

Everything mortgage lenders need to know about the

National Consumer Credit Laws

2 April 2010

THE LEGAL FRAMEWORK 2
REGISTRATION 7
LICENSING..... 11
CONDUCT OBLIGATIONS..... 17
RESPONSIBLE LENDING..... 24
DEFAULT PROCEDURES..... 32
CHECKLISTS 35

About the author: [Kate Cooper](#) is partner at Bransgroves Lawyers, she has written multiple articles for the NSW Law Society Journal and regularly lectures on topics pertaining to mortgage law for the NSW College of Law. At Bransgroves, she supervises a team of five litigation solicitors and one transactional solicitor. Her fields of expertise include: mortgage-related litigation, originator/funder disputes, professional negligence claims by mortgage lenders against solicitors and valuers, responsible entity running mortgage trusts and mortgage credit compliance consulting.



The legal framework

The National Credit Reform plan

1. In 2008, the Council of Australian Governments agreed that the Commonwealth would assume responsibility for the regulation of consumer credit. The program involved two phases.
2. The key elements of phase one (legislation to be in place by mid 2009) which concern mortgage lenders are:
 - a) replacing the Uniform Consumer Credit Code with a Commonwealth version;
 - b) establishing a national licensing regime requiring lenders and brokers of consumer credit to be licensed by ASIC;
 - c) making ASIC the national regulator of the new credit laws;
 - d) requiring licensees to observe general conduct requirements including disclosure and responsible lending;
 - e) requiring licensees be members of an external dispute resolution body;
 - f) extending the definition of consumer credit to include any residential investment properties.
3. The key elements of phase two (legislation to be in place by mid 2010) which concern mortgage lenders are:
 - a) prohibiting additional specified unfavourable lending practices;
 - b) regulating credit provided to small businesses;
 - c) regulating mortgages for residential investment properties;
 - d) reforming the mandatory comparison rates and default notices;
 - e) tailored regulation of reverse mortgages.

The Legislation

4. The Legislation already in force is:
 - a) [National Consumer Credit Protection Act 2009](#)
 - b) [National Consumer Credit Protection \(Fees\) Act 2009](#)
 - c) [National Consumer Credit Protection \(Transitional and Consequential Provisions\) Act 2009](#)
 - d) [The National Consumer Credit Protection Amendment Act 2010](#)

The Regulations

5. The regulations already in force are:
 - a) [National Consumer Credit Protection \(Transitional And Consequential Provisions\) Regulations 2010;](#)
 - b) [National Consumer Credit Protection Regulations 2010](#)

- c) [National Consumer Credit Protection \(Fees\) Regulations 2010](#)

The Code

6. The main legislation is the [National Consumer Credit Protection Act 2009](#) (the Act). Schedule 1 to the Act contains [National Consumer Credit Code](#) (the Code) which is substantially similar to the [UCCC](#).

The Regulatory Guides

7. ASIC has issued the following Regulatory Guides specific to the new regime which:
- (a) explain when and how ASIC will exercise specific powers under legislation;
 - (b) explain how ASIC interprets the law;
 - (c) describe the principles underlying ASIC's approach;
 - (d) give 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).

- [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 209](#) Credit licensing: Responsible lending conduct

Credit to which the code applies

8. The Act only regulates those types of credit covered by the Code. The predominant purpose of the loan determines if the loan is regulated by the Act.
9. [Section 5](#) of the Code defines credit to which the Code and Act apply.
- (1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of pre-contractual obligations) it is proposed to be entered into:
 - (a) the debtor is a natural person or a strata corporation; and
 - (b) the credit is provided or intended to be provided wholly or predominantly:
 - (i) for personal, domestic or household purposes; or
 - (ii) to purchase, renovate or improve residential property for investment purposes; or
 - (iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve

- residential property for investment purposes; and
 - (c) a charge is or may be made for providing the credit; and
 - (d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.
- (2) If this Code applies to the provision of credit (and to the credit contract and related matters):
 - (a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and
 - (b) this Code continues to apply even though the credit provider ceases to carry on a business in this jurisdiction.
 - (3) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.
 - (4) For the purposes of this section, the predominant purpose for which credit is provided is:
 - (a) the purpose for which more than half of the credit is intended to be used; or
 - (b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

10. The biggest change is the regulation of investments in residential property by an individual.

Presumptions

11. A loan is presumed to be regulated unless the contrary can be proven. Sections [13](#) of the Code provides:

- (1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.

12. As before a ‘business purpose declaration’ acts as a rebuttