoting the company and its goods or services in general);
- Machine generated receipts, including cash-register receipts;
- Business cards and 'with compliments' slips; or
- Items which are not documents (e.g. vehicles, television advertisements).

6.2.2. Where must the ACN be located?

The ACN must appear immediately after the first mention of the company's full name. Companies may use the words "Australian Company Number", or an abbreviation, such as "ACN" or "A.C.N."

For example:

- "Company XYZ Pty Ltd ACN 123 456 789"
- "Company XYZ Pty Ltd A.C.N. 123 456 789"
- "Company XYZ Pty Ltd Australian Company Number 123 456 789"

The Company name and ACN must be set out in full on all of the documents in which it is required to appear. For documents that are longer than a page, the company name and ACN must be shown on the first page. It does not matter where it is on the first page. For example, it would be acceptable if "Acme Brokers Pty Ltd" had "ACME" printed at the top of its letterhead and "Acme Brokers Pty Ltd ACN 123 456 789" at the footer.¹⁷⁷

After the first page, the company name may appear elsewhere, with or without the ACN, and either in full or in an abbreviated form.

There are no specific requirements as to how an ACN should appear on a document. It should be legible to the ordinary reader (a font of 8 point Times Roman or better is acceptable)¹⁷⁸ and make it obvious to which company the ACN relates. So for example, where a number of separate companies are listed on a letterhead, the ACN of each company should appear immediately after the name of the company to which it relates.

6.2.3. Can the ABN be used instead of the ACN?

If a company has an Australian Business Number (ABN), it may use the ABN instead of the ACN, provided the ABN includes the nine-digit ACN. In other words, if the last nine digits of the ABN are identical to all nine digits of your ACN, the ABN can be used.¹⁷⁹

It is not necessary to show both the ACN and ABN if this is the case. However, if the last nine-digits of a company's ABN are different from the ACN, it must use its ACN.

7. Credit Reports

USER GUIDE:

THIS SECTION PROVIDES INFORMATION ON THE CONTENT AND PURPOSES FOR WHICH CREDIT REPORTING INFORMATION CAN BE USED TO ASSIST LOAN WRITERS TO PROVIDE GUIDANCE AND ADVICE TO CLIENTS IN THIS AREA. NOTE THESE REQUIREMENTS CHANGED FROM 12 MARCH 2014.¹⁸⁰

Terminology changes include:

- A 'credit reporting agency' is now called a 'credit reporting body';
- Third parties such as mortgage insurers and trade insurers to whom credit related information is disclosed are called 'affected information recipients';
- Credit information about an individual (essentially in relation to their credit worthiness) is now called 'credit reporting information';
- Credit reporting information that was disclosed to a credit provider by a credit reporting body is called 'credit eligibility information'.

7.1 CREDIT INFORMATION

7.1.1. What is Credit Information

There are many different types of credit information – it is personal information about an individual that is one of the following ¹⁸¹

- **Identification information** – including name, alias or previous name, date of birth, gender, current or last known address (and 2 past addresses if any), current or last known employer; and driver's license number;
- **Consumer credit liability information** - in respect of any current consumer credit, i.e. e name of the provider and whether they hold a credit

¹⁷⁷ ASIC Regulatory Guide 13

¹⁷⁸ ASIC Regulatory Guide 13

¹⁷⁹ s153(2) Corporations Act 2001 (Cth)

¹⁸⁰ Privacy Act 1988 (Cth) and the introduction of a new Credit Reporting Privacy Code which replaces the Credit Reporting Code of Conduct

¹⁸¹ s6N Privacy Act 1988 (Cth) as amended by the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)

licence, the type of consumer credit, the date the credit was entered, its terms or conditions relating to repayment and the date it is terminated, and the maximum credit available under the credit arrangement;

• **Repayment history information - i.e.:**

- whether a borrower has met an obligation to make monthly payments;
- the day on which the payment is due;
- if a borrower makes a payment after the due date, the date the payment is made;

• **Information requests** - A statement that an information request has been made by a credit provider, mortgage insurer or trade insurer or information about the type and amount of consumer or commercial credit the borrower has sought in an application that has prompted an information request;

• **Default information** - i.e. information about accounts which have been in default over 60 days - if the lender has informed the borrower in writing about the default and asked them to fix it;

• **Payment information** - where a credit provider has disclosed default information to a credit reporting body, payment information is a statement that an overdue payment has been made and on what date;

• **New arrangement information** – where a credit provider has disclosed default or serious credit infringement information to a credit reporting body and the terms of the credit have been changed because of the default, new arrangement information is a statement that the terms have been varied or a new credit contract entered into;

- Information about court judgements;
- Personal insolvency information;
- Publicly available information about a borrowers eligibility for, history of and capacity to repay consumer credit; and
- The opinion of a credit provider that a borrower has committed a serious credit infringements, i.e.:
 - fraudulently obtained credit or evaded their obligations under a credit arrangement; or
 - committed an act that would indicate to a reasonable person that they no longer intend to comply with their obligations and the lender has unsuccessfully tried to contact the borrower and at least 6 months have passed since they last had contact with them.

7.1.2. Destruction of Credit Information

Credit reporting bodies must destroy credit reporting information at the end of the period/s shown in the table below.

Type of information	Retention Period
Consumer credit liability information	2 years from termination of the consumer credit
Repayment history information	2 years from the date a monthly repayment is due
Information about information requests made by credit providers and the type of credit to which they relate	5 years from the date an information request was received
Default information	5 years from the date the information was collected
Payment information	5 years from the date the related default information was collected
New arrangement information	2 years from the date the information was collected
Information about court judgments	5 years from the date of the judgement
Information about the opinion of a credit provider in relation to a serious credit infringement	7 years from the date the information was collected

Bankruptcies are permanently recorded on the National Personal Insolvency Index (<https://www.afsa.gov.au/resources/npil>).

Borrowers may require their credit provider to notify the credit reporting body when loans are discharged.

7.2 CONTENT OF CREDIT REPORTS

7.2.1. Who May Obtain Credit Reporting Information¹⁸²

Credit providers such as banks and finance companies may obtain credit reporting information about individuals without their consent in order to assess an application for consumer credit or collect overdue payments of consumer credit.

If you have been appointed as the credit provider's agent, you may also be able to obtain these reports.

Credit reporting bodies may also provide credit reporting information to:

- Credit providers – in respect of:
- Applications for or collections in relation to commercial credit (if the individual has provided consent in writing);
- An offer by an individual to be guarantor (if the individual has provided consent in writing);
- A belief on reasonable grounds that an individual has committed a serious credit infringement;
- Consumer credit liability information in relation to credit provided by the provider;
- Mortgage insurers - to assess whether to provide insurance to a credit provider in respect of mortgage credit given to the individual;
- Trade insurers – to assess whether to provide insurance in respect of commercial credit given to the individual (if the individual has consented in writing).

TIP

Repayment history information can only be disclosed to a credit reporting body or credit provider that holds a credit licence, or a mortgage insurer.

7.2.2. Use of Credit Reporting Information

Clients can require credit providers to only take into account relevant credit reporting information when assessing a consumer loan application, i.e. to ignore irrelevant information. Clients are entitled to know if credit reporting information has been the basis for refusing an application for consumer credit.

Clients are entitled to have applications for consumer credit assessed without recourse to commercial credit reporting information (but they can consent to the lender viewing their commercial credit reporting information).

Credit providers may only use credit reporting information for assessing the person's application to them for credit, except in limited circumstances such as for the collection of overdue payments or use in connection with a serious credit infringement.¹⁸³

Credit providers may not pass credit reporting information to each other without the client's consent unless:

- They are acting as agent for the provider to whom the information is passed; or
- They are both current providers of mortgage credit to the individual and the disclosure is made to enable either of them to decide what to do about a payment that is overdue by more than 60 days.¹⁸⁴

7.2.3. Borrower Access to Credit Reporting Information

Clients are entitled to inspect the information held about them and any reports produced by credit reporting bodies. If a request for access is made to a credit reporting body, the credit reporting body must give the person access to their credit reporting information within 10 working days of the request.¹⁸⁵

Credit reporting bodies cannot charge for providing access to the information they hold unless another access request has been made within the preceding 12 months. And then, the charge must not be excessive and no charge can be made for making the request.¹⁸⁶

Credit providers must also provide access to credit eligibility information they hold with a reasonable timeframe. They can also charge for access but, similar to credit reporting bodies, the fee must not be excessive and no charge can be made for making the request.

When refusing a request for access, credit reporting bodies and credit providers are required to provide reasons in writing and tell the individual about their right to complain to an external dispute resolution body or the Information Commissioner.

Clients who are applying for a loan or seeking advice in relation to a loan can authorise any one to obtain access to their credit reporting or credit eligibility information. The authority needs to be in writing - an appropriate form would be:

¹⁸² s20E and F Privacy Act 1988 (Cth) as amended by the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)

¹⁸³ s21G Privacy Act 1988 (Cth) as amended by the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)

¹⁸⁴ a21J Privacy Act 1988 (Cth) as amended by the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)

¹⁸⁵ s20R Privacy Act 1988 (Cth) as amended by the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)

¹⁸⁶ s21T Privacy Act 1988 (Cth) as amended by the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)

Consent to Obtain Credit Information

I/we <insert name/s> authorise <insert broker's name> or other persons employed by <insert broking firm's name> to act as my/our agent in seeking access to my/our credit reporting information and/or credit eligibility information held by <insert name of credit reporting body or credit provider>.

This authority only applies to enquiries made in connection with:

- An application or proposed application by me/us for credit
- Advice I/we have sought about my/our existing credit.

<Signed and dated by the parties>

If credit reporting or credit eligibility information is inaccurate, clients can insist that the credit reporting body or credit provider correct it promptly. They cannot charge for doing so ¹⁸⁷.

8. Conflicts of Interest

USER GUIDE:

THIS SECTION PROVIDES GUIDANCE FOR LOAN WRITERS ON THEIR CONFLICTS OF INTEREST OBLIGATIONS. CREDIT LICENSEES NEED TO CUSTOMISE THIS SECTION FOR THEIR BUSINESS BY:

- **ADAPTING THE PROCEDURES TO ENSURE THAT THEY FIT YOUR BUSINESS OPERATIONS AND STRUCTURE; AND**
- **REVIEWING THE SAMPLE DISCLOSURES, DELETING ANY THAT DO NOT APPLY TO YOUR BUSINESS, AMENDING THOSE THAT DO APPLY SO THAT THEY REFLECT THE ACTUAL CONFLICTS IN YOUR BUSINESS AND CUSTOMISING THE SUGGESTED METHODS OF DEALING WITH THE CONFLICTS TO YOUR REQUIREMENTS.**

Credit licensees are required to ensure that consumers are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities in which you or your credit representatives engage. ¹⁸⁸

You don't have to avoid conflicts of interest; you just have to have adequate arrangements to manage them to ensure that clients are not disadvantaged. ¹⁸⁹ Both the MFAA Code of Practice and the FBAA Code of Conduct require their members to fully disclose conflicts of interest. ¹⁹⁰

TIP

The most common conflict for credit services intermediaries is where one loan offers higher commissions than another. Which do you recommend to the client?

You must always have a reasonable basis for recommending a loan that you present as appropriate. Do not recommend a loan solely because it pays the most remuneration; the product must be as suitable for the client as other products offering less commission. When assessing its suitability, don't just look at the cost of the product; the terms, service and reputation of the lender are also important factors.

8.1 WHAT IS A CONFLICT OF INTEREST?

A conflict of interest occurs where the legal obligation that you owe to a client is inconsistent with your interests.

It can occur regardless of whether the legal obligation arises under the credit laws, under contract or simply as a result of your relationship with the client.

TIP

Conflicts can be actual or potential, depending on how circumstances evolve. Sometimes there may be no actual conflict, but only the appearance of a conflict.

Remember – your perception can be another person's reality!

