



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 209

Credit licensing: Responsible lending conduct

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About this guide

This is a guide for credit licensees, credit applicants and unlicensed carried over instrument lenders (unlicensed COI lenders).

It sets out ASIC's expectations for meeting the responsible lending obligations in Chapter 3 of the *National Consumer Credit Protection Act 2009* (National Credit Act).

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This version was issued on 31 March 2011 and is based on legislation and regulations as at 31 March 2011.

Previous versions:

- Superseded Regulatory Guide 209, issued 26 February 2010, reissued 25 June 2010

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the credit legislation and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

Credit licensees must comply with the responsible lending conduct obligations in Ch 3 of the *National Consumer Credit Protection Act 2009* (National Credit Act). The key concept is that credit licensees must not enter into a credit contract with a consumer, suggest a credit contract to a consumer or assist a consumer to apply for a credit contract if the credit contract is unsuitable for the consumer.

As a credit licensee, you must decide how you will meet the responsible lending obligations. This guidance sets out our expectations for compliance.

Meeting your responsible lending obligations will require taking three steps:

- make reasonable inquiries about the consumer's financial situation, and their requirements and objectives;
- take reasonable steps to verify the consumer's financial situation; and
- make a preliminary assessment (if you are providing credit assistance) or final assessment (if you are the credit provider) about whether the credit contract is 'not unsuitable' for the consumer (based on the inquiries and information obtained in the first two steps).

In addition, if the consumer requests it, you must be able to provide them with a written copy of the preliminary assessment or final assessment (as relevant).

This section of the guide sets out the context of the responsible lending obligations and provides an overview of our guidance.

The responsible lending obligations

RG 209.1 The National Credit Act contains responsible lending obligations for credit licensees. These conduct obligations apply to both credit providers (i.e. lenders, such as banks, credit unions and finance companies) and credit assistance providers (e.g. mortgage and finance brokers).

Note 1: The *Corporations Act 2001* has been amended to include a responsible lending obligation in relation to margin loans under the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*. This guide does not deal with the responsible lending provisions in relation to margin lending.

Note 2: The responsible lending conduct obligations for brokers and some lenders apply from 1 July 2010. This includes registered persons as well as credit licensees.

Note 3: For the remaining lenders (i.e. authorised deposit-taking institutions (ADIs) and registered finance corporations), the obligations apply from 1 January 2011.

RG 209.2 The primary obligation is to conduct an assessment that the credit contract or lease is ‘not unsuitable’ for the consumer: see Section C. A contract will be unsuitable where either:

- (a) it does not meet the consumer’s requirements and objectives; or
- (b) the consumer will be unable to meet the repayments, either at all or only with substantial hardship.

RG 209.3 In undertaking the assessment, you must:

- (a) make reasonable inquiries about both the consumer’s requirements and objectives and their financial situation; and
- (b) take reasonable steps to verify the consumer’s financial situation (see Section B).

RG 209.4 Therefore, you must make a preliminary assessment (if you are providing credit assistance) or a final assessment (if you are the credit provider) about whether the credit contract is ‘not unsuitable’ for the consumer (based on the inquiries and verification of information you have made).

Note: See s115, 116, 117, 128, 129, 130, 140 and 153.

RG 209.5 The responsible lending obligations also apply when you:

- (a) suggest, assist with, or provide a new credit contract or lease to a consumer;
- (b) increase the limit on a particular credit contract, suggest that a consumer increase the limit, or assist a consumer to increase the limit; or
- (c) suggest to a consumer that they remain in a particular credit contract or consumer lease.

Note: For further guidance on ‘assisting’ and ‘suggesting’, see Regulatory Guide 203 *Do I need a credit licence?* at RG 203.46–RG 203.51.

RG 209.6 This means that the responsible lending obligations do not just apply to new credit contracts—the obligations also apply where a consumer increases a particular credit contract or consumer lease or remains in a particular credit contract or consumer lease.

Note 1: See s123, 124, 128, 138 and 139.

Note 2: Unless otherwise mentioned, future references to a ‘contract’ or ‘credit contract’ also include reference to a consumer lease.

RG 209.7 In addition, if the consumer requests it, you must be able to provide them with a written copy of the preliminary assessment or final assessment (as relevant).

Note: See s120, 132, 143 and 155.

The responsible lending obligations of credit assistance providers and credit providers

- RG 209.8 Our guidance generally applies equally to credit providers and credit assistance providers; however, there are times when the obligations of these groups will differ. Within the broad class of either credit providers or credit assistance providers, different business models or differences in the services provided may mean that different or additional steps are required in order to ensure compliance with the responsible lending obligations: see RG 209.19–RG 209.23 for further guidance.
- RG 209.9 We expect that the compliance processes a credit licensee puts in place will depend on the business model and credit activities that the licensee undertakes: see RG 209.30–RG 209.37.
- RG 209.10 Table 1 summarises the general Ch 3 obligations for credit assistance providers, and Table 2 summarises the general Ch 3 obligations for credit providers. These tables also indicate where our guidance on these obligations is located in this regulatory guide.

Table 1: Summary of key responsible lending obligations for credit assistance providers

| What you must do | Brief overview of obligation | Location of guidance |
|---|---|----------------------|
| 1 Conduct reasonable inquiries about the consumer | <p>You must, before making a preliminary assessment of whether the proposed credit contract is 'not unsuitable' for a consumer:</p> <ul style="list-style-type: none"> • make reasonable inquiries about the consumer's financial situation; • make reasonable inquiries about the consumer's requirements and objectives; • take reasonable steps to verify the consumer's financial situation; and • take any steps prescribed by the regulations to verify any matter prescribed by the regulations: s117 and 140. | Section B |
| 2 Based on these inquiries, make a preliminary assessment about whether the proposed credit contract is 'not unsuitable' for the consumer | <p>The proposed credit contract will be unsuitable if, at the time of the preliminary assessment, it is likely that:</p> <ul style="list-style-type: none"> • the consumer will be unable to comply with their financial obligations under the proposed credit contract, or could only comply with substantial hardship; or • the proposed credit contract will not meet the consumer's requirements or objectives: s118(2), 119(2), 141(2), 142(2). <p>Note: The regulations may also prescribe additional circumstances in which a credit contract is unsuitable.</p> | Section C |
| 3 If requested by the consumer, give the consumer a written copy of the preliminary assessment | <p>If the consumer requests a copy of the preliminary assessment, you must give the consumer a written copy of the assessment within the prescribed timeframes and free of charge: s120 and 143.</p> | Section D |

Table 2: Summary of key responsible lending obligations for credit providers

| What you must do | Brief overview of obligation | Location of guidance |
|--|---|----------------------|
| 1 Conduct reasonable inquiries about the consumer | <p>You must, before making a final assessment of whether a credit contract is 'not unsuitable' for a consumer:</p> <ul style="list-style-type: none"> • make reasonable inquiries about the consumer's financial situation; • make reasonable inquiries about the consumer's requirements and objectives; • take reasonable steps to verify the consumer's financial situation; and • take any steps prescribed by the regulations to verify any matter prescribed by the regulations: s130 and 153. | Section B |
| 2 Based on these inquiries, make a final assessment about whether the credit contract is 'not unsuitable' for the consumer | <p>The credit contract will be unsuitable if, at the time of the final assessment, it is likely that:</p> <ul style="list-style-type: none"> • the consumer will be unable to comply with their financial obligations under the credit contract, or could only comply with substantial hardship; or • the credit contract will not meet the consumer's requirements or objectives: s131(1) and 154(2). <p>Note: The regulations may also prescribe additional circumstances in which a credit contract is unsuitable.</p> | Section C |
| 3 If requested by the consumer, give the consumer a written copy of the final assessment | <p>If the consumer requests a copy of the final assessment, you must give the consumer a written copy of the assessment within the prescribed timeframes and free of charge: s132 and 155.</p> | Section D |

Documents you must provide to consumers

- RG 209.11 In addition to the responsible lending obligations discussed above, Ch 3 also requires you to provide certain documents to consumers at particular stages of the credit process. The appendix summarises these documentation requirements. Section D outlines our guidance on the obligation to provide a consumer with a copy of the assessment that a credit contract is 'not unsuitable'.