¹⁸⁷ s20T and 21V Privacy Act 1988 (Cth) as amended by the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)

¹⁸⁸ s47(1) National Consumer Credit Protection Act 2009 (Cth)

¹⁸⁹ ASIC Regulatory Guide 205.80

¹⁹⁰ Clause 4.7(g) MFAA Code of Practice (December 2012), FBAA Code of Conduct

8.2 MANAGING CONFLICT OF INTEREST

If you become aware of an actual, potential or even an apparent conflict of interest, then:

- If the conflict is one that is identified below, follow the approach recommended there. If you need assistance or the approach does not seem appropriate, consult the Conflicts Manager for assistance;
- Refer all new conflicts to the Conflicts Manager for a decision and guidance regarding the appropriate method for managing it. The Conflicts Manager's decision should be final.

8.2.1. Management Techniques

Identifying Conflicts of Interest – Be alert for situations where actual, potential or apparent conflicts of interest arise that could concern a client.

Remember that although client conflicts are the most frequent, conflicts can also occur in your day-to-day business activities as well, for example, your relationships with suppliers, including lenders.

Actual, apparent or potential conflicts of interest are managed in one of three ways:

- **Disclosing** – Fully and frankly disclosing the conflict. Most conflicts can be managed in this way. Ideally disclose the conflict in writing. More information about disclosing conflicts is set out below.
- **Controlling** – Implementing procedures to ensure that the affected party's interests are not compromised as a result of the conflict, e.g. allocating a different person to service the client or creating a "Chinese wall" - this approach is suitable for managing confidentiality conflicts.
- **Avoiding** – Where there is a material and fundamental conflict of interest between your interests and the interests of the other person, and that cannot be effectively managed in any other way, it may be necessary to avoid the conflict of interest, by declining to provide services to them.

8.2.2. Disclosing Conflicts of Interest

Most conflicts, particularly those relating to your relationships or remuneration, can be adequately managed merely by disclosing them.

When disclosing a conflict of interest, provide sufficient information to enable the client to make a reasonable assessment of the possible influence of the conflict on your services. The client can then decide if they will continue to use your services or rely upon the advice you have provided, and to what extent (e.g. if a client is aware of a conflict, it may cause them to more closely consider their position).

Provide more information about significant and material conflicts than less important ones. The level of detail will depend on the client concerned. For example, it is not necessary to provide high levels of detailed information where:

- The client is financially sophisticated;
- People other than the client are unlikely to rely upon the advice given;
- The client already knows about the conflict; or
- The loan you are arranging or the situation is not complex.

When deciding what information to provide, always remember that you must:

- Not mislead or deceive;
- Clearly disclose remuneration (including commission) that you receive that may influence any advice you give (see below);
- Not take any secret commissions;
- Clearly disclose any financial, direct or other interests you have; and
- Clearly disclose any associations or relationships you have with any lenders or other service providers.

TIP

Failing to disclose conflicts or providing only limited information can damage your reputation. Properly disclosing conflicts reduces the possibility that you can be criticised for not acting in the interests of your client or credit providers.

Any disclosure must be:

- **Timely** – that is, disclose the conflict before you provide the service so the person has time to consider whether they want to use your services;
- **Specific to the client** – describe the conflict and explain how it applies to the service you are providing. You do not need to disclose all conflicts – only those that are relevant to the person concerned;
- **Clear** – aim to ensure that the person is able to understand the conflict and its potential impact on them; and
- **Sufficiently prominent** – ensure that the person’s attention is drawn to the conflict.

Conflicts may be disclosed either orally or in writing, but where guidance is given, the disclosure should generally be given in the same form as the guidance. If you disclose the conflict orally, keep a detailed file note.

8.3 METHODS FOR MANAGING BUSINESS CONFLICTS

The conflicts of interest that might arise in your business and suggested methods of managing them (including sample disclosures, where applicable) are described below. Customise these to suit your business.

8.3.1. Remuneration

Remuneration	How the conflict might arise? You receive a commission (or other benefit) from a lender, mortgage insurer or other supplier of product to your client. How to manage it? Fully disclose the commission or benefit to the client. (This is required by law in any event). See section 3 on remuneration and section 4 on responsible lending disclosure for more information about how to disclose commissions and other benefits.
Remuneration	How the conflict might arise? You receive a higher commission from one lender for placing business with them: <ul style="list-style-type: none">• You are entitled to a volume bonus if you place more than a certain level of business with a lender; or• You need to achieve a certain level of volume with the lender to stay on the lender’s panel. How to manage it? The product must be as suitable for the client as other products offering less commission. When assessing its suitability, don’t just look at the cost of the product; the terms, service and reputation of the lender are also important factors. Have a suitably comprehensive and properly researched product list that is reasonably representative of the products available in the market. These must be competitive in price, although not necessarily the cheapest. Disclose your remuneration to your clients (including any potential to receive a volume bonus) – remember that you are required to disclose your commissions, including any volume bonus arrangements in your disclosure documents. For non-NCC loans, you should still disclose remuneration where it is material. Your remuneration will not be material where: <ul style="list-style-type: none">• You will be paid even if the client does not act on your guidance;• You rebate the remuneration in full; or• You were not aware of the remuneration at the time you provided your guidance. Sample Disclosure <After disclosing the amount of the commission in the normal manner>. This is higher than the commission I would receive for other loans which also met your financial needs and objectives. I am able to access this lender because I place more than a minimum volume of loans with them.

8.3.2. Party Conflicts

Representing more than one Party to a Loan

How the conflict might arise?

You are asked to represent more than one party to a loan, e.g. the borrower and guarantor.

How to manage it?

Only represent more than one party in the same transaction if each party has given prior written informed consent and understands that you may need to disclose information to the other parties.

Sample Disclosure

We also represent <insert name>. It may be in your best interests to obtain independent advice regarding the appropriateness of the loan for your circumstances before proceeding. Further, we may need to provide some of your information to <insert name>. Please confirm that you agree that we may represent <insert name> as well as representing you.

Acting as Agent for the Credit Provider

How the conflict might arise?

You are the agent of the lender, but the borrower does not know or understand what this means.¹⁹¹

How to manage it?

Before the client signs a Quote (or any other document engaging you to provide services to them), tell the client that you are the agent for the credit provider and recommend that the client seek and rely upon their own enquiries about the competitiveness and suitability of the loan for their circumstances.¹⁹²

Sample Disclosure

We are an agent for <insert name of credit provider>. This means that we represent <insert name of credit provider> and not you. You may wish to obtain your own advice about the competitiveness and suitability of the loan for your circumstances before proceeding.

8.3.3. Commercial Conflict

Interest in the Transaction

How the conflict might arise?

You (or an associated company) have an interest in the property or services being purchased using the loan, property being offered as security or any other commercially relevant transaction.

This could include an agency or other commercial relationship with any lender, borrower, aggregator, valuer¹⁹³, real estate agent, mortgage insurer, lawyer, accountant, financial planner or adviser, insurer or insurance broker or any other finance broker who is directly or indirectly related to the loan, e.g. the funds will be used to invest in a property development which you partly own or from which you will receive a commission.

How to manage it?

Fully inform each person (borrower) of these matters, recommend in writing that it is in their best interests to obtain independent advice in relation to the merits of the transaction and obtain consent from each person to you continuing to represent them.

Sample Disclosure

We have an interest in <insert full details of your interest in the loan transaction, any property or services being purchased using the loan, any property being offered as security or any other commercially relevant transaction, etc>. We recommend that you obtain independent advice regarding whether the loan is appropriate for your circumstances. Before we continue to represent you, would you kindly confirm that you consent to us doing so?

8.3.4. Related Company Conflicts

A related company is a company in which you or your shareholders hold shares or other interests. Another company (or its shareholders) who hold shares in your company is also a related company

It does not matter what type of company it is – it could be an aggregator, credit provider, mortgage manager, real estate agency, etc. Other relationships which do not arise out of co-ownerships can also give rise to conflicts if you receive a benefit, whether financial or non-financial.

Manage these types of conflicts as set out over the page:

¹⁹¹ This is required for FBAA members under the FBAA Code of Conduct

¹⁹² This is required for FBAA members under the FBAA Code of Conduct

¹⁹³ FBAA Code of Conduct

Related Companies**How the conflict might arise?**

You provide information on and arrange loans with credit providers that are related to you.

You use or refer your clients to other businesses such as valuers, financial planners and the like that you own or in which you own shares (or they own all or part of your company).

How to manage it?

When you deal with or through related companies, disclose the following to the client:

- Your relationship with the other company, and
- The remuneration you may receive for arranging the loan, including any additional remuneration received due to the relationship, and
- Any services or facilities provided will be of the same standard and cost as are available elsewhere.

NB: information provided to related companies should only be provided for appropriate purposes, i.e. the Privacy Act should be complied with and sharing of personal / sensitive information should be reviewed to avoid or minimise conflicts of interest.

Sample Disclosure

<insert name of intermediary group> is part of the <insert name of company> which also includes <insert name of credit provider>.

OR

<Insert Name> is <insert details of how the company is related to you> We will receive a <commission / fee> of \$<insert amount> for referring you to them.

OR

One of our directors is also a director of <insert name of company>.

Family Relationships**How the conflict might arise?**

You may use or refer your clients to other businesses where a family member of one of your directors or employees is either an owner or employee.

A conflict may arise if the client is not aware of the relationship.

How to manage it?

When you refer a client to a related business, disclose the following to the client:

- The nature of the relationship, and
- Any benefit or advantage that either you (or your employees) or the family member in the other business will receive if the client uses the other business. If this is a financial benefit, disclose it in the usual way. If it is a non-financial benefit, explain the nature of the benefit (or potential benefit) to the client.

Sample Disclosure

Your loan writer is <describe nature of relationship> to <insert name of family member> who is a principal of <insert name of family member's business>. <Insert name of person who will receive benefit> will receive a <describe nature of benefit> if they are appointed to <describe the product or service the family member is to provide>.

Relationship with Applicant, Borrower or Guarantor or Other Party**How the conflict might arise?**

One of your employees or principals is related to the applicant, borrower or guarantor of the loan.

How to manage it?

Immediately advise any loan writer in the lending transaction of any financial interest, relationship or association that any of your employees or principals has with the applicant, borrower, guarantor or any other party in relation to the loan.

Sample Disclosure

A member of our firm is the <describe nature of relationship> to <insert name of applicant, borrower or guarantor> who is the <applicant, borrower or guarantor> for this loan.

8.3.5. Confidentiality Conflicts

Use of Client Information	How the conflict might arise? You have an opportunity to use information obtained from clients for your own benefit, e.g. buy a property in the same development as a client. How to manage it? Do not use information obtained from clients for your own benefit without the client's full knowledge and consent in writing. Sample Disclosure We have been offered the opportunity to <describe opportunity>. This arose as a result of information which we obtained as a result of acting for you. It is our strict policy not to use information obtained from our clients for our own benefit without their full knowledge and consent. Would you kindly confirm that you have no objection to us proceeding with this transaction? If you need further information, please contact <insert name>.
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9. Complaints and Disputes

USER GUIDE:

THIS SECTION CONTAINS A SUGGESTED POLICY AND PROCEDURES FOR MANAGING COMPLAINTS AND DISPUTES. CUSTOMISE AND IMPLEMENT THIS IN YOUR BUSINESS.

9.1 Why have a Disputes Policy and Procedures?

Credit licensees must have a documented internal dispute resolution procedure that complies with standards and requirements made or approved by ASIC and covers disputes in relation to the credit activities in which we engage.¹⁹⁴

As well as being a specific licence obligation for consumers, having robust processes and systems for dealing with complaints and disputes is an essential part of good business practice.¹⁹⁵

This is because you are the first place that a client with a grievance can take their dispute. It helps to ensure that consumers feel no hesitation complaining to you about your services. Clients need to be able to identify and deal with a person with the ability, authority and training to properly hear the dispute and provide a substantive response.