Objective of the responsible lending obligations

- RG 209.12 The objective of the responsible lending obligations is to ensure that credit licensees do not suggest, assist with or provide a credit contract or lease to a consumer that is unsuitable for the consumer. According to the Explanatory Memorandum to the National Consumer Credit Protection Bill 2009 (Explanatory Memorandum), the responsible lending provisions are intended to:

- (a) introduce standards of conduct to encourage prudent lending and leasing, and impose sanctions in relation to irresponsible lending and leasing (see para 3.16); and
- (b) curtail undesirable market practices, particularly where intermediaries are involved in lending (see para 3.11).

Our general approach to administering the responsible lending obligations

RG 209.13 This guide sets out our expectations for compliance with the responsible lending obligations, including the kind of conduct we will expect from you. We will administer the responsible lending obligations to reduce the risk of consumers being offered loans that they cannot afford to repay or that are otherwise unsuitable for them, and to promote the objectives set out in RG 209.12.

RG 209.14 We will also take into account other obligations that apply to credit licensees, including the general conduct obligations you are required to meet under s47 of the National Credit Act, the consumer protection provisions in the *Australian Securities and Investments Commission Act 2001* (Pt 2, Div 2) and other relevant credit legislation.

Note: Our guidance regarding the general conduct obligations is set out in Regulatory Guide 205 *Credit licensing: General conduct obligations* (RG 205).

B Making reasonable inquiries

Key points

In order to determine whether a credit contract is ‘not unsuitable’, you must make ‘reasonable inquiries’ about the consumer’s financial situation, and the consumer’s requirements and objectives in relation to the credit contract. You are also required to take ‘reasonable steps to verify’ the consumer’s financial situation.

The obligation to make reasonable inquiries, and to take reasonable steps to verify information, is scalable—that is, what you need to do to meet these obligations will vary depending on the circumstances.

This section sets out guidance on our expectations about making reasonable inquiries, and what constitutes taking reasonable steps to verify information provided by the consumer.

- RG 209.15 Your key responsible lending obligation is to ensure that you do not enter into a credit contract with a consumer, suggest a credit contract to a consumer or assist a consumer to apply for a credit contract if the credit contract is unsuitable for the consumer.
- RG 209.16 In order to determine whether a credit contract is unsuitable, the legislation states that you must make reasonable inquiries about the consumer. The legislation requires both credit assistance providers and credit providers to:
- (a) make reasonable inquiries about the consumer’s requirements and objectives in relation to the credit contract;
 - (b) make reasonable inquiries about the consumer’s financial situation (i.e. to determine whether the consumer has the capacity to repay the loan); and
 - (c) take reasonable steps to verify the consumer’s financial situation.

Note: See s117, 130, 140 and 153.

Scalability of the reasonable inquiries and verification obligations

The level of inquiries you need to make depends on the circumstances

- RG 209.17 The legislation requires that you make inquiries and verify information to a reasonable standard. We consider that the obligation to make reasonable inquiries and take reasonable steps to verify information is scalable—that is, what you need to do to meet these obligations will vary depending on the circumstances.

Note: In relation to inquiries about a consumer’s financial situation, the Explanatory Memorandum states that the significance and extent of inquiries will depend on the circumstances: see Explanatory Memorandum, paras 3.71 and 3.140.

RG 209.18 We have set out some relevant factors in relation to the concept of scalability in Table 3.

Table 3: Factors relevant to the scalability of the reasonable inquiries and verification obligations

| Relevant factor | Effect on the obligations |
|---|--|
| Potential impact on the consumer of entering into an unsuitable credit contract | <p>More extensive consumer inquiries are likely to be necessary where the potential negative impact on the consumer is likely to be relatively serious if the credit contract is unsuitable—for example, if the size of the loan is large <i>relative</i> to the consumer's capacity to repay the loan. This is because, if a consumer is on a low income, even a small loan can cause financial difficulties for them, and therefore, in this situation, we expect that you will need to make more inquiries in order to meet your responsible lending obligations. Example 1 illustrates this point.</p> <p>Note: See also Explanatory Memorandum, para 3.71.</p> |
| Complexity of the credit contract | <p>Less extensive inquiries are likely to be necessary where the credit contract has relatively simple terms that most consumers can easily understand. More extensive inquiries are likely to be necessary where the credit contract has complex terms.</p> |
| Capacity of the consumer to understand the credit contract | <p>More inquiries about the consumer's requirements and objectives are likely to be necessary where it is evident to you that:</p> <ul style="list-style-type: none"> • the consumer has limited capacity to understand the credit contract; • the consumer has conflicting objectives; • the consumer is confused about their objectives (or has difficulty articulating them); or • there is an apparent mismatch between the consumer's objectives and the product being considered by the consumer. <p>Note: We do not expect you to routinely evaluate the capacity of consumers to understand the credit product. Rather, we expect that this factor will be taken into account if it is clearly an issue.</p> |
| Whether the consumer is an existing customer of a credit provider or a new customer | <p>If you are a credit provider, you may be able to make less extensive inquiries about the consumer, and take less extensive steps to verify information, where the consumer is an existing customer and you already hold information about the consumer. More extensive inquiries and verification would be required for a new customer.</p> |

Note: This is not intended to be an exhaustive list of potentially relevant factors that you can consider when deciding whether inquiries should be 'scaled up' or 'scaled down' in order to meet the 'reasonable inquiries' threshold.

Example 1: Scalability of reasonable inquiries

Generally, for a more basic credit contract, such as a small personal loan (i.e. one that is small *relative* to the person's capacity to repay), we expect that credit licensees would need to make less detailed inquiries than for a mortgage (where this is a significant amount that is approaching the limit of a person's capacity to repay without substantial hardship). We would expect credit licensees to have specific processes in place for making reasonable inquiries that are appropriate for each of these situations.

Example 2: Reverse mortgages

Reverse mortgages are a more complex type of credit contract. Consumers acquiring reverse mortgages usually intend to repay the reverse mortgage credit contract not with ongoing repayments but, instead, by the sale of the property subject to the reverse mortgage. Consumers of reverse mortgages are often seniors who are utilising their primary residence and only significant asset to obtain a reverse mortgage. If a reverse mortgage is unsuitable for the consumer, the consequences for the consumer may potentially be significant and severe. We would expect a high standard of investigation and verification to ensure a reverse mortgage product meets the consumer's requirements and objectives. For example, because of the potential impact of a reverse mortgage on a consumer's eligibility for Centrelink payments, we consider that an inquiry into a consumer's eligibility to receive these payments is an essential component of this investigation and verification. We would also expect a high standard of investigation and verification as to the consumer's understanding of the contract and its possible consequences.

What amounts to a reasonable level of inquiries depends on the nature of the service you offer to consumers

- RG 209.19 The responsible lending obligations for credit providers and credit assistance providers are set out in different provisions of the National Credit Act, which reflects the fact that these groups of licensees have different roles in the credit application process. However, as many of the responsible lending obligations for these functionally distinct groups of licensees are identical, we consider it appropriate to provide consistent guidance where possible.

Note: The responsible lending provisions that relate to credit assistance providers are in Pt 3-1 of Ch 3, and the provisions for credit providers are in Pt 3-2 of Ch 3.

- RG 209.20 The service that credit providers and credit assistance providers offer to consumers is different. We expect you to apply this guidance in the context of the credit services you provide.
- RG 209.21 This means that what amounts to a 'reasonable level of inquiries' and taking 'reasonable steps to verify' can differ, depending on the type of service you provide to consumers.

Example 3: Scalability in relation to the service you provide

If a credit licensee offers a debt consolidation service to consumers, which includes a review of current debts and how these could best be structured, we would expect them to undertake a greater level of inquiries to gain a more comprehensive understanding of a consumer's financial situation.

- RG 209.22 In administering the law on the reasonable inquiries and verification obligations, we will take into account all the circumstances when determining whether you have satisfied the obligation to make reasonable inquiries. This would include the nature of the services you offer—that is, whether you are a credit provider or a credit assistance provider.
- RG 209.23 It would be reasonable to expect a credit provider, for example, to obtain a credit report, but this may not be reasonable for credit assistance providers.

What inquiries should you make?

- RG 209.24 We expect you to decide what inquiries it is reasonable for you to make in order to meet your responsible lending obligations for a given transaction. However, when considering whether you have conducted reasonable inquiries, we will look at whether you have made inquiries about the kinds of issues listed in RG 209.27–RG 209.28.
- RG 209.25 As discussed earlier in this section, we consider that the obligation to make reasonable inquiries is scalable. The lists of factors that follow are not designed to be ‘checklists’ that we expect you to follow in each instance.
- RG 209.26 Credit providers and credit assistance providers should decide what inquiries it is reasonable for them to make about the consumer in the relevant circumstances. Because the requirement to make reasonable obligations is scalable, this means that you may make less or more inquiries than those set out below, or a different range of inquiries, depending on the circumstances.

Reasonable inquiries about a consumer’s financial situation

- RG 209.27 Depending on the circumstances, reasonable inquiries about a consumer’s financial situation could include inquiries about:
- (a) the consumer’s current amount and source of income or benefits (this would include the nature and length of their employment—e.g. full-time, part-time, casual or self-employed);
 - (b) the extent of the consumer’s fixed expenses (such as rent, repayment of existing debts, child support and recurring expenses such as insurance);
 - (c) the consumer’s variable expenses (and drivers of variable expenses such as dependants and any particular or unusual circumstances);
 - (d) the extent to which any existing debts are to be repaid from the credit advanced;
 - (e) the consumer’s credit history;
 - (f) the consumer’s circumstances, including their age (particularly where they may be a minor) and the number of dependants;
 - (g) the consumer’s assets, including their nature (such as whether they produce income) and value (see also RG 209.68–RG 209.69);

- (h) any significant changes to the consumer's financial circumstances that are reasonably foreseeable (such as a change in repayments for an existing home loan due to the ending of a 'honeymoon' interest rate period, or changes to the consumer's employment arrangements such as seasonal employment or impending retirement and plans to fund retirement, e.g. from superannuation or income-producing assets);
- (i) geographical factors, such as remoteness, which may require consideration of specific issues (such as potentially higher living costs compared to urban areas); and
- (j) indirect income sources (such as income from a spouse) where that income is reasonably available to the consumer, taking into account the history of the relationship and the expressed willingness of the earning person to meet repayment obligations.

Note 1: If you are considering the relevance of indirect income to a consumer's financial situation, you will need to obtain information about the earning person's financial situation and verify that information (including their ability and willingness to meet the repayment obligations of the consumer). You should ensure that the consumer and the earning person understand that the assessment of the consumer's capacity to repay depends on the availability of that income. The assessment should note that the borrower's capacity to repay depends on the availability of the indirect income: see also Section D.

Note 2: This list is for your guidance and is not intended to be an exhaustive list of potentially relevant inquiries.

Note 3: The Explanatory Memorandum states that the 'purpose for undertaking reasonable inquiries about the consumer's financial situation is to ascertain a reasonable understanding of the consumer's ability to meet *all* the repayments, fees, charges and transaction costs of complying with the proposed credit contract': see Explanatory Memorandum, paras 3.69 and 3.139. See also paras 3.70, 3.72, 3.140 and 3.141.

Reasonable inquiries about a consumer's requirements and objectives

RG 209.28 Depending on the circumstances, reasonable inquiries about a consumer's requirements and objectives could include inquiries about:

- (a) the amount of credit needed or the maximum amount of credit sought (for example, the desired limit for a credit card);
- (b) the timeframe for which the credit is required;
- (c) the purpose for which the credit is sought and the benefit to the consumer; and
- (d) whether the consumer seeks particular product features or flexibility, and understands the costs of these features and any additional risks.

Note 1: This list is for your guidance and is not intended to be an exhaustive list of potentially relevant inquiries.

Note 2: The Explanatory Memorandum states that the minimum requirement for satisfying reasonable inquiries about a consumer's requirements and objectives is to 'understand the purpose for which the credit is sought and determine if the type, length, rate, terms, special conditions, charges and other aspects of the proposed contract meet this purpose': see Explanatory Memorandum, paras 3.68 and 3.138.

- RG 209.29 In relation to credit cards, the Explanatory Memorandum states that ‘a credit card has no particular purpose and therefore there would be a limited requirement to understand the consumer’s requirements and objectives in this case’: see Explanatory Memorandum, Example 3.5 for further details. However, we expect that you would still make inquiries about the maximum limit the consumer requires on the card, as this is a key feature of the product that relates to the consumer’s requirements and objectives.

Processes to ensure that reasonable inquiries are made

- RG 209.30 We expect that you will be able to demonstrate that you have adequate processes in place to ensure that you make reasonable inquiries about the consumer. If you do not have appropriate processes in place, it will be difficult for you to show that you are meeting your responsible lending obligations.
- RG 209.31 Many credit providers already have product-specific processes in place to assess new consumers for different credit products. For example, we understand that it is already good industry practice to make more detailed inquiries in relation to offering a home loan compared with the inquiries made for a small personal loan.

Processes that are appropriate to your business model and the type of credit activities you are undertaking

- RG 209.32 We expect that the supervision and compliance processes you put in place will depend on your business model and the credit activities that you undertake. For example, if you have employees who are situated in a number of different locations, you will need to have specific measures in place to ensure that employees are adequately supervised. Adequate supervision could include a combination of having compliance staff in regional offices (or visiting regional offices), conducting regular auditing or ‘spot checks’ on staff in all locations, or using a centralised system for assessing credit applications.

Note: We have provided separate guidance in relation to meeting your general conduct obligations as a credit licensee: see Regulatory Guide 205 *Credit licensing: General conduct obligations* (RG 205).

- RG 209.33 Many credit providers also use credit application and behavioural scoring systems to decide whether or not to provide credit to a customer. While these systems may assist you in meeting your responsible lending obligations, it is also important that the requirements of the legislation are met. For example, a consumer’s ability to comply with the financial obligations of a credit contract must be assessed (i.e. the capacity to repay the credit contract).

RG 209.34 A system that only measures the credit risk of the consumer, but does not assess the consumer's capacity to repay the credit contract, will not meet the responsible lending requirements (although such a system may provide a good prediction about the overall risk of default in the loan portfolio).

Note: The Explanatory Memorandum states that the fact that an application for credit has satisfied a credit provider's own policies for affordability does not necessarily mean that the application meets the standard required by the legislation. However, it is expected that the types of inquiries made and assessments conducted for the purposes of the credit provider's internal standards and guidelines on affordability would, in most cases, be very similar to those that are required in order to assess the likelihood that a consumer can meet the financial obligations under the proposed contract: see Explanatory Memorandum, para 3.153.

Processes in relation to face-to-face and internet applications

RG 209.35 Our guidance is technology neutral but, depending on the channel you use, you may need to adjust your processes to ensure compliance. We consider that you can meet your responsible lending obligations using an online or face-to-face approach. As we have stated above, we consider that the obligation to make reasonable inquiries and take reasonable steps to verify information is scalable—that is, what you need to do to meet these obligations will vary depending on the circumstances.