If the consumer is dissatisfied with the outcome, they can complain to your external dispute resolution scheme which will either be the Credit Ombudsman Service Limited (COS) or the Financial Ombudsman's Service¹⁹⁶ (FOS).

9.2 WHAT IS A COMPLAINT/DISPUTE

A complaint or a dispute is an expression of dissatisfaction that is made about your services (or even about our disputes handling process itself) where the client expects a response or resolution.¹⁹⁷

A complaint or dispute that it resolved to the consumer's satisfaction by the end of the fifth business day after the day on which the complaint was received does not need to undergo your full internal dispute resolution process.¹⁹⁸

¹⁹⁴ s47(1) National Consumer Credit Protection Act 2009 (Cth). This is also required by clause 11 of the MFAA Code of Practice (December 2012) and the FBAA Code of Conduct.

¹⁹⁵ s47(1)(h)(i) National Consumer Credit Protection Act 2009 (Cth), ASIC Regulatory Guide 165, Clause 41 COSL Rules.

¹⁹⁶ FOS is the recommended scheme for FBAA members and COSL is the recommended scheme for MFAA members

¹⁹⁷ ASIC Regulatory Guide 165.79

¹⁹⁸ ASIC Regulatory Guide 165.81

9.3 OUR COMPLAINTS & DISPUTES POLICY

It is good practice to have a Complaints and Disputes Policy that you can provide to consumers if they request it and to publish this on your website.¹⁹⁹

Below is a suggested Complaints and Disputes Policy which you may wish to adopt.

Complaints and Disputes Policy

We are committed to meeting if not exceeding our clients' expectations whenever possible. As much as we all dislike receiving complaints, we recognise that dissatisfied clients have a right to complain and to have their complaint handled quickly and directly. Clients who take the time to complain may well still have confidence in us and want to continue dealing with us.

Complaints are not just a nuisance or a cost, they are an opportunity to obtain feedback from clients about their product or service experience. We use them as a way to assist us to rapidly and inexpensively change products, service style and market focus to meet clients' needs, maintain clients' confidence and continuously improve service and relationships with our clients.

Complaints are, in fact, a valuable and important part of ongoing business relationships. They provide a flag to potential problems and difficulties, and a repetition of complaints can indicate a recurring systemic problem that needs immediate attention. They enable us to provide solutions to problems, rather than have remedies imposed by an external body.

The prompt resolution of complaints is a good indicator of whether, generally, we are consistent and presenting the best possible image to clients and prospective clients. It enables us to prevent disputes from becoming entrenched.

All staff and credit representatives must comply with our internal dispute resolution procedures.

We do not charge a fee to consumers who make a complaint.²⁰⁰

Our Complaints Contact Person is <insert name>. If he/she is not available, the backup is <insert name>.

Our Complaints Contact Person is responsible for:

- Dealing with and attempting to resolve all client complaints which cannot be resolved by the providing clarification or information;
- Advising clients of their rights to lodge complaints with our external dispute resolution scheme;
- Managing all disputes with clients;
- Liaising with our external dispute resolution scheme; and
- Dealing with the MFAA and the MFAA Disciplinary Tribunal as necessary.

We provide the following information about our internal and external dispute resolution procedures:

- We display a leaflet publicising our external dispute resolution scheme in our offices and on our website²⁰¹;
- We publish the name and contact details of our Complaints Contact Person and a guide to our Internal Dispute Resolution Procedure on our website; and
- We give a guide to our Internal Dispute Resolution Procedure to any consumer who asks for it or when they want to make a complaint of dispute.²⁰²

199 This is required by clause 11.3 of the MFAA Code of Practice (December 2012) and the FBAA Code of Conduct

200 This is required under Clause 11.5 MFAA Code of Practice (December 2012) and the FBAA Code of Conduct

201 Clause 11.6 MFAA Code of Practice (December 2012), FBAA Code of Conduct

202 Rule 42 COSL Rules, MFAA Code of Practice, FBAA Code of Practice

9.4 INTERNAL DISPUTE RESOLUTION PROCEDURE²⁰³

The following table is a procedure for dealing with and reporting client complaints and disputes and the timeframes within which they should be dealt. It applies to disputes with consumers as well as any other individual or small business who wishes to make a complaint.

Stage	Action	By Whom	Timeframe
Receive Complaint	Attempt to resolve the client's concern yourself, e.g. if a correction is required to be made to our records or a simple apology is sufficient. <hr/> Complete a Complaints Form and note the action that was taken.	Staff member or credit representative who receives the complaint	Day after initial complaint received
If Complaint is not Resolved	Tell the consumer the name and direct telephone number details of the "Complaints Contact Person". <hr/> Inform the Complaints Contact Person about any client complaint that you are unable to resolve by providing information or explanations. <hr/> If the complaint concerns privacy, notify the Privacy Officer (if they are not also the Complaints Contact Person).	Staff member or credit representative who receives the complaint	Day after initial complaint received
Acknowledge Complaint	Acknowledge the complaint in writing, advising what is being done about it and requesting further information if necessary. Inform the client about the options available to them.	Complaints Contact Person (or Deputy)	Within 2 days after initial complaint received
Investigate Complaint	Investigate the complaint by requesting information from the complainant, reviewing the file and talking to staff and representatives who have relevant knowledge of the matter. <hr/> (If the Complaints Contact Person (or Deputy) is involved in the subject matter of the complaint, then an alternate must be appointed.) <hr/> Notify the Manager responsible for handling professional indemnity matters about the complaint.	Complaints Contact Person (or Deputy)	Commence within 2 days after initial complaint received
Notify PI Insurer	Consider whether the matter could give rise to a claim and whether to notify the professional indemnity insurer and/or seek legal advice (in order to establish privilege for further documents created).	Manager in charge of handling PI matters	Within 2 days after notification
Provide Information	Respond to the Complaints Contact Person's requests for information.	All managers contacted by the Complaints Contact Person	Within 3 working days of request for information
Prioritise Complaints	If you have a number of complaints, prioritise them in order of urgency, having regard to the seriousness of the complaint and the potential effect on the consumer.	Complaints Contact Person	
Resolve Complaint	When all information is to hand, decide on a final response to the complainant. You may: <ul style="list-style-type: none"> • Accept the complaint and, if appropriate, offer redress; or • Offer redress without accepting the complaint.²⁰⁴ If this is not possible within 45 days after receipt of the initial complaint, tell the client the reasons for the delay, that they have the right to refer the complaint to your EDR and provide the EDR's contact details. If it is achievable within 45 days, telephone, meet or correspond with the client to achieve resolution. If the dispute is resolved, confirm the final outcome with the client in writing. A final written response does not need to be provided to the client if the dispute is resolved by the end of the fifth business day after the complaint was received unless the client has asked for one or the complaint relates to a claim for hardship.	Complaints Contact Person (or Deputy)	As soon as possible, but within 45 days after initial receipt

²⁰³ ASIC Regulatory Guide 165, Clauses 6 to 9 MFAA IDR Procedures 1 Feb 2007, FBAA Code of Conduct These procedures are suitable for broking businesses and comply with the MFAA and ISO 10002-2006 requirements for internal dispute resolution procedures.

²⁰⁴ ASIC Regulatory Guide 165.81 Where a complaint is satisfactorily resolved by the end of the fifth business day after receipt, there is no need to follow the rest of the Complaints Procedures set out below or even to record the complaint in the Complaints Register. However file notes which identify the complaint and the resolution must be kept in the client file.

Stage	Action	By Whom	Timeframe
If Complaint cannot be Resolved	<p>If the complaint cannot be resolved to the satisfaction of the consumer:</p> <ul style="list-style-type: none"> • Provide a substantive response in writing and give reasons for the decision. The reasons must adequately address the issues raised in the complaint and, where practicable, refer to applicable provisions in legislation, codes, standards or procedures. • Tell the consumer about their right to take their complaint or dispute to our external dispute resolution scheme • Provide the name and contact details of your external dispute resolution scheme. 	Complaints Contact Person (or Deputy)	As soon as possible, but within 45 days after initial receipt
Update PI Insurer	If the problem is not resolved, inform your professional indemnity insurer.	Manager in charge of handling PI matters.	As soon as possible
Complainant goes to EDR	<p>If consumer takes the complaint to your external dispute resolution scheme:</p> <ul style="list-style-type: none"> • Respond to the external dispute resolution scheme's requests for information; and • Take the action required by the external dispute resolution scheme. 	Complaints Contact Person (or Deputy)	Within 10 working days or the time required by the EDR body ²⁰⁵
Complainant goes to your Industry Association	<p>If consumer takes the complaint to your industry association:</p> <ul style="list-style-type: none"> • Respond to the industry association's requests for information; and • Take the action required by the industry association 	Complaints Contact Person (or Deputy)	Within 10 working days or the time required by the industry association ²⁰⁶

9.4.1. How Complaints May be Made

If you receive a written complaint or dispute, hand it to the Complaints Officer Contact Person immediately.

Complaints need not be in writing. They may be presented by any reasonable means, e.g. letter, telephone, in person or email.²⁰⁷ To enable complaints or disputes to be made orally, a toll-free or local call fee facility could be made available, especially for large-medium sized businesses.

In some cases, insisting that complaints are in writing can be a disincentive to the complainant. For example, if they have poor writing skills. Help complainants with limited literacy skills to complete forms or to express their complaint or dispute more clearly.

Where complainants or disputants have special needs, you may need to provide interpreters and staff who are cross-culturally trained or trained.

9.4.2. Dealing with the Consumer

When a consumer makes a complaint, it is an opportunity for you to ensure that they feel important and appreciated and to demonstrate your commitment to excellent service and respect for your clients. Your aim should be to turn any client's frustration into satisfaction. Also, depending on the complaint, non-action may result in an "errors and omissions" claim at a later date.

If you receive a complaint:

- Listen to what the client says - this is the first step in reducing tension;
- Acknowledge the complainant's feelings - denying that the complainant is, or has the right to be, upset may antagonise them;
- Record details and determine what they want - ask the necessary questions in a polite and even-handed manner to obtain the most detailed response;
- Confirm the information you have received to ensure that your understanding is correct;
- Empathise with the complainant in a courteous manner, without making any admissions;
- Do not offer excuses or argue with the complainant;
- Do not attempt to lay blame or be defensive;
- Attempt to resolve the problem with an explanation or information within a day after the complaint is received;
- Ask the client if they are satisfied;

²⁰⁵ Clause 11.7 MFAA Code of Practice (December 2012)

²⁰⁶ MFAA Disciplinary Rules, FBAA Code of Conduct

²⁰⁷ ASIC Regulatory Guide 165 Table 2

- If the client is still not satisfied, tell them that you have a person who is dedicated to resolving client problems and that you would like to refer the matter to them to see if they can help the client further. Seek to obtain the client's agreement to this. Tell them the name of your Complaints Contact Person and that the Complaints Contact Person will contact them promptly; and
- Immediately provide all the relevant information to the Complaints Contact Person.

It may be appropriate to apologise to the client, but you need to take care in the way that you do this. This is because most professional indemnity insurance policies contain a condition prohibiting the insured from making any admissions of liability, and an apology that can be viewed as an admission may mean you are not covered by your policy.

There are ways to safely apologise to clients without compromising your insurance cover. The key is to empathise and/or apologise for the emotional impact experienced by the client (e.g. "I'm so sorry you feel ..." "I'm sorry for the inconvenience / frustration / annoyance / anger, etc.") – rather than the action that caused the problem (e.g. "I'm sorry, I should have explained the default penalties to you ..."). Be mindful of this when offering apologies.

When a client complains, you should:

- Try to remain calm even in the most demanding situations. Help the client maintain their control, no matter how angry they are;
- Treat the client courteously and fairly at all times;
- Be convincing in your expressions and actions to earn client trust;
- Listen to the client - while they are not always right, a dissatisfied client is a liability, not an asset;
- Be patient if your client communicates poorly. Help them to get their meaning across; and
- Understand when and how to say "no" and be firm without antagonising the client.