RG 209.36 The way we regulate the responsible lending provisions is the same regardless of the way that you deliver your credit service.

RG 209.37 It is up to you to determine how you want to accept and process applications for credit products. Factors to consider include:

- (a) whether you are operating a high-volume business, which might lend itself to applications being taken by email or via the internet; and
- (b) the complexity of the credit product you are offering.

Verification of information provided by a consumer

How the verification obligation differs between credit providers and credit assistance providers

RG 209.38 You are obliged to take reasonable steps to verify a consumer's financial situation. Generally, this will require some positive steps to verify the information provided by the consumer: see Table 4. As discussed earlier, what constitutes taking 'reasonable steps to verify' information is scalable, and what amounts to reasonable verification will depend on the information and resources that you have access to and the facts and circumstances of each case.

RG 209.39 In contrast to a final assessment made by a credit provider for the purposes of entering a consumer into a credit contract, the assessment made by a credit assistance provider is considered to be a 'preliminary' assessment, based on the information available to a credit assistance provider. This does not diminish a credit assistance provider's responsibilities with regard to verification; however, it recognises that a credit assistance provider may not have access to some information that is available to a credit provider. Credit providers generally have access to a wider range of information than credit assistance providers (e.g. via credit reports, or account information for existing customers).

Note: See Explanatory Memorandum, para 3.67.

RG 209.40 We recognise that, in certain circumstances, credit providers will be able to verify a consumer's financial situation without receiving information from the consumer. For example, a bank could look at a consumer's regular deposited salary, the timing of credit card payments, and the payment of other expenses. However, credit providers should take care relying on such information, which may not reflect the consumer's entire financial position—for example, if the consumer holds credit cards with other financial institutions.

RG 209.41 The use of sophisticated automated systems and tools for testing the reliability of information about income provided by an intending borrower may play a role in satisfying the requirements to take reasonable steps to verify such information. It is the responsibility of credit licensees to satisfy themselves that the use of any such system is adequate and appropriate for verifying information provided by a consumer about their financial situation, in relation to the credit being applied for. Credit licensees should ensure that any such systems are regularly monitored and reviewed to ensure their continued effectiveness.

Table 4: Examples of the types of information you could use to verify a consumer's financial situation

| | Types of information | Who should gather the information |
|------------------------------------|--|--|
| For PAYG employees | Recent payroll receipts/payslips Confirmation of employment with the employer (subject to the requirements of the <i>Privacy Act 1988</i>) | Credit assistance providers and credit providers (see RG 209.45–RG 209.48 for guidance about sharing this information) |
| For self-employed consumers | Recent income tax returns A statement from the person's accountant Business Activity Statements | Credit assistance providers and credit providers (see RG 209.45–RG 209.48 for guidance about sharing this information) |
| For all consumers | Credit report Information/reports from other lenders (subject to the requirements of the <i>Privacy Act 1988</i>) Bank account or credit card records held by the credit provider (e.g. expenses can be verified by examining bank statements over a period of time), and other information held about an existing customer | Credit providers |

Note 1: This is not intended to be an exhaustive list of types of evidence that you could use to verify information provided by a consumer. As we have stated above, what amounts to taking 'reasonable steps to verify' information is scalable and depends on the circumstances.

Note 2: Other tools may become available to you in the future, which may further assist you in complying with the responsible lending obligations (e.g. comprehensive credit reports). As new verification tools become available to licensees, what constitutes 'reasonable steps to verify' information may change.

Note 3: The Explanatory Memorandum states that credit providers 'must make such efforts to verify the information provided by the client as would normally be undertaken by a reasonable and prudent lender' in the relevant circumstances: see Explanatory Memorandum, para 3.146.

What constitutes 'reasonable steps to verify' where a consumer provides inconsistent information?

RG 209.42 In some circumstances, taking reasonable steps to verify information should involve making additional inquiries about the consumer where:

- (a) the information that a consumer provides is inconsistent with other information that you hold about the consumer (e.g. in a credit report or account information for existing customers); and/or
- (b) the information that a consumer provides is outside the standard range for the consumer (e.g. the income stated is far greater than would be expected for the type of work the consumer undertakes, as indicated by benchmarks).

RG 209.43 For example, you may believe that an application involving a full-time student with a \$6000 per month income should warrant further verification.

RG 209.44 You may also need to verify that the information you are relying on is up-to-date. This is particularly true when relying on information in a preliminary assessment: see RG 209.45–RG 209.48.

Can credit providers take into account information provided by a credit assistance provider or other third parties?

RG 209.45 The purpose of a preliminary assessment is to ensure that, as a credit assistance provider:

- (a) you do not suggest a credit contract to a consumer that you do not reasonably believe meets the consumer's requirements and objectives; and
- (b) you reasonably believe that the consumer has the capacity to repay the contract without substantial hardship.

Note: See Explanatory Memorandum, para 3.66.

RG 209.46 In some instances, credit providers are provided with information about the consumer by a credit assistance provider, which may be based on information from a preliminary assessment.

RG 209.47 Credit providers are, however, still bound by the reasonable inquiries and verification obligations, as well as the general obligations such as to act efficiently, honestly and fairly: see s47(1)(a), 130 and 153. We expect that reasonable and prudent credit providers will have processes in place to ensure the reliability of any information collected by third parties, including information contained in a preliminary assessment. This could include a combination of approaches such as:

- (a) conducting 'spot checks' on some of the information by re-verifying it yourself;
- (b) ensuring you only use information in preliminary assessments from intermediaries that have robust compliance arrangements; and
- (c) having processes to actively discourage inappropriate practices (e.g. ensuring that any incentives offered to intermediaries encourage, rather than discourage, appropriate information collection practices).

RG 209.48 However, credit providers should not rely on information if, despite having appropriate processes in place, they have any reason to doubt the reliability of the information.

C Making a preliminary or final assessment that a credit contract is ‘not unsuitable’ for a consumer

Key points

You must:

- if you are providing credit assistance, make a ‘preliminary’ assessment that a credit contract is ‘not unsuitable’ before suggesting a credit contract to a consumer or assisting a consumer to apply for a credit contract; or
- if you are the credit provider, make a ‘final’ assessment that a loan is ‘not unsuitable’ before entering into a credit contract with a consumer.

Making a final assessment or preliminary assessment will require you to take active steps to form a reasonable view as to whether the contract is ‘not unsuitable’ for the consumer.

We expect that you will base this assessment on the reasonable inquiries you have made about the consumer: see Section B.

There are two main issues for you to consider in determining that a credit contract is ‘not unsuitable’:

- will the consumer be able to meet their financial obligations under the credit contract (i.e. have the capacity to repay the loan) without substantial hardship? and
- does the credit contract meet the consumer’s requirements and objectives?

If requested, you must provide the consumer with a copy of the assessment that the credit contract is ‘not unsuitable’ for them: see Section D.

Provisions in the National Credit Act relevant to making a preliminary or final assessment that a credit contract is ‘not unsuitable’

RG 209.49 As discussed in Section B, the responsible lending obligations require you to:

- make reasonable inquiries about the consumer’s requirements and objectives in relation to the credit;
- make reasonable inquiries about the consumer’s financial situation (i.e. to determine whether they can repay the loan);
- take reasonable steps to verify the consumer’s financial situation; and
- make a final assessment (credit providers) or a preliminary assessment (credit assistance providers) about whether the credit contact is ‘not unsuitable’ for the consumer.

Note: See s115, 116, 117, 128, 129, 130, 140 and 153.

RG 209.50 In addition, you must assess a credit contract as unsuitable where it is likely that:

- (a) the consumer will be unable to comply with their financial obligations under the contract, or could only comply with substantial hardship; or
- (b) the contract will not meet the consumer's requirements or objectives.

Note: See s118, 119, 131, 141, 142 and 154.

RG 209.51 The responsible lending obligations also require that you must not:

- (a) provide credit assistance to a consumer by suggesting that they remain in an unsuitable credit contract, or by assisting the consumer to enter into, or increase the limit on, an unsuitable credit contract (see s123, 124);
- (b) provide credit assistance to a consumer by suggesting that they apply for, or remain in, an unsuitable consumer lease (see s146, 147);
- (c) enter into a credit contract or increase the limit on a credit contract that will be unsuitable for the consumer (see s133); or
- (d) enter into a consumer lease that will be unsuitable for the consumer (see s156).

RG 209.52 Further, if requested, you must provide the consumer with a copy of the preliminary or final assessment that the credit is 'not unsuitable' for the consumer: see s120, 132, 143 and 155. In practice, this means that you must record the assessment in a form that allows you to provide a written copy promptly to the consumer: see Section D.

Note: Assignees to whom the rights of a credit provider under a credit contract have been assigned have an additional eight business days to comply with a request for a copy of the assessment if it is made within two years of the credit contract commencing. If the request is made after two years, the assignee has an additional four business days to comply: see reg 27 of the National Consumer Credit Protection Regulations 2010. Assignees should ensure that the credit provider assigning its rights under the credit contract provides the assignee (or has in place arrangements to provide the assignee) with the relevant records and other material to enable the assignee to comply with the obligation to provide a copy of the assessment on request by the consumer.

RG 209.53 Together, these provisions of the National Credit Act mean that you must take active steps in order to form the view that a loan is 'not unsuitable' before you enter into a credit contract with a consumer, suggest a credit contract to a consumer or assist a consumer to apply for a credit contract.

RG 209.54 We expect that you will base your assessment on the reasonable inquiries you have made about the consumer (plus any other relevant information you have).

Note 1: In order to meet the requirements under the National Credit Act, the final assessment or preliminary assessment must specify the period the assessment covers: s116, 129 and 152.

Note 2: For credit assistance providers, the preliminary assessment must be made within 90 days before the credit assistance is provided: s115 and 138. For credit providers, the final assessment must be made within 90 days before the credit contract is entered into: s128 and 151.

Note 3: In addition to the responsible lending requirements in Ch 3 of the National Credit Act, a credit contract that is unsuitable, particularly if the borrower has insufficient capacity to meet the repayment obligations, may also be unjust under s76 of the National Credit Code. We have standing to make an application under s76 in relation to one or more credit contracts, or a class of credit contracts. If a court considers that a contract is unjust, the transaction that gave rise to the contract can be reopened to provide relief to affected consumers.

Processes to ensure that a preliminary or final assessment is made

- RG 209.55 As set out above, the National Credit Act requires credit licensees to assess (via either a preliminary or final assessment) whether a credit contract is ‘not unsuitable’ for a consumer. In order to meet this obligation, we expect that you will be able to demonstrate that you have adequate processes in place to assess whether a consumer has the capacity to repay the credit contract without substantial hardship, and whether the credit contract meets the consumer’s requirements and objectives. If you do not have the appropriate processes in place, it will be difficult for you to show that you are meeting your responsible lending obligations.
- RG 209.56 Depending on a consumer’s objectives, an assessment of whether a credit contract is ‘not unsuitable’ may require consideration of the contract against the background of credit contracts that are commonly available in the market.

Assessing whether a consumer can meet the financial obligations of a credit contract (i.e. has the capacity to repay)

- RG 209.57 Having completed reasonable inquiries (as set out in Section B), a credit assistance provider or credit provider (as relevant) must assess whether the credit contract is ‘not unsuitable’, which includes assessing whether the consumer can meet the financial obligations of the credit contract without substantial hardship (i.e. the consumer has the capacity to repay the credit contract). This assessment will be based on the information you obtained (and verified) when you made reasonable inquiries about the consumer’s financial situation.
- RG 209.58 A credit contract (or an increase to a credit limit) is unsuitable if, at the time of the assessment, it is likely that the consumer will:
- (a) be unable to comply with their financial obligations under the contract (e.g. to make repayments); or
 - (b) only be able to comply with the contract with substantial hardship.

Note 1: See s118(2)(a), 119(2)(a), 131(2)(a), 141(2)(a), 142(2)(a) and 154(2)(a).

Note 2: The assessment of unsuitability on the grounds that the consumer will be unable to comply with the financial obligations under the credit contract takes into account information reasonably believed, or which ought reasonably to be believed, by the credit licensee, and also any additional information the licensee would have reasonably believed had they made reasonable inquiries or verification: see s118(4), 119(4), 131(4), 141(4), 142(4) and 154(4).

What should you take into account in assessing a consumer's capacity to repay?

RG 209.59 We expect that both credit assistance providers and credit providers will base the assessment of a consumer's capacity to repay a loan on the reasonable inquiries you have made about the consumer's financial situation, and the reasonable steps you have taken to verify the consumer's financial situation (as set out in Section B). You should also consider the likely maximum amount to be repaid under the credit contract (including fees) when determining whether a consumer has the capacity to repay.

Note: The Explanatory Memorandum states that 'the purpose for undertaking reasonable inquiries about the consumer's financial situation is to ascertain a reasonable understanding of the consumer's ability to meet *all* the repayments, fees, charges and transaction costs of complying with the proposed credit contract': see Explanatory Memorandum, paras 3.69 and 3.139. We would expect you to take into account these types of issues when assessing whether a consumer will be able to repay the credit contract. For example, in relation to exit fees, a credit provider should ask the consumer to obtain a payout statement from the original lender.

RG 209.60 Where two or more consumers jointly apply for a credit contract, credit assistance providers and credit providers may assess each of the consumers' capacity to repay individually, or consider the reasonable inquiries made about their *combined* financial situation and the reasonable steps taken to verify that financial situation.

Example 4: Capacity to repay, taking into account all costs

A consumer goes to the website of a credit assistance provider to make an application to refinance a loan. When the credit assistance provider assesses the consumer's application, they will need to take into account all of the costs of changing credit contracts to determine the consumer's ability to meet the obligations of the new credit contract over the term of the contract, as at the time the assessment is made. This would include any fees for using the credit assistance provider's services.

Example 5: Capacity to repay in relation to credit cards

For credit cards, there may be some risks associated with assessing a consumer as having the capacity to repay the contract based solely on being able to meet the minimum monthly repayments. If, by paying only the minimum monthly repayments, the consumer is likely to take a long period of time to repay the maximum limit on the card, credit licensees should consider whether this would meet the consumer's requirements and objectives (i.e. taking a number of years to repay a relatively small debt, and paying high amounts of interest on this debt).

Substantial hardship

RG 209.61 ‘Substantial hardship’ is not defined in the National Credit Act. We do not propose to give any definitive formulation of what substantial hardship means. The law about the meaning of ‘substantial hardship’ will develop and become clearer as cases come before the courts and judgments are handed down.

Note: Case law and other legislation provide some guidance on the interpretation of ‘hardship’ in different contexts. For example, in the superannuation context, one of the tests for whether a person is in ‘severe financial hardship’ is that ‘the person is unable to meet reasonable and immediate family living expenses’: Superannuation Industry (Supervision) Regulations 1994, reg 6.01(5)(a)(ii).

RG 209.62 We consider that determining whether repaying a credit contract will cause substantial hardship to a consumer will require consideration of a number of factors.