Good communication skills are vital. For example, a client may complain that a telephone call had not been responded to for two weeks, but the client actually could be inferring that they may be considering going to a competitor.

It is important that you differentiate between these two messages. Most people do not like to hear complaints and put up enormous psychological blocks. If you only listen to the surface message, it will result in a mismanaged complaint and possibly, the loss of the client. If you can listen to clients with an open mind and a flexible point of view, a complaint may become an opportunity to rectify a client problem and cement your good relationship.

9.4.3. Objectivity

Be equitable, objective and unbiased when determining a complaint. Do this by:

- Allowing both the complainant and the affected staff members and representatives to provide relevant information and make their case;
- Wherever possible, have the complaint or dispute investigated by staff who were not involved in the subject matter of the complaint or dispute. This is not always possible for a small-micro sized business; and
- When responding to complaints, give reasons for reaching a decision on the complaint or dispute and adequately address the issues that were raised in the initial complaint or dispute. Where practicable, reasons for your decision should be in writing and should refer to applicable provisions in legislation, codes, standards or procedures.

9.4.4. Confidentiality

Do not disclose personally identifiable information concerning the complaint, unless it is needed to address the complaint or the consumer agrees that you may do so.

Actively protect this information from disclosure by keeping complaints files in a lockable cabinet.

9.4.5. Remedies

If you accept a complaint/dispute and consider that it is appropriate to offer redress, the redress may be financial or non-financial. Financial remedies could include compensation for direct loss or damage caused to the client.

When determining the appropriate remedy and the extent of loss or damage, consider relevant legal principles, the MFAA Code of Practice and other relevant codes of conduct, concepts of fairness and industry best practice.

9.5 EXTERNAL DISPUTE RESOLUTION SCHEME

If a consumer complains directly to your external dispute resolution scheme, they will give you the opportunity to respond to the complaint. You must do this within the time that they specify.

If the consumer is not satisfied with your response, they may request your external dispute resolution scheme to deal with the complaint. Your external dispute resolution scheme will first attempt to conciliate between you and the consumer, and, if this is unsuccessful, will make a decision about the complaint.

See the Credit Service Management Manual for more information about the workings of external dispute resolution schemes.

10. Communications

USER GUIDE:

THIS SECTION LOOKS AT YOUR DUTIES AND OBLIGATIONS TO CLIENTS AS A MORTGAGE OR FINANCE BROKER. AND THE SOURCES FROM WHICH THESE DUTIES ARISE.

10.1 Write, Read and Respond

The need for constant, effective communication and confirmation cannot be overstated.

Remember the 3 Rs - **W**Rite, **R**ead and **R**espond.

Write

- Write down all oral instructions, advices and representations given or received in a file note and confirm them in writing to the appropriate parties;
- Date and time each call and meeting; and
- Always retain a copy of file notes and all documents on the file (hard copy or electronic) and initial or sign all file notes etc.

Read

- Constantly check the consistency of information on documents. For example, is the interest rate in the loan approval the same as the one you told the client?
- Read application forms thoroughly to check that all questions have been answered and completed correctly;
- Always check and re-check all documents as soon as issued, and
- Keep up-to-date with industry changes, financial information and industry journals.

Respond

- Communicate frequently if information is required, particularly if a request goes unanswered;
- Send loan documents to clients without delay;
- Respond to communications promptly; and
- Be proactive.

10.2 TELEPHONE CALLS/MESSAGES

10.2.1. Telephone Messages

When taking a telephone message, so that you have a record of calls, it is advisable to:

- Use a Telephone Log Book (in duplicate) or send an email to the recipient;
- Time and date and initial all telephone messages;
- Always obtain the caller's name and return telephone number; and
- If the recipient is not able to return the call that day, arrange for a responsible person to ring back to check the urgency or offer assistance if required.

10.2.2. Telephone Calls

Record all telephone calls in file notes. Include the time and date of the call and summarise the discussion. Put a copy of the note on the relevant file. Where relevant, confirm the telephone call / instruction / confirmation back to the client / credit provider in writing (this can be done by email).

10.3 WRITTEN COMMUNICATIONS

10.3.1. Correspondence

Incoming – All incoming mail should be time and date stamped. This includes correspondence, faxes, hand or courier deliveries and any communications provided to employees outside the office.

Correspondence should be sorted, distributed and attended to within 24 hours of receipt (or sooner if urgent) and a response issued within 48 hours.

Outgoing – All communications should leave the office on the day they are prepared.

Important material should always be sent by registered mail and a record of the mail details retained on the client file.

10.3.2. Facsimiles

Receiving – If receiving on a plain paper fax machine, using coloured paper assists in distinguishing facsimiles from other papers on desks.

Sending – A transmission record slip should be retained with all outgoing faxes.

If using a fax to transmit important information, ask the addressee to stamp, sign and return it in case it is necessary to prove receipt. Always do this when faxing instructions to credit providers. Follow up if no response is received within 24 hours.

Where an important matter is being conveyed to a client or credit provider, also send a copy of the facsimile by mail.

10.4 E-MAIL

10.4.1. Information required in Emails

Remember business e-mails e.g. correspondence, must contain any or all of the following information:²⁰⁸

- Name, logo and contact details of the person or organisation authorising the message;
- Name and contact details of the author; or
- Name, logo and contact details of the:
 - Author's employer (if there is one), partnership (if the author is a partner) or organisation (if the author is a director or officer); or
 - Sponsor of the message.
- The information must be reasonably likely to remain valid for 30 days after sending the message; and
- The message must contain a functional unsubscribe link.

10.4.2. Usage Guidelines

Be cautious about the content of e-mails sent. Electronic messages and attached material are discoverable documents. No comment should be made that could be actionable or contain admissions if scrutinised by any person or a court of law.

Also remember that emails containing personal information about another person may breach the privacy laws if the information is not used or disclosed for the purpose for which it was collected.

If your email software has a 'Return Receipt' utility, use this for all important e-mails.

Staff should not send e-mail from any computer other than under their own password.

E-mails received in error must be notified to the sender immediately and then deleted. They must not be copied to any other party.

It is considered bad manners to use CAPITAL LETTERS other than for headings or emphasis. It is looked upon as shouting. Do not use defamatory, libellous or rude language and remember unless emails are clearly drafted, they may not be interpreted by the recipient in the way that they were intended..

²⁰⁸ s17 and Schedule 1 Spam Act 2003 (Cth)

Never download or transmit:

- Rude, lewd, pornographic or any other email material which may be offensive to others;
- Chain email or any email that may be interpreted as a form of harassment;
- Junk or random email;
- Email material containing illegal content;
- Email material that is or is potentially discriminatory, defamatory, sexual or offensive; or
- Email material of a threatening or exploitative nature.

Make staff aware of these guidelines and that breaches could lead to disciplinary action, including dismissal.

Include a standard signoff on all e-mails. You may wish to adapt the following:

Sample Signoff

“The information in this message and any attachments is intended for the exclusive use of the intended addressee(s). If you receive it in error, you are not authorised to read, reproduce, use, disclose or disseminate the information. While any attachments have been checked for viruses, you should rely on your own virus checking programs. To assist us in contacting you, we have stored your name and email address and any other contact information you have provided to us in our contact databases. Send an email to tell us if your contact details change, if you wish to be removed from our database or if you do not want us to communicate with you by email and include the word “Unsubscribe” in the subject line.”

10.4.3. Checking E-mails

People tend to think that once they have sent an e-mail, the recipient will have seen it. Unless the person is at his/her desk, this is obviously not the case. Emails should be checked regularly - at least 6 times a day or, if staff are out, they should arrange for someone to review them. Automatic out-of-office and auto-forwarding of messages can also be used if available.

10.4.4. Retention

A hard copy of every e-mail sent and received should be filed on the relevant file (or directory for paperless offices).

Email databases can take up quite a bit of server system memory. Carefully retain and save attachments and messages that are going to be needed.

Watch for over-loading of the hard-drive of the Internet Temp Files after heavy usage, especially if downloading large sites or documents.

10.4.5. Viruses

Watch for any attachment with e-mail from unsolicited or unknown sources. Do not open any suspicious attachments without checking directly with the source or running virus protection.

Ensure that all staff regularly run virus protection programs or ensure that your IT system administrator has created an effective firewall and an automatic anti-virus update feature on your server(s).

11. Types of Loans

USER GUIDE:

THIS SECTION LOOKS AT YOUR DUTIES AND OBLIGATIONS TO CLIENTS AS A MORTGAGE OR FINANCE BROKER. AND THE SOURCES FROM WHICH THESE DUTIES ARISE.

THIS SECTION OF THE COMPANION PROVIDES BRIEF GUIDANCE ON THE FEATURES OF VARIOUS TYPES OF LOANS AND IS DESIGNED TO ASSIST YOU TO MANAGE SOME OF THEIR PITFALLS. IT IS NOT A SUBSTITUTE FOR A FULL STUDY OF THIS AREA.

11.1 FIXED VS. VARIABLE INTEREST RATES

If your client wishes to fix their interest rate, ensure you properly indicate to the client, the nature and effect of fixed rate terms. Some key points to be covered include:

- The risks and benefits of fixed rate loans, i.e. that if rates increase, they will be better off, but that they could be worse off if interest rates decrease because the fixed rate will not decrease;
- Significant break costs could be incurred if they discharge a fixed rate mortgage early – and may also be payable on a partial lump sum repayment during the fixed rate term;
- Extra repayments may not be possible or may be limited to a fixed amount each year;
- The rate applying at the time of the application may increase (or decrease) by the time the loan is settled; and
- A rate lock may be available, indicate what this costs and its benefits for the client.

11.2 REVERSE MORTGAGES²⁰⁹

11.2.1. What is a Reverse Mortgage

A reverse mortgage, or equity release loan, is a loan where the consumer borrows money against the equity in his or her home and the principal and interest are not repaid until the home is sold (usually when the consumer dies or voluntarily vacates the home).

The NCCP requirements for reverse mortgages apply to mortgages over a consumer's dwelling or land to secure their obligations under a credit contract where it is likely that where the borrower's total liability under the contract or mortgage may exceed the maximum amount of credit provided because of interest and other fees and charges.²¹⁰

Reverse mortgages are complex financial products and different from normal credit products. It is difficult to estimate the long-term cost of a reverse mortgage and how much equity might be left to fund future needs. With access to large amounts of credit, some people have difficulty budgeting for the long term. The need to budget is greatest when the family home is the only significant financial asset.

Estimating the long-term cost of a reverse mortgage is inherently complex. The borrower's remaining equity is equal to the house value minus the loan advance and growing interest. The calculation depends on the interaction of three factors, all of which are uncertain when the loan is taken out:

- Future interest rates (unless the borrower obtains a fixed rate of interest);
- Duration of the reverse mortgage contract (until the borrower moves out of the home or dies); and
- Future changes in housing prices (to calculate the borrower's remaining equity).

The complexity of this calculation puts it beyond the ability of most consumers, unless they have expert assistance or access to specially-designed calculators.

11.2.2. Information about Reverse Mortgages

If you provide or hold yourself out as being able to provide credit assistance in relation to reverse mortgages, then:²¹¹

- If your website contains information about reverse mortgages, make a Reverse Mortgage Information Statement available to consumers through the website; and
- Give a Reverse Mortgage Information Statement to anyone who asks for it.

You do not need to do this if you reasonably believe that someone else has given the consumer a Reverse Mortgage Information Statement.

11.2.3. Risks of Reverse Mortgages

There are several key risks in taking out a reverse mortgage:

- The borrower may use their credit for living expenses. When they reach their credit limit, they then have a sudden drop in income and may have to sell their house to cover living expenses.
- The borrower may use their credit for discretionary spending such as holidays, 4WD and caravan or helping family members. When they reach their credit limit, they have no credit in reserve for emergency needs (e.g. health expenses, home care).
- The borrower reaches their credit limit and is unable to afford essential house maintenance and modifications. They may have to sell their home and move somewhere much cheaper.
- The combination of spending and compounded interest could absorb most of the equity in the borrower's home and, even after selling the home, they may have insufficient money for their desired aged-care accommodation (e.g. a bond for nursing hostel or buying into a retirement village).