RG 209.63 In determining whether a credit contract is likely to result in substantial hardship for the consumer, we expect you will take into account information obtained about the customer’s financial situation as part of the ‘reasonable inquiries’ process set out in Section B. Therefore, in administering the law, we will take the following factors into account when considering whether a transaction is likely to result in substantial hardship:

- (a) the money the consumer is likely to have remaining after their living expenses have been deducted from their after-tax income;
- (b) how consistent and reliable the consumer’s income is (and the size of the loan relative to their income level);
- (c) whether the consumer’s expenses are likely to be significantly higher than average (e.g. because they live in a remote area);
- (d) the consumer’s other debt repayment obligations and similar commitments (e.g. child support);
- (e) how much of a buffer there is between the consumer’s disposable income and the repayments (e.g. how vulnerable they are to an increase in interest rates, or the impact once any ‘honeymoon’ rate ends); and
- (f) whether the consumer is likely to have to sell their assets, such as a car, to repay the loan.

Note 1: This is not intended to be an exhaustive list of potentially relevant factors. In determining whether a situation involves substantial hardship, the presence (or absence) of any one or more of the listed factors is not conclusive.

Note 2: In relation to RG 209.63(f), see also the guidance at RG 209.68–RG 209.69.

RG 209.64 In addition, you may wish to take into account any other conversations that you have had with the consumer about how the loan will affect their living standards. For example, a consumer may be willing to make reasonable changes to their lifestyle to enable them to afford the loan without substantial hardship (such as cutting back on non-essential expenses).

Processes for determining substantial hardship

- RG 209.65 We expect you to develop appropriate systems and processes to identify whether a proposed credit contract is likely to cause substantial hardship to a consumer. Different licensees are likely to take different approaches, depending on the nature of their business and their range of customers.
- RG 209.66 Benchmarks can be useful tools in the process of determining whether a particular consumer will experience substantial hardship as a result of meeting the obligations of a credit contract. Applying benchmarks, as set out in the following paragraphs, may provide a credit licensee with an indication of whether a consumer would be assumed to be exposed to substantial hardship. For example, such benchmarks could assess whether a consumer's disposable income is:
- (a) below a level where they do not have funds to meet their realistic living costs and those of their dependants;
 - (b) below an amount based on a particular objective indicator (e.g. the Henderson Poverty Index plus a certain margin); or
 - (c) below the maximum applicable level of government benefits for a person in the financial and family situation of the consumer.
- RG 209.67 We would expect credit providers to have detailed policies and processes to assess whether a consumer will be able to repay a loan. These include processes for calculating what funds a person needs to pay for basic living expenses in order to determine how much they can borrow (i.e. at what level a consumer can make repayments).

Meeting repayment obligations from income, not assets

- RG 209.68 Generally, consumers should be able to meet a credit contract's obligations from income rather than equity in an asset. However, there may be circumstances where this is not a reasonable position (e.g. bridging loans and reverse mortgages).

Note: We expect lenders to take particular care when assessing the capacity to repay for products like reverse mortgages and bridging loans. The Australian Government has indicated that enhancement to the regulation of reverse mortgages will occur under Phase 2 of the Action Plan for the national regulation of credit: see the Australian Government leaflet, which details the National Consumer Credit Government Action Plan, available at: <http://www.treasury.gov.au/consumercredit/content/publications.asp>.

- RG 209.69 Under the National Credit Act, it is presumed that, if a consumer will only be able to comply with their financial obligations under the credit contract by selling their principal place of residence, then the consumer could only comply with those obligations with substantial hardship, unless the contrary is established: see s118(3), 131(3), 142(3) and 156(3). The effect of this is that where a consumer establishes that they could only meet the repayments by selling their home, then the onus is on the credit provider or credit

assistance provider to establish that the credit contract is ‘not unsuitable’. The law allows credit providers and credit assistance providers to exercise judgement in the application of this requirement.

- RG 209.70 Information obtained from reasonable inquiries into the consumer’s financial situation (see RG 209.27) will assist the credit provider or credit assistance provider to establish whether the consumer has the appropriate capacity to meet repayment obligations, despite foreseeable changes to income.

Examples about meeting repayment obligations from sources other than current income

- RG 209.71 Following are some examples to illustrate our guidance on meeting the repayment obligations from sources other than current income.

Example 6: Repayment from superannuation

A male consumer aged 65 applies for a fixed-term loan to purchase a boat. Although currently working full time, he intends to retire within a year. Without further inquiry, it may appear prudent to refuse the application on the basis that his financial circumstances will be very different once he ceases work. The preliminary inquiries undertaken by the finance broker he has approached reveal, however, that his superannuation will be more than sufficient to meet his ongoing financial needs as well as repayments under the loan.

Example 7: Future plans to sell the principal residence and downsize

A female consumer applying for a 25-year principal and interest home loan to purchase a new home is currently employed and can demonstrate capacity to meet repayments under the proposed loan—however, she is 55 years old and intends to retire at age 65, with a post-retirement income insufficient to meet repayment obligations without substantial hardship. As it is likely the consumer could only meet her financial obligations post retirement by selling the home, it appears at first view that the presumption in s118(3) applies and, as a result, the loan would be unsuitable.

The lender’s inquiries about her requirements and objectives, however, reveal that she has planned for her future change in financial circumstances and, at the point that she can no longer comfortably afford repayments, intends to sell the home and downsize. She does not wish to purchase a smaller home until this time, however, and also considers the home she is currently purchasing has greater potential to appreciate in value in the years before she has to sell it. Given her expressed intent, if her likely equity position will be such that she can readily pay the outstanding balance of the loan at the time of the planned sale, it is reasonable to assess the loan as ‘not unsuitable’.

Examples about capacity to repay and substantial hardship

RG 209.72 Following are some other examples to illustrate our guidance on the capacity to repay and substantial hardship.

Example 8: Regular family expenses

In assessing whether a credit contract will cause a consumer to experience substantial hardship, a credit licensee might set one or more levels of realistic family living expenses required to meet the consumer's (and their dependants') living costs. The consumer would need to be able to meet these living costs from their income, after deducting the ongoing repayments under the credit contract (and all other repayments and regular financial commitments of the consumer). Below this level, the licensee would, as a policy, not consider the consumer to have the capacity to repay the loan without substantial hardship, regardless of their circumstances.

Example 9: Temporary period without income

A consumer wishes to enhance their chances of a promotion in the future by undertaking tertiary study on a vocational course with direct relevance to their chosen job. The consumer seeks credit to pay for the course. Their employer has given assurances that the consumer will be able to take their job back at the end of the course, if they do not obtain a higher paid one within the firm on the basis of the new qualification.

However, for the duration of the course, the consumer will only be able to meet their repayments under the proposed credit contract by making serious cutbacks on their expenditure. The consumer has indicated they are willing to incur this short-term hardship for the purpose of improving their long-term prospects, and they have a realistic plan for economising so that they can still meet their minimum loan repayments.

In this case, the credit licensee may conclude that the consumer would have the capacity to repay without substantial hardship, even if most other individuals (with a different purpose for the loan funds) would not.

Example 10: Refinancing

Where a consumer cannot currently comply with their existing financial obligations under a credit contract (or only with substantial hardship), a credit licensee can refinance the consumer's debts if, after refinancing, they will be able to comply with the resulting credit contract without substantial hardship. While the level of hardship may still be significant, the important factors are both that it is reduced and that, despite the unusually high level of hardship, genuine capacity to meet new repayment obligations can be demonstrated.

Example 11: Casual employees

A consumer receives their first fortnightly pay cheque as a casual employee, and applies for a credit card. The consumer is told by the bank officer to multiply their salary by 26 to calculate their annual income. This is not an appropriate method to determine income because the consumer's employment is on a casual basis and their salary fluctuates considerably from fortnight to fortnight. The resulting calculation based on the bank officer's instructions will not accurately reflect the consumer's annual income and capacity to repay the loan.

Example 12: Balloon repayments

Some products involve a large 'balloon' payment at the end of the loan term. While a consumer may be able to manage the regular repayments under the loan, whether the product is suitable for them also depends on whether they will be able to make the final, much larger, payment. We would expect the credit licensee to satisfy themselves that the consumer understands, and has the capacity to cover, the final repayment before offering this type of product to the consumer.

Assessing whether a credit contract will meet a consumer's requirements and objectives

Overview of obligation

- RG 209.73 A credit contract is unsuitable if it 'will not meet the consumer's requirements and objectives': see s118(2)(b), 119(2)(b), 131(2)(b), 141(2)(b), 142(2)(b) and 154(2)(b). This requires a credit assistance provider or credit provider to assess whether a credit contract will meet the consumer's requirements and objectives (as disclosed by the consumer).
- RG 209.74 Determining the consumer's requirements and objectives in relation to the credit contract is, therefore, part of your overall obligation to avoid placing a consumer in a credit contract that is unsuitable for them. Having completed reasonable inquiries (as set out in Section B), you must then assess whether the credit contract is 'not unsuitable', which includes assessing whether it meets the consumer's requirements and objectives (as well as whether the consumer has the capacity to make repayments, as discussed earlier in this section).

Note: The assessment of unsuitability on the grounds that the credit contract will not meet the consumer's requirements and objectives takes into account information reasonably believed, or that ought reasonably to be believed, by the credit licensee, and also any additional information the licensee would have reasonably believed had they made reasonable inquiries or verification: see s118(4), 119(4), 131(4), 141(4), 142(4) and 154(4). If you are unsure of the consumer's objectives and needs, this should be resolved through the reasonable inquiries process.

Factors relevant to assessing whether a credit contract meets a consumer's requirements and objectives

- RG 209.75 Making an assessment that a credit contract meets a consumer's requirements and objectives involves matching the consumer's stated requirements and objectives (which you will understand from the reasonable inquiries process set out in Section B) with a credit contract that is 'not unsuitable'.
- RG 209.76 We consider that whether a credit contract meets a consumer's requirements and objectives will vary depending on the circumstances, but some examples of factors that you could take into account in making this assessment include:
- (a) the nature of the credit requested by the consumer, and the consumer's stated objectives in obtaining the credit (based on inquiries made about the consumer, as set out in Section B);
 - (b) if the loan is to purchase a specific item, the term of the loan relative to the likely useful life of the asset;
 - (c) the interest rate and fees applying to the credit contract;
 - (d) the complexity of the credit contract, and whether a more basic product could meet the consumer's needs;
 - (e) whether the consumer will need to finance a large final payment under the contract; and
 - (f) in relation to switching, the extent to which switching to the new credit contract will benefit the consumer.

Note 1: This is not intended to be an exhaustive list of potentially relevant factors in relation to assessing whether a credit contract meets a consumer's requirements and objectives. In determining whether a contract meets a consumer's requirements and objectives, the presence (or absence) of any one or more of the listed factors is not conclusive.

Note 2: The Explanatory Memorandum states that the minimum required of credit licensees in order to meet the obligation to make reasonable inquiries about a consumer's requirements and objectives will be to understand the purpose for which the credit is sought. The next step that the licensee should take is to determine whether the type, length, rate, terms, special conditions, charges and other aspects of the proposed credit contract meet this purpose or, if not, to suggest credit contracts that do match the consumer's purpose: see Explanatory Memorandum, paras 3.68 and 3.138.

What if none of the credit contracts you offer meets the consumer's requirements and objectives?

- RG 209.77 If none of the credit contracts that you provide (or provide services about) meets the requirements and objectives for a given consumer (i.e. they are all unsuitable), then you must not enter into a credit contract with the consumer, suggest a credit contract to the consumer or assist the consumer to apply for a credit contract.

Examples about meeting a consumer's requirements and objectives

RG 209.78 Following are some examples to illustrate our guidance on meeting a consumer's requirements and objectives.

Example 13: Key features for the customer

If a prospective borrower indicates that the ability to refinance their home loan is a key requirement, a credit contract that has high exit fees or other break costs would not meet the consumer's requirements and objectives.

Example 14: Short-term finance

A consumer contacts a mortgage broker by phone because they are having short-term difficulties in meeting bills, pending the maturing of a term deposit. It is not appropriate for the mortgage broker to suggest a loan secured by the equity in the consumer's house. The costs involved in establishing this type of loan would not be warranted if the consumer's financial difficulty is clearly short term. A preferable approach might be for the mortgage broker to suggest that the consumer investigate the penalties associated with early access to the term deposit.

Switching and refinancing

Additional considerations for switching or refinancing activities

RG 209.79 We expect that you will undertake additional analysis when engaging in switching and refinancing activities (i.e. the level of inquiries you make may need to be 'scaled up': see guidance at RG 209.17–RG 209.23). This would include consideration of whether entering the new credit contract:

- (a) would result in overall cost savings to the consumer that are likely to override any loss of benefits; or
- (b) may result in minimal cost savings, but the new credit contract better meets the consumer's requirements and objectives (e.g. because of convenience, greater flexibility or particular tailored features such as a redraw facility on a mortgage).

RG 209.80 The determination of whether there are overall cost savings to the consumer should take into account all the circumstances, including the cost of the replacement (i.e. making the switch or refinancing) and all associated fees and other charges. There are usually transaction costs associated with refinancing, including any fees for using a credit assistance provider's services.

Note 1: See Explanatory Memorandum, paras 3.73 and 3.148-149.

Note 2: When you are arranging the refinancing or switching, you will not have access to the details of the credit contract if the old contract is with another licensee. However, we expect that you should find out the costs of the current contract from the consumer as part of the reasonable inquiries made about the consumer.

RG 209.81 We expect that, if your business includes refinancing activities, you will need to have specific processes in place to ensure that your employees are adequately supervised and trained to undertake these activities. For example, when considering whether to offer credit as part of a refinancing transaction, we expect that you, as the provider, would make reasonable inquiries about the consumer's existing credit arrangements before forming a view about whether the new credit is 'not unsuitable'.

Refinancing where a consumer is in arrears

RG 209.82 The level of inquiries that is reasonable is likely to be greater where the consumer is refinancing, particularly where they are having difficulties meeting the repayments, or are even in arrears, on their existing credit contract. In this situation, it will be possible to determine that the consumer cannot meet the repayments of the amount being charged under that contract, and a contract will *prima facie* be unsuitable where the repayments are at the same or a similar level.

RG 209.83 Where the current contract is no longer 'not unsuitable', and no alternative contract is considered to be 'not unsuitable', there is a defence provided that allows the credit assistance provider to suggest that the consumer remain in the contract without contravention of the responsible lending obligations: see s124(7).

Note: See also Explanatory Memorandum, paras 3.73 and 3.148-149.

D Guidance about providing a written assessment that a credit contract is ‘not unsuitable’

Key points

You must, if requested, provide the consumer with a copy of the assessment that the credit contract is ‘not unsuitable’.

In this section, we provide guidance about our expectations in relation to the form of this document.

When must you provide a consumer with a written assessment?

- RG 209.84 Under the National Credit Act, you must, if requested, provide free of charge to the consumer a copy of the assessment that the credit contract is ‘not unsuitable’ for the consumer: see s120, 132, 143 and 155. In practice, this means that you must keep a record of the assessment in a form that allows you to provide the assessment to a consumer promptly and in writing.
- RG 209.85 The National Credit Act also sets out timeframes in which the written assessment must be provided: see s120, 132, 143 and 155.

What information should be included in a written assessment?

- RG 209.86 We expect that this written assessment will be concise and easy for consumers to understand, and include reference to the relevant factual information provided by the consumer that you used to assess the credit contract as ‘not unsuitable’.
- RG 209.87 You should ensure that the written assessment you provide to consumers will:
- (a) assist consumers in understanding that the credit contract has been assessed as ‘not unsuitable’ for them; and
 - (b) assist you in demonstrating compliance with the responsible lending obligations.