Access to loan funds without disciplined budgeting or some mechanism to help people ration their credit over time can create major problems, particularly where the lender has approved more credit than the borrower needs or provides a flexible line-of credit, which the borrower does not manage well.

A reverse mortgage loan is likely to remain with a borrower until they sell their home or die. At the time of publication, the average life expectancy for a 65 year-old ranges from 20.9 years (for men) to 24.3 years (for women). Therefore, planning must cover long term needs.

²⁰⁹ ASIC Report 109 "All We Have is this House – Consumer experiences with reverse mortgages lenders", November 2007. s13A National Credit Code – Bridging contracts of less than 2 years duration are not considered to be reverse mortgages under the Code.

²¹⁰ s13A National Credit Act

²¹¹ s133DC and s133DD National Credit Act. A civil penalty of 2,000 penalty units and a criminal penalty of 50 penalty units apply.

11.2.4. Protecting Yourself and the Lender

Credit providers may need to ensure that the borrower has obtained independent legal advice before entering into a reverse mortgage.²¹²

In addition to the obligations to undertake preliminary assessments for reverse mortgages, you should also do the following when providing information to older clients regarding reverse mortgages:

- Ask questions about their financial situation and lifestyle when they apply for the reverse mortgage;
- Clearly explain how the loan will work;
- Explain how the loan will be repaid;
- Explain the cost of all fees and charges;
- Explain how varying interest rates and housing prices might affect the loan;
- Explain the impact the loan would have on pensions and taxation;
- Show them a projection of how much the loan might cost over time;
- Show them a projection of how much equity might be left in the home over time;
- Ask about their family situation and whether it is important for them to leave an inheritance to their children;
- Encourage or require them to seek independent financial advice;
- Encourage or require them to discuss the loan with their family; and
- Encourage them to seek advice from Centrelink before finalising the loan.

Carefully explain default conditions on reverse mortgages to clients. Common default clauses include the following:

- Other people may not live in the house without the lender's authority;
- Outgoings and insurance must be paid (e.g. rates);
- Limits on the period the property may be left vacant; and
- The value of the property is not permitted to become materially reduced.

The consequences of not meeting these terms and conditions could be severe.

You should also consider the following:

- The suitability of the amount borrowed;
- Will the borrower be able to resist easy access to a large amount of cash? If so, ensure that they do not take any more credit than they need and offer to assist them with budgeting;
- Is a lump sum or an income stream more appropriate? A lump sum can incur unnecessary interest and could potentially jeopardise Social Security entitlements;
- How the borrower will use the credit and undertake long-term budgeting? Make them aware of the risks of using the credit to mask the fact that they cannot maintain their current living arrangements and lifestyle indefinitely after retirement; and
- Whether the reverse mortgage has a 'no negative equity guarantee'. This means the credit provider guarantees that the amount the borrower owes on the loan will never exceed the current value of their home.

TIP

MFAA members should always follow MFAA's Equity Release Code of Proper Process when selling a reverse mortgage product. It sets out a step by step procedure for handling reverse mortgages. See the link below <http://www.mfaa.com.au/uploads/0702MFAAEquityReleaseProofProperProcess.pdf>.

TRAP

MFAA members should not sell reverse mortgage products if you have not completed an accredited training and assessment under the SEQUAL Equity Release Education program. If you do, you will be in breach of the MFAA Code of Practice.

²¹² s18C National Credit Code. At the time of publication, these regulations have not yet been released.

11.2.5. Reverse Mortgage Lenders' Obligations

Tenanted properties – If the reverse mortgaged property is to be occupied by someone other than the borrower, ensure the credit contract for the reverse mortgage allows the borrower to nominate the proposed occupier to the lender and revoke that nomination. This will give the tenant of the property the same rights to occupy the property as the borrower (apart from the vacation of the property by the debtor or the death of the debtor).²¹³ Lenders are required to keep a register of nominated tenants (and revocations of those nominations).²¹⁴

Restrictions on Lenders' Rights – Reverse mortgage credit contracts cannot contain terms which entitle the lender to commence proceedings against the borrower, even if the borrower does the following:²¹⁵

- Fails to inform the lender that another person occupies the property;
- When the debtor occupies the property, fails to give the lender evidence that the debtor, or another person nominated by the debtor to the lender, occupies or occupied it;
- Leaves the reverse mortgaged property unoccupied while it is their principal place of residence;
- Fails to pay a cost to a person other than the lender within 3 years after the payment became due;
- Fails to comply with a provision of the credit contract if the contract does not make it clear how the borrower is to comply with the provision;
- Breaches another credit contract with the lender.

Unsuitable Reverse Mortgages – If a lender has entered into or increased the limit of a (non reverse mortgage) credit contract in breach of the responsible lending provisions and the borrower could have obtained a reverse mortgage which would not have been 'not unsuitable' for them, the borrower may be able to obtain a court order to be able to continue to reside in the home.²¹⁶

Discharge of Reverse Mortgage²¹⁷ – Lenders cannot require borrowers under reverse mortgages to pay more than the "adjusted market value"²¹⁸ of a property. If they pay this amount at any time, the borrower's obligations under the reverse mortgage are discharged and the lender cannot require the borrower to pay any further amount.

A borrower cannot rely on this protection if they made any misrepresentation to the lender in relation to the reverse mortgage at the time it was taken out.

11.2.6. Good Lending Practices

ASIC has provided a number of recommendations for reverse equity mortgages to facilitate disciplined money management and planning. Brokers should aim to arrange reverse mortgages with lenders who observe these recommendations.

Issue	Guideline
Loan Structures	<p>Lenders should:</p> <ul style="list-style-type: none"> • Not grant more credit than the borrower applies for; • Where loans are primarily for living expenses, offer the option of regular fortnightly or monthly payments; • Include a projection in the monthly statement such as 'Based on your average monthly spending, your credit will be used up in (month, year)'; • Have responsible advertising, so short-term spending is not encouraged to the detriment of meeting longer-term, but more essential, needs; • Provide access to relevant tools and information (such as budgeting tools, information about the statistical likelihood of needing, and potential costs of, such things as supported accommodation, and information about taking credit by a lump sum or instalments), and allow for a percentage of equity to be protected (e.g. to meet a wish by the borrower to leave some inheritance for their children).
Personalised Projections	<p>Lenders should provide personalised projections based on the applicant's age, amount borrowed, current house value and a conservative estimate of future property values. Projections should cover long-term scenarios (e.g. to age 90 or for 10 years, whichever is longer, or to zero equity).</p> <p>Based on the consumer's pattern of drawdowns, lenders should include projections in each annual statement of:</p> <ul style="list-style-type: none"> • Dollar debt in absolute terms; • Debt in relation to credit limit; and/or • Owner's share of home equity against various house price inflation scenarios.
Reminders	<p>Lenders should remind borrowers annually (in plain language) about their key obligations, especially those that trigger a loan default or jeopardise a no negative equity guarantee.</p>

²¹³ s158 National Credit Code

²¹⁴ s18A National Credit Code

²¹⁵ s18A National Credit Code

²¹⁶ s179(6) National Consumer Credit Protection Act 2009 (Cth)

²¹⁷ s86A – s86F National Credit Code

²¹⁸ Reg 84A National Consumer Credit Protection Regulations 2010 (Cth) specifies how this value is calculated (no regulations have been prescribed for any adjustment at this time)

Issue	Guideline
Default Procedures ²¹⁹	<p>In the event of default lenders should adopt procedures which are appropriate to the age and vulnerabilities of this group of borrowers. In particular, they should include a no negative equity guarantee in their reverse mortgage products. This guarantee:</p> <ul style="list-style-type: none"> • Should be expressed in simple language; • Should only be lost in limited circumstances where the lender's security is at significant risk; and • Should not be lost where the lender can take simple action to protect their interests (e.g. adding the cost of unpaid council rates to the balance of the loan).

11.3 SMSF LENDING

Although self managed superannuation funds are able to borrow, this is a specialised area. SMSFs are not generally permitted to borrow money other than where it is:

- A short term loan to pay a beneficiary, tax liability or for a securities transaction;²²⁰ or
- Borrowing to purchase a single acquirable asset²²¹. This means that the borrowed money can only be used to buy one property or a parcel of identical shares in one company. For this type of borrowing, to ensure the other SMSF assets are protected, only the acquired asset can be used as security and it (and the loan) must be held in a specific holding trust until the loan is repaid. The asset cannot be improved until the loan has been repaid and shares cannot be actively traded

The SMSF's trust deed must allow the SMSF to borrow.

As these and other restrictions on SMSFs when they borrow are complex, only assist them if you are an SMSF accredited adviser. Refer them to a properly accredited loan adviser²²² if you are not. And ensure that they seek financial and tax advice on their SMSF so that the borrowing does not breach the requirements.

12. Credit Providers' Obligations to Borrowers

USER GUIDE:

THIS SECTION PROVIDES INFORMATION ABOUT SOME OF THE KEY FEATURES OF THE NATIONAL CREDIT CODE AND ITS IMPACT ON THE RIGHTS AND OBLIGATIONS OF BORROWERS TO ASSIST YOU TO ADVISE CONSUMERS WHEN ARRANGING FINANCE FOR THEM AND IF THEY GET INTO DIFFICULTY DURING THE COURSE OF THE LOAN.

LENDERS MUST ALSO PROVIDE PRESCRIBED INFORMATION TO CLIENTS IN 'KEY FACT SHEETS' FOR HOME LOANS AND CREDIT CARDS.²²³

It is important that you are familiar with the Code as it will assist you to protect your client's interests.

This is not a complete summary and you should always recommend that your client obtains legal advice on their rights.

12.1 NATIONAL CREDIT CODE

The NCC provides a national standard of lending behaviour for credit providers and common documentation for establishing, administering and enforcing certain consumer loan agreements.

It applies to credit provided by any business to individuals and strata corporations wholly or predominantly (i.e., greater than half) for personal, domestic or household purposes (or to finance or refinance the purchase, renovation or improvement of residential property for investment purposes) and where a charge is made for providing the credit. Individuals include individual trustees, unincorporated associations, sole proprietors of businesses and partners.²²⁴

It applies to credit providers who are in the business of providing credit in Australia or provide the credit as part of or incidentally to another business that it carries out in Australia.

Some examples of transactions to which the NCC does not apply are²²⁵:

- Loans between friends or family members, that is where the lender is not in the business of lending money or no interest or other charges are payable;
- Loans for which no interest or charges are payable; short term loans (62 days or less) – but only where the fees and charges (including introduction fees) are less than 5% of the amount of credit and the interest rate is less than 24% p.a.;

219 s93A National Credit Code prescribes extra requirements for credit providers before enforcing a reverse mortgage where the debtor's liability exceeds the value of their mortgaged property

220 s67 Superannuation Industry (Supervision) Act 1993 (Cth)

221 s67A Superannuation Industry (Supervision) Act 1993 (Cth)

222 The MFAA has an accredited SMSF Lending Program

223 Part 3-2A and Part 3-2B National Consumer Credit Protection Act 2009 (Cth)

224 s5 National Credit Code

225 s5, s6 National Credit Code

- Investment loans, even where the investment is in real estate or shares;
- Margin loans – but note that these are regulated under the Corporations Act;
- Credit provided without any prior express agreement, e.g. a cheque account becomes overdrawn and there is no overdraft facility;
- Continuing credit where no interest is paid (Note that a periodic or fixed charge that does not vary according to the amount of the credit provided (unless it exceeds any maximum prescribed charge) may be made);
- Loans by pawnbrokers (where the pawnbroker's only remedy is the sale of the goods) and trustees of estates (unless it is an unjust transaction);
- Loans and leases to employees that are provided on concessional terms;
- Bill facilities; and
- Insurance premiums that are payable by instalments (provided the insured has no liability for further payments if the contract is cancelled).