You should also ensure that the consumer has the opportunity to check the factual basis on which you have made the assessment (as stated by you in the written assessment) so that, if it is inaccurate, the consumer can raise the matter with you. This means that the assessment should include a record of the financial information obtained, and the requirements and objectives communicated by the consumer.

- RG 209.88 For example, the written assessment could set out information provided by the consumer about their income and expenses (i.e. which demonstrates that the consumer has the capacity to repay the loan), as well as the stated purpose for the loan (where relevant).
- RG 209.89 Where the borrower's capacity to repay the loan depends on availability of income provided by another person, the assessment should reflect this.
- RG 209.90 We do not expect you to disclose the commercially sensitive lending criteria on which your credit decisions are based. Only the information that specifically relates to the statutory concepts of 'requirements and objectives', 'capacity to repay' and 'reasonable inquiries' should appear in the written assessment.

Circumstances where you are not required to provide a written assessment to a consumer

- RG 209.91 You are not required to give the consumer a copy of the assessment if:
- (a) you are a credit provider and the transaction does not go ahead; or
 - (b) you are a credit assistance provider and you do not provide credit assistance to the consumer.

Note 1: 'Credit assistance' is defined in s8 of the National Credit Act, and includes suggesting that a consumer apply for a particular credit contract with a particular credit provider, and assisting the consumer to do so.

Note 2: The *Credit reporting code of conduct* (issued by the Privacy Commissioner under s18A of the *Privacy Act 1988*, September 1991 and including all amendments as at March 1996) provides at Note 40 that: 'A credit provider who has refused an individual's application for credit based on a credit report issued by a credit reporting agency must provide the individual with written notice of refusal, informing the individual: (a) that refusal was based wholly or partly on the credit report; (b) of his or her rights to obtain access to his or her credit information file held by the credit reporting agency; and (c) of the name and address of the credit reporting agency.' This is also a requirement under s18M of the *Privacy Act 1988*.

Appendix

Table 5: Summary of the Ch 3 obligations relating to documents

| Document | Who the obligation applies to | Brief overview of obligations |
|---|--|---|
| Credit guide | <p>Credit providers, credit assistance providers and credit representatives must give a credit guide to the consumer</p> <p>Note: The obligation also applies to unlicensed carried over instrument lenders (unlicensed COI lenders) in relation to carried over instruments. For more information on the statutory regime for unlicensed COI lenders, see INFO 110 <i>Lenders with carried over instruments</i> and reg 38, Transitional Regulations.</p> | <p>Credit assistance providers must give a credit guide to the consumer as soon as practicable after it becomes apparent to the credit assistance provider that they are likely to provide credit assistance to the consumer: s113(1), 136.</p> <p>Credit providers must give a credit guide to the consumer as soon as practicable after it becomes apparent to the credit provider that the consumer is likely to enter into a credit contract with them: s126(1), 149.</p> <p>Credit representatives must give a credit guide to the consumer at the same time that they give the consumer the credit guide of the licensee they represent: s158.</p> |
| Quote for providing credit assistance | Credit assistance providers | <p>Credit assistance providers must not provide credit assistance to a consumer unless they have given the consumer a quote and the consumer has signed and dated the quote (or otherwise indicated their acceptance of the quote): s114(1), 137.</p> |
| Credit or lease proposal disclosure document | Credit assistance providers | <p>Credit assistance providers must, at the same time as providing credit assistance to the consumer, provide the consumer with a credit or lease proposal disclosure document: s121, 144.</p> |
| Written preliminary assessment or final assessment that a credit contract is 'not unsuitable' | Credit providers and credit assistance providers | <p>If requested by the consumer:</p> <ul style="list-style-type: none"> • credit assistance providers must give the consumer a copy of the preliminary assessment free of charge; and • credit providers must give the consumer a copy of the final assessment free of charge. <p>For further information, see Section D.</p> |

Key terms

| Term | Meaning in this document |
|--|--|
| ADI | Has the meaning given in s5 of the National Credit Act |
| ASIC | Australian Securities and Investments Commission |
| carried over instrument | Has the meaning given in s4 of the Transitional Act |
| Ch 3 (for example) | A chapter of the National Credit Act (in this example numbered 3), unless otherwise specified |
| COAG | Council of Australian Governments |
| COI lender | A person who was a credit provider or lessor in relation to a carried over instrument immediately before 1 July 2010 and who remains the credit provider or lessor on or after 1 July 2010 |
| consumer | A natural person or strata corporation Note: See s5 of the National Credit Act |
| consumer lease | A consumer lease to which the National Credit Code applies Note: See s169–171 of the National Credit Code |
| credit | Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code |
| credit activity (or credit activities) | Has the meaning given in s6 of the National Credit Act |
| credit assistance | Has the meaning given in s8 of the National Credit Act |
| credit contract | Has the meaning in s4 of the National Credit Code |
| credit legislation | Has the meaning given in s5 of the National Credit Act |
| credit licence | An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities |
| credit licensee | A person who holds an Australian credit licence under s35 of the National Credit Act |
| credit provider | Has the meaning given in s5 of the National Credit Act |
| credit representative | A person authorised to engage in specified credit activities on behalf of a credit licensee or registered person under s64(2) or s65(2) of the National Credit Act |
| credit service | Has the meaning given in s7 of the National Credit Act |
| Explanatory Memorandum | Explanatory Memorandum to the National Consumer Credit Protection Bill 2009, unless otherwise specified |

| Term | Meaning in this document |
|-----------------------------|--|
| general conduct obligations | The obligations under s47(1) of the National Credit Act |
| lender | A credit provider |
| National Credit Act | <i>National Consumer Credit Protection Act 2009</i> |
| National Credit Code | National Credit Code at Schedule 1 of the National Credit Act |
| National Credit Regulations | National Consumer Credit Protection Regulations 2010 |
| RG 205 (for example) | An ASIC regulatory guide (in this example numbered 205) |
| s47 (for example) | A section of the National Credit Act (in this example numbered 47), unless otherwise specified |
| Transitional Act | <i>National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009</i> |
| Transitional Regulations | National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010 |
| UCCC | Uniform Consumer Credit Code |
| unlicensed COI lender | Has the meaning given in s5 of the National Credit Act, as modified by item 2.4 of Schedule 2 of the National Credit Regulations |

Related information

Headnotes

carried over instrument, COI lender, credit assistance provider, credit contract, credit licence, credit licensee, credit provider, responsible lending, unlicensed COI lender

Regulatory guides

RG 51 *Applications for relief*

RG 108 *No-action letters*

RG 121 *Doing financial services business in Australia*

RG 139 *Approval and oversight of external dispute resolution schemes*

RG 165 *Licensing: Internal and external dispute resolution*

RG 202 *Credit registration and transition*

RG 203 *Do I need a credit licence?*

RG 204 *Applying for and varying a credit licence*

RG 205 *Credit licensing: General conduct obligations*

RG 206 *Credit licensing: Competence and training*

RG 207 *Credit licensing: Financial requirements*

RG 208 *How ASIC charges fees for credit relief applications*

RG 210 *Compensation and insurance arrangements for credit licensees*

Information sheets

INFO 96 *Getting ready for credit*

INFO 97 *Guidance for small credit businesses*

INFO 101 *Does the new credit regime apply?*

INFO 102 *Getting registered for credit*

INFO 110 *Lenders with carried over instruments*

Legislation

Australian Securities and Investments Commission Act 2001, Pt 2, Div 2

Corporations Act 2001

Corporations Legislation Amendment (Financial Services Modernisation) Act 2009

National Credit Act, Ch 3, s115–133, 138–146, 151–156; National Credit Code, s204; National Credit Regulations, reg 27, Transitional Regulations, reg 38

Privacy Act 1988

Superannuation Industry (Supervision) Regulations 1994, reg 6.01(5)(a)(ii)