It applies to both mortgages and guarantees and hire purchase agreements.²²⁶

TIP

To determine if the NCC applies when funds have been borrowed for a number of purposes, consider whether the purposes is private or investment and the timeframes for each.

The purpose of the loan is determined at the time it is made. If it is covered by the NCC at that time, it will remain covered, even if the borrower later alters the purpose of the loan.

TIP

This Handbook contains many references to the obligations imposed by the NCC.

Remember these will only apply if the loan or lease is covered by the NCC, i.e. if it is a consumer credit loan or a consumer lease. The NCC does not apply to investment or commercial finance (except for residential investments).

12.1.1. Short-Term Credit Contracts (Pay Day Lending)

A 'short-term credit contract' is a loan (other than a continuing credit contract) for less than 15 days and for \$2,000 or less.²²⁷

Only ADIs are permitted to offer 'short-term credit contracts'.²²⁸

12.1.2. Small Amount Credit Contracts²²⁹

A 'small amount credit contract' is a loan (other than a continuing credit contract) made by a non-ADI for between 16 days and 1 year and for \$2,000 or less.²³⁰

From 1 March 2013, considerable additional requirements will apply to non ADIs who offer these loans. These include:

- Providing prescribed notices to customers at their business premises and on any websites, to warn about small amount loans;²³¹
- Inability to charge interest;
- Maximum permitted fees and charges of²³²: establishment fee of 20%, monthly fees or 4% of the initial loan amount, a maximum default charge (no more than twice the initial loan amount)²³³ and other government fees, charge or duty. Borrowers are not liable to pay any prohibited fees or charges and may recover any amounts if they pay them²³⁴;
- Loan funds cannot be used to pay any amount to the credit provider (other than the allowed fees or any loan that has been refinanced). If they are, the borrower is not liable to repay the amount so repaid and can recover it from the lender;²³⁵
- Limits on repayments – for any person receiving 50% or more of their income under the Social Security Act 1991, the repayment cannot exceed 20% of their income.²³⁶ These payments can include pensions (aged and disability), parenting payments, carers payments, Austudy, and the Newstart allowance;
- Inability to recover more than twice the initial principal following a default;²³⁷
- Additional requirements following a default under direct debit repayments.²³⁸

226 s9 National Credit Code

227 s5(1) National Consumer Credit Protection Act 2009 (Cth)

228 s133CA National Consumer Credit Protection Act 2009 (Cth) A civil penalty of 2000 penalty units and a criminal penalty of 50 penalty units apply.

229 s5(1) National Consumer Credit Protection Act 2009 (Cth)

230 s5(1) National Consumer Credit Protection Act 2009 (Cth)

231 s133CB National Consumer Credit Protection Act 2009 (Cth). The size, format and content of these warnings are prescribed in Schedules 7 and 9 of the National Consumer Credit Protection Regulations 2010 (Cth).

232 s23A and S24(1A) National Credit Code. A criminal penalty of 100 penalty units applies.

233 s31A and s39B National Credit Code

234 s31B National Credit Code

235 s39A National Credit Code

236 s133CC National Consumer Credit Protection Act 2009 (Cth), Reg 28S National Consumer Credit Protection Regulations 2010 (Cth). Civil penalty of 2,000 penalty units and a criminal penalty of 50 penalty units will apply.

237 s39B National Credit Code

238 s39C National Credit Code

12.2 LOAN DOCUMENTS

12.2.1. Credit Contracts

Consumer credit contracts must be in writing and signed by the borrower and the credit provider. They can be in the form of an offer that is signed only by the credit provider if the offer can be accepted by the borrower by either accessing or drawing down credit or doing any other act that satisfies the offer conditions and legally accepts the offer.²³⁹

Consumer credit contracts must contain the following information:²⁴⁰

- The credit provider's name;
- The amount of credit (or if it is not ascertainable, the maximum amount of credit or the credit limit) and the persons to whom it is payable (and the amounts payable to each of them). If the credit is for land, a description of the land and its cash price. If the credit is for goods by instalments, a description of the goods and their cash price;
- The annual percentage rate or rates (and if there is more than one, how they apply). If the rate is determined by referring to a reference rate, information about the name or description of the rate, the margin(s) above or below the rate to be applied, where the rate is published or how it can be ascertained and the current rate;²⁴¹
- The method of calculation of the interest charges and the frequency of debiting those charges;²⁴²
- If the contract is for less than 7 years, the total amount of interest charges payable, if ascertainable;²⁴³
- The amount or method of calculation of repayments and, if ascertainable, the number of repayments and, if the contract is for less than 7 years, the total amount of repayments, when the first repayment is to be paid, the frequency of repayments and if the contract provides for a minimum repayment, the amount of that repayment (or method of calculation if the amount is not ascertainable);
- A statement of the credit fees and charges that are or may become payable and when they are payable, the amount of each fee and charge (or, if not ascertainable, the method of calculation) and the total amount of fees and charges if ascertainable;
- Whether the interest rate or frequency of payment may be changed or new charges or fees imposed and if so, how the borrower will be notified of the change;
- How often statements of account will be provided (for variable rate contracts only);
- The rate that will apply if the borrower defaults under the loan. If the rate is determined by referring to a reference rate, the same information as for annual percentage rates as is set out in the third bullet point above;
- A statement that enforcement expenses may become payable if the borrower is in breach;
- If a mortgage or guarantee has been taken, this must be stated, together with a description of any property secured by the mortgage;
- If a commission is to be paid to, or by, the credit provider for the introduction of the credit or finance business, the details of the amount of the commission (if ascertainable) and to and by whom it is payable. There is no need to include details of commission paid to employees of the credit provider or in connection with a credit related insurance contract;
- If the credit provider knows that the borrower is to enter into a credit related insurance contract that is to be financed under the credit contract, the name of the insurer, the amount of the premium (or how it is calculated), the type of insurance, the amount or percentage of any commission to be paid by the insurer for introduction of the business (if the credit provider is aware of it);
- If the credit contract is a reverse mortgage which allows a person other than the debtor to occupy the mortgaged property, and
- The contract document must be in the form required by the regulations.

TIP

It is good practice for brokers to check that consumer credit contracts contain all the required information.

Interest Rates and Charges – The National Credit Code sets out detailed rules regarding how and when credit providers may calculate interest and fees and charges based on unpaid daily balances. You may need to refer to these if you believe that your client is being over charged or interest is being incorrectly calculated.²⁴⁴

239 s14 National Credit Code

240 s17 National Credit Code

241 This does not apply to small amount credit contracts

242 This does not apply to small amount credit contracts

243 This does not apply to small amount credit contracts

244 Div 3 and 4 National Credit Code

12.2.2. Mortgages

A mortgage can also be a consumer credit contract. Mortgages are required to be in writing and signed by the mortgagor(s).²⁴⁵

Mortgage documents must accurately describe the property that is subject to the mortgage, otherwise they will be void. However, care must be taken when describing the property because the mortgage can be void, if that property is not permitted to be mortgaged. Examples of descriptions that would be void include mortgages over:

- All the property of the 246;
- Property which is not yet owned by the borrower (unless it is to be acquired wholly or partly with the credit being provided)²³¹;
- Goods supplied from time to time under a continuing consumer credit contract;
- An employee's remuneration or employment or superannuation benefits²⁴⁷; and
- Essential household property, except where the mortgage was created in connection with the supply of that property or goods that are property used by the borrower in earning income by personal exertion that are worth less than a certain amount.²⁴⁹

Mortgages may secure not only the amount owed under the consumer credit contract and any related guarantee, but also credit provided under a future credit contact or related guarantee. However, a mortgage may not secure more than the sum of the amount owed under the consumer credit contract the reasonable expenses of enforcing the mortgage – if it does it will be void.²⁵⁰

12.2.3. Guarantees

Guarantees of mortgages must also be in writing and signed by the guarantor. They may be incorporated into the mortgage.²⁵¹

Limited Guarantees – Guarantors of continuing consumer credit contracts can limit the guarantee to cover only the credit already provided to the borrower (and/or any further specified amount). They do not have to be open-ended.²⁵²

Indemnities in Guarantees – While a guarantee cannot limit or postpone the guarantor's right to indemnity from the borrower, where the borrower is under 18, the guarantor may not be entitled to any indemnity from the borrower.²⁵³

TIP

Guarantees cannot secure more than the liabilities of the borrower under the consumer credit contract and the reasonable cost of enforcing the guarantee.

Explanation – The credit provider must give the guarantor(s) a copy of the consumer credit contract and an explanation (in a prescribed form) of the rights and obligations of a guarantor before they sign the guarantee - if they do not, the guarantee will not be enforceable.²⁵⁴

Copy of Guarantee – Within 14 days after the signed guarantee is given to the credit provider, the credit provider must provide the guarantor with a copy of the signed guarantee and the consumer credit contract (unless they have been provided previously).²⁵⁵

TIP

Guarantors may withdraw from the guarantee at any time before credit is first provided under the consumer credit contract – and can even do so after credit is provided if the consumer credit contract is materially different from the consumer credit contract given to the guarantor before they signed the guarantee.²⁵⁶

TIP

A guarantor's liability under a guarantee cannot be increased in line with a change in the terms of a consumer credit contract that increases the liability under that contract unless the guarantor agrees in writing after having been given written notice of the change.²⁵⁷

245 s42 National Credit Code

246 s44 National Credit Code

247 s45 National Credit Code

248 s50(1) National Credit Code

249 s50(2) National Credit Code. This does not apply to pre National Consumer Credit Protection Act loans.

250 s47, s49 National Credit Code

251 s55 National Credit Code

252 s60 National Credit Code

253 s60 National Credit Code

254 s56 National Credit Code

255 s57 National Credit Code

256 s58 National Credit Code

257 s59 National Credit Code

12.2.4. Pre-Contract Disclosure

Before the earlier of when a borrower either offers to enter into a consumer credit contract or signs the contract, the credit provider must give the borrower:²⁵⁸

- A Pre Contractual Statement setting out the matters to be included in the contract; and
- An Information Statement of the borrower's statutory rights and obligations in a prescribed form.

The lender may also give the borrower a Comparison Rate before the contract is entered into. Any such Comparison Rate must be calculated in accordance with certain requirements.²⁵⁹

Pre-Contractual Statement – This must contain essentially similar information as is required to be contained in a credit contract, but needs to be in a tabular form and financial information must be shown separately.²⁶⁰

Information Statement of the Borrowers Statutory Rights and Obligations – This statement consists of 25 questions and answers.²⁶¹

Comparison Rate – This rate is calculated according to a complex formula based on the number of repayments, the time between repayments, the amount of credit and the fees and charges payable.²⁶² See above for more information about Comparison Rates.

In addition to the Comparison Rate, the credit provider must tell the borrower the amount of credit on which it is based (which must be the amount required by the borrower) and the term for which credit is provided (which must be the term {or maximum term} required by the borrower).

The borrower must also be given a warning, immediately after the comparison rate is given, to the following effect:²⁶³

WARNING: This comparison rate applies only to the example or examples given. Different amounts and terms will result in different comparison rates. Costs such as redraw fees or early repayment fees and cost savings such as fee waivers, are not included in the comparison rate but may influence the cost of the loan.

12.3 BORROWERS' RIGHTS

12.3.1. Caps on Interest Rates

States – The aggregate of interest, fees and charges (not including default fees) for consumer loans must not exceed 48% per annum in NSW, ACT and Queensland.²⁶⁴

In Victoria a consumer credit contract is unenforceable if the interest rate exceeds 48% per annum and a related mortgage whose interest rate exceeds 30% per annum is void. There is no cap on fees and charges.²⁶⁵

If a borrower repays early, they may sometimes pay more than these caps. However this does not breach these laws as the cap is only breached as a result of the voluntary early repayment; there is no obligation to pay in excess of the cap.

Commonwealth – A cap of 48% on the 'annual cost rate' of loans applies to loans offered by non-ADIs (other than small amount credit contracts and bridging finance which are subject to separate requirements).²⁶⁶

- An additional establishment fee of \$400 can be charged for medium amount credit contracts (loans other than a continuing credit contracts offered by a non-ADI for between \$2,001 and \$5,000 and for between 16 days and 2 years); and
- The regulations will prescribe what, if any, additional fees can be charged for other credit contracts offered by non ADIs.

Small amount credit contracts are not subject to a 48% interest rate cap, but may not charge any interest, or any fees except:²⁶⁷

- An establishment fee not exceeding 20% of the first amount of credit advanced;
- A monthly fee not exceeding 4% of the first amount of credit advanced;
- A default fee or charge; and
- Any government fees or charges.

258 s16 National Credit Code

259 s16 National Credit Code

260 S17 National Credit Code and Reg 72 National Consumer Credit Protection Regulations 2010 (Cth)

261 Form 5 National Consumer Credit Protection Regulations 2010 (Cth)

262 Reg 71 National Consumer Credit Protection Regulations 2010 (Cth)

263 Reg 71(11) National Consumer Credit Protection Regulations 2010 (Cth)

264 Consumer Credit (NSW) Act, Fair Trading Act 1992 (ACT), Credit (Commonwealth Powers) Act 2009 (Qld)

265 s39, s40 Consumer Credit (Victoria) Act 1995 (VIC)

266 s32A, s32B National Credit Code

267 s31A National Credit Code

12.3.2. Changes to NCC Credit Contracts

Unless a change reduces the borrower's liability, credit providers cannot alter or add to a consumer credit contract after it is signed by the borrower, unless the borrower has agreed in writing to the change(s).²⁶⁸

Further, credit providers cannot change a consumer credit contract or its terms unless the right to do so is contained in the contract.

Interest Rates – Changes in the annual percentage interest rate must be notified to borrowers no later than the day on which they take effect. This can be done by publishing a notice in a newspaper circulating in the relevant state or territory.²⁶⁹ If the notice is given in this way, then the borrower's next statement of account must contain details of the change.

No notice of a change in interest rates is required if the new rate (and when it takes effect) are clear from the terms of the contract.²⁷⁰

However, notice of a change in the manner in which interest is calculated (including a change in or abolition of an interest free period) and which has the effect of increasing the borrowers' obligations, must be given 20 days before that change takes effect.²⁷¹

TIP

Credit providers cannot increase the fee or charge payable on early termination or a prepayment of a fixed rate consumer credit contract after the contract is entered into.²⁷²

Repayments – Credit providers must provide borrowers with 20 days written notice of a change in the amount, frequency, time for payment or method of calculation of instalments or minimum repayments.

Advance notice is not required if the change reduces the borrower's obligations or extends the time for payment – but details of the change must be shown in the borrower's next statement of account.

Credit Fees and Charges – If the amount, frequency or time for payment of a credit fee or charge changes, the credit provider must give the borrower 20 days written notice of the change.²⁷³ If the notice is given by publishing it in a newspaper published in the relevant state, then the borrower's next statement of account must contain details of that change.

Advance notice is not required if the change reduces the borrower's obligations or extends the time for payment – but details of the change must be shown in the borrower's next statement of account.²⁷⁴

TRAP

Credit providers cannot charge exit fees for mortgages of residential property entered into after 1 July 2011. However, they can charge for credit fees incurred before termination of the credit contract and also break fees (being a charge that relates to loss to the credit provider due to differences in interest rates caused by early repayment of a fixed rate loan) and discharge fees (being the credit provider's reasonable administrative costs for terminating the contract).²⁷⁵

Changes by Agreement – The credit provider and borrower can always agree to change the terms of an existing consumer credit contract and, if so, the credit provider must provide the borrower with written details of the change within 30 days - unless the change defers or otherwise reduces the borrower's obligations for up to 90 days or increases the amount of credit provided.²⁷⁶

12.3.3. Statements of Account

Periodic Statements – Credit providers must provide borrowers with periodic statements of account – for loans that are not continuing credit contracts these must be provided at least every 6 months or where the loan involves a reverse mortgage every 12 months.²⁷⁷ For continuing contracts other than credit cards, they must be provided at least every 40 days (or any agreed period that is less than 3 months).

Statements of account are not required where:²⁷⁸

- Contracts have a fixed rate for the whole of the term;
- No amount has been debited or credited during the period (other than government charges or taxes) on receipts or withdrawals and the outstanding amount is less than \$10;
- The credit provider wrote off the debt during the period;
- The borrower was in default and the credit provider has either commenced proceedings or has not provided further credit; or
- The borrower has died or is insolvent and the personal representative or trustee in bankruptcy has not requested a statement.

268 s19 National Credit Code

269 s64(1) and (2) National Credit Code. A criminal penalty of 100 penalty units applies to a failure to do so and this is a strict liability offence.

270 s63(2) National Credit Code

271 s64(4) National Credit Code

272 s70 National Credit Code

273 s66 National Credit Code

274 s65(2) National Credit Code. A criminal penalty of 100 penalty units applies to a failure to do so and this is a strict liability offence.

275 Reg 79A National Consumer Credit Protection Regulations 2010 (Cth)

276 s71 National Credit Code

278 s33 National Credit Code A criminal penalty of 100 penalty units applies to a failure to do so and this is a strict liability offence.

Statements of account should contain the following information:²⁷⁹

- The dates on which the statement period begins and ends;
- The opening and closing balances for the period;
- The amount of each amount of credit provided during the statement period;
- The amount of the interest charge debited to the account, the annual percentage rate and any rate change since the last statement²⁸⁰;
- Any fees and charges debited during the period;
- Each amount paid by, credited to, or transferred to, or from, the account during the period;
- Any minimum amount payable under a continuing credit contract; and
- If any payment to an insurer is made for a credit related insurance contract that is financed under the credit contract, the name of the insurer, the amount paid, the type of insurance and the amount or percentage of commission paid by the insurer – but only if this has not been disclosed previously.

Individual requests – A borrower or guarantor can request a credit provider to provide a statement of the current balance of the account, any amounts credited or debited during any period, any amounts currently overdue and when they became overdue, any amount currently payable and the date it becomes due - at any time.²⁸¹

The credit provider must provide the statement within 14 days, if it relates to the past year, or within 30 days - if the information requested is more than 1 year old. However, there is no obligation to provide such a statement if one has been provided in the past 3 months. The statement need only be given to the borrower or guarantor who requested it – not to all borrowers and guarantors. If requested orally it may be provided in writing, but if the request was in writing, the statement must also be provided in writing.

The maximum penalty for failing to provide a statement on request is 100 penalty units.

12.3.4. Financing Insurance Premiums

Financing the Premium – While credit providers can finance the premium payable for the insurances that they require, they may only do so for periods of up to 1 year at a time. Further, they must not debit the premium to the borrower's account more than 30 days prior to the date on which the insurance policy commences.²⁸² If the credit provider does so, it can be required to repay the premium which has been wrongly debited to the borrower.

Borrower's Entitlement to Information – If the premium has been financed by the credit provider, the insurer must give the borrower a copy of the policy within 14 days after accepting the insurance proposal.²⁸³

If the borrower is also insured under the policy, the insurer must give the borrower details of the key features of the contract within 14 days, including the following:²⁸⁴

- The name of insurer;
- The type of insurance, risks insured against and any exclusions;
- Who is entitled to indemnity under the policy;
- The expiry date;
- The premium, fees and charges payable (to the extent ascertainable); and
- Who may make a claim and how to make a claim.

Insurance Rejected – If it was proposed to finance the premium, but the insurer rejects the proposal for insurance, the insurer must tell both the credit provider and the borrower of the rejection. The credit provider must refund any amount paid by the borrower in full.

The maximum penalty for failing to do so is 100 penalty units.²⁸⁵

Commission on Insurance – Credit providers are not entitled to receive more than 20% of the premium as commission (excluding government charges). If they do the borrower is entitled to receive the full amount of the commission from the credit provider and a maximum penalty of 100 penalty units may apply.²⁸⁶

279 S34 National Credit Code

280 This does not apply to small amount credit contracts

281 s36 National Credit Code

282 s144 National Credit Code

283 s146 National Credit Code

284 s146 National Credit Code and Reg 93 National Consumer Credit Protection Regulations 2010 (Cth) A criminal penalty of 100 penalty units applies to a failure to do so and this is a strict liability offence.

285 s147 National Credit Code. A criminal penalty of 100 penalty units applies to a failure to do so and this is a strict liability offence.

286 s145 National Credit Code. A criminal penalty of 100 penalty units applies to a failure to do so and this is a strict liability offence.

12.3.5. Disputed Liabilities²⁸⁷

Borrowers may dispute a liability that has been entered against them under a credit contract. If they do so in writing within 30 days of receiving the statement of account (or 3 months after the day the contracts ends, where statements are not required), then the credit provider must provide an explanation (in reasonable detail) of how the liability arose.

Credit providers cannot take enforcement proceedings on the basis of a default arising from the disputed liability until 30 days after they have provided that explanation.²⁸⁸

If the borrower is not satisfied with the explanation, they may apply to a Court to have the dispute determined and the credit provider cannot take any enforcement proceedings without the leave (permission) of the Court.²⁸⁹

12.3.6. Enforcement of Credit Contracts

Default Notice Required – Before a credit provider can commence proceedings to enforce a debt, under either a consumer credit contract or a mortgage, they must give the borrower and any guarantor a default notice allowing 30 days in which to remedy the default. The default notice must describe the default and the action that is required to remedy it.²⁹⁰

For reverse mortgages, the credit provider must also speak to the debtor or the debtor's lawyer or a person who has a power of attorney from the debtor (in person or via telephone within the 30 day notice period) confirming receipt of the default notice and inform them of the consequences for failing to remedy the default.²⁹¹

No default notice is required if the credit provider reasonably believes that it was induced by fraud to enter the mortgage or consumer credit contract or the credit provider has made reasonable attempts to locate the borrower or mortgagor without success.

If the borrower remedies the default within the 30 days, the contract or mortgage is reinstated and no acceleration clause²⁹² comes into effect.²⁹³

The credit provider may only commence proceedings if the default has not been remedied within that time.²⁹⁴

Note though that, before the default notice expires, the borrower can ask the credit provider to postpone the enforcement proceedings. The credit provider must respond to this within 21 days. From 1 March 2013, the lender must also provide the borrower at least a further 14 days' notice after the initial response, before beginning enforcement proceedings, even if the credit provider is not willing to negotiate a postponement.²⁹⁵

Judgement against Guarantor – A credit provider cannot enforce a judgement against a guarantor unless:²⁹⁶

- A judgement against the borrower has been unsatisfied for 30 days after the credit provider made a written demand for payment of the debt – unless the Court has ruled that the credit provider does not need to obtain a judgement against the borrower on the basis that recovery from the borrower is unlikely;
- Reasonable attempts to locate the borrower have been unsuccessful; or
- The borrower is insolvent.

12.3.7. Hardship

Borrowers who are unable to meet their obligations under a consumer credit contract have some redress in certain circumstances. Both the National Credit Code and the MFAA Code of Practice impose obligations on credit providers (who are members of the MFAA).

National Credit Code – If a borrower is unable to meet their obligations under a consumer credit contract then the borrower can apply to the credit provider to have the contract changed.

Within 21 days of the hardship notice, the credit provider must request, information that it needs to decide:²⁹⁷

- Whether the debtor is or will be unable to meet their obligations under the contract; or
- How to change the contract if the debtor is or will be unable to meet those obligations.

This request can be verbal or written.

The debtor has 21 days from the date the notice is given by the credit provider (which date must also be stated in the notice) to provide the requested information.

287 s38 National Credit Code. This applies to pre National Consumer Credit Protection loans from 1 July 2010.

288 s38(6) National Credit Code. A criminal penalty of 50 penalty units applies to a failure to do so and this is a strict liability offence.

289 s38 (8) National Credit Code. A criminal penalty of 50 penalty units applies to a failure to do so and this is a strict liability offence.

290 s88 National Credit Code and Form 12 National Consumer Credit Protection Regulations 2010 (Cth) A criminal penalty of 50 penalty units applies to a failure to do so.

291 s88(1)(d) and s88(2)(d) National Credit Code. A criminal penalty of 50 penalty units applies to a failure to do so.

292 An "acceleration clause" is a term that entitles the credit provider to request immediate payment of all or part of the debt that would not otherwise have been immediately

payable or giving the credit provider discretion to require payment in a manner that is different from that set out in the contract. These clauses can only operate if the borrower is in default under the loan and certain other conditions have been satisfied – s92, s93 National Credit Code.

293 s89 National Credit Code

294 S88 National Credit Code - A criminal penalty of 30 and 50 penalty units applies respectively, for failing to give these notices and these are strict liability offences.

295 S94 National Credit Code

296 s90 National Credit Code

297 s72 National Credit Code and Clause 13 MFAA Code of Practice (December 2012). From 1 March 2012, a failure to respond in the appropriate time and manner can attract a civil penalty of 2000 penalty units.

The credit provider must give the debtor a notice of its decision. If the credit provider has decided not to change the credit contract, the notice must state this and provide information about ²⁹⁸:

- Why they have not agreed; and
- The name and contact details of the approved external dispute resolution scheme of which the credit provider is a member; and
- The debtor's rights under that scheme.

That notice must be provided to the debtor within the following timeframes ²⁹⁹ :

- If the credit provider did not request further information from the debtor – within 21 days after receiving the hardship notice;
- If the credit provider did request further information but did not receive that information within 21 days after requesting it – 28 days after the request for the information;
- If the credit provider requested further information and received it within the required timeframe – 21 days after receiving the information.

The credit provider must also give the borrower and guarantor written notice of the varied payment terms within 30 days after the agreement.³⁰⁰

The borrower can apply to a Court to have the change made and the Court can change the contract if it thinks it appropriate. The Court can also make other orders, including a stay of any enforcement proceedings by the credit provider.³⁰¹

MFAA Code of Practice³⁰² – The MFAA Code of Practice also imposes obligations on members in relation to consumer loans.

If a member becomes aware, or is advised by a consumer that the consumer is or may be in financial difficulties, consider in good faith if it is reasonably appropriate to vary the terms of the credit facility. If so, suggest that the consumer contact the credit provider to request to vary the repayment terms.

Where appropriate the member credit provider must:

- Consider the borrower's request to vary the payment terms in good faith and within a reasonable time, having regard to the borrower's financial circumstances;
- Suspend any action to recover any payments due under the credit facility and if they have not listed a default already, not list a credit default in respect of the credit facility against the borrower until they inform the borrower in writing whether they will vary the payment terms and if they do, agree, until the borrower fails to meet the varied payment terms, and
- Encourage the borrower to make any payments the borrower can afford, pending the Member informing the borrower of its decision to alter the payment terms.

Credit providers must act reasonably in assessing a borrower's request to vary the payment terms under the borrower's credit facility and must give prompt written notice to the consumer of the varied payment terms.

TIP

Lenders may not make it a condition that the borrower first apply for superannuation to be released or seek financial assistance from family and friends before they consider whether to, or agree to, vary the payment terms.

If the credit provider does not agree to the change, it must promptly inform the borrower in writing of its decision and the reasons for it and the borrower's rights to make a complaint to the credit provider's External Dispute Resolution Scheme if the credit falls within the jurisdiction of the scheme. The lender must also provide the borrower with the scheme's contact details.

TIP

Borrowers can seek compensation from lenders who do not properly consider hardship applications.

12.3.8. Unjust Transactions

Courts have powers as well. These include:

- Reopening an unjust transaction and either³⁰³:
 - relieving the borrower and guarantor of payment of an amount that the court considers is more than reasonably payable;
 - setting aside an agreement or mortgage given in connection with the transaction,
 - ordering that the credit provider discharge the mortgage; or

298 s72 National Credit Code and Clause 13 MFAA Code of Practice (December 2012). From 1 March 2012, a failure to respond in the appropriate time and manner can attract a civil penalty of 2000 penalty units.

299 s72 National Credit Code and Clause 13 MFAA Code of Practice (December 2012). From 1 March 2012, a failure to respond in the appropriate time and manner can attract a civil penalty of 2000 penalty units.

300 s73 National Credit Code and Clause 13 MFAA Code of Practice (December 2012). It is a strict liability offence if the credit provider fails to give this notice in the appropriate time and manner. A criminal penalty of 30 penalty units applies.

301 s74 National Credit Code

302 Clause 13 MFAA Code of Practice (December 2012)

303 s77, s78 National Credit Code

- making an order in favour of a party of the amount the court considers is justly due;
- Reviewing unconscionable interest rates, establishment fees or charges, or fees or charges payable on early termination or prepayment. It will be 'unconscionable' if the charge is unreasonable having regard to the advertised rates or representations made by the credit provider before or when the contract was entered into, or the charge unjustifiably discriminates against the borrower compared to other similar borrowers³⁰⁴.

12.3.9. Unfair Terms in Standard Contracts³⁰⁵

Unfair contract terms in "standard" contracts with consumers are void. If the term goes to the heart of the contract, the whole contract is void. If it can be considered in isolation, the unfair term will be severed from the contract.

A consumer contract is a contract under which an individual acquires goods, services or an interest in land predominantly for personal, domestic or household use or consumption.

There is no definition of what is a "standard form contract". However if a contract comes in pre-printed form, concerns a common or widespread type of consumer transaction, and is offered to the consumer on a "take it or leave it" basis, it is most likely to be a standard form contract.

Terms which define the main subject matter of the contract, terms which set the up-front price and terms which are required or expressly permitted by Commonwealth, state or territory laws cannot be declared unfair.

A term is unfair if:

- It would cause significant imbalance in the parties' rights and obligations;
- Is not reasonably necessary to protect the legitimate interests of the advantaged party; and
- Would cause detriment if it were relied on.

Some of the types of terms that may be unfair include clauses that:

- Allow one party, but not another to end, vary, renew, not renew the contract or determine that a breach has happened;
- Limiting a party's right to sue;
- Allow assignment of rights to the detriment of a party; and
- Impose the evidentiary burden on one party (e.g. "the certificate of the lender is final").

A consumer who is not a party to a contract which has been declared unfair can obtain the same redress as the party to the contract if they have suffered a loss as a result of the unfair term.

12.3.10. Termination of Consumer Credit Contracts

Terminating Consumer Credit Contracts – Borrowers can terminate a consumer credit contract by giving written notice to the credit provider unless any credit has been obtained under it already. The credit provider may retain or require payment of fees or charges incurred prior to the termination.³⁰⁶

When a consumer credit contract is terminated, any consumer credit insurance contract financed under the consumer credit contract is also terminated. The credit provider must pay to, or credit the borrower with, a proportionate rebate of the premium which has been paid - and may recover this amount from the insurer.³⁰⁷

If the insurance is over mortgaged property, on termination of the consumer credit contract, the borrower can terminate the insurance contract and recover a rebate of premium.³⁰⁸

Paying Out Credit Contracts³⁰⁹ – A borrower or a guarantor may pay out a credit contract under which funds have been advanced at any time. They must pay the total of the amount of credit, interest charges and fees payable up to the date of termination, any reasonable enforcement expenses and any early termination charges provided for in the contract less any payments already made and any rebate of insurance premium due.³¹⁰

Borrowers and guarantors may request a written statement of the amount required to pay out a credit contract at any time (including details of the items that make up the amount).³¹¹ The consumer credit provider must give this to the person who asked for it within 7 days of the request date.³¹²

Sometimes a borrower will pay more than the interest rate cap if they repay early as the combination of establishment and repayment fees push the effective rate over the limits. This is permissible because the cap is breached as a result of the borrower's act in repaying early, not because the borrower has been obliged to pay more than the cap.³¹³

13. Glossary

ADI	Authorised Deposit-Taking Institution – companies that are authorised to carry on banking business under the Banking Act 1959 (Cth)
Aggregator / Franchisee	Groups or networks who provide support to brokers – including administration services, technology systems and software, education and training, communication and marketing assistance
AMC	an Accredited Mortgage Consultant – an MFAA Member who is employed by or contracted to another Member other than an AMC
APRA	Australian Prudential Regulatory Authority – the prudential regulator of the financial services industry
ASIC	Australian Securities & Investments Commission – the regulator that enforces and regulates companies to protect creditors and the financial services laws to protect consumers, and investors
Capacity	A borrower’s ability to repay a debt
Churning	Occurs when a loan writer receives a commission, payment or other incentive for negotiating a refinanced loan for a consumer, with a different lender from the lender which originally financed the loan for the same property, and the consumer is not better off as a result of the refinance
Credit Provider	A business that that lends or provides credit. Also a lender
Code of Banking Practice	A Code which establishes the banking industry’s key commitments and obligations to clients on standards of practice, disclosure and principles of conduct
Comparison Rate	A tool to assist consumers to identify the true cost of a loan. It includes the interest rate, fees and charges relating to a loan, reduced to a single percentage figure
National Credit Code	A law governing consumer lending that is designed to protect consumer’s interests. Formerly known as the Uniform Consumer Credit Code or NCC
COS or COSL	Credit Ombudsman Service Limited which handles complaints and disputes for the mortgage broking industry
Credit Report	A report containing information about a person’s dealings with lenders and creditors
Credit Risk	The danger that the borrower will not repay a loan. It is assessed by credit analysts and is normally reflected in the interest rate charged and other conditions imposed by lenders
Creditworthiness	A measure of the borrower’s ability and willingness to make timely repayments – as illustrated by their credit history
FBAA	Finance Brokers Association of Australia.
FBAA Code of Practice	The Code of Practice promulgated by the FBAA and as revised by the FBAA from time to time
Finance Broker	A business that brings together potential borrowers and credit providers in respect of lease, hire purchase and rental transactions
FOS	Financial Ombudsman’s Service which handles complaints and disputes for the mortgage broking and financial services industries
Lenders Mortgage Insurance (LMI)	Insurance that protects the lender if the borrower defaults on a loan
Loan to Valuation Ratio (LVR)	The percentage that the loan bears to the total value of the property. (divide the loan amount by the property value and show it as a ratio)
MFAA	Mortgage & Finance Association of Australia, the peak industry body for mortgage and finance broking professionals to assist them to develop, foster and promote the mortgage and finance broking industry in Australia
MFAA Code of Practice	The Code of Practice promulgated by the MFAA and as revised by the MFAA from time to time
Mortgage Broker	An individual or business that works with clients to determine their borrowing needs for residential property, presents loans most suited to their circumstances and manages the process through to settlement
Mortgage Manager	A business that manages mortgages on behalf of a credit provider
Mortgage Originator	Mortgage brokers and their representatives who bring together potential borrowers and lenders. They offer loans from lenders to whom they are accredited
Mortgage Protection Insurance	Insurance that covers the borrower for payment of their mortgage instalments in the event of unforeseen circumstances such as unemployment, illness or death
Mortgage Security	The physical asset over which the lender holds a charge to secure the loan
Pre- approved	The mortgage lender has approved the borrower for a specific loan amount, subject to certain conditions being met
Pre-qualified	The borrower has been assessed as a person who will potentially be approved for a loan (based on their income, employment history and available deposit)
Settlement	The final step in buying property, when the balance of the purchase price is paid to the vendor’s representative and the loan is drawn down, in return for guaranteed ownership of the property
Title	A document that identifies the ownership of land
Unconditional Approval	A borrower is safe to purchase property as full loan approval has been granted
Valuation Report	A report that details a professional opinion of the dollar value of a property

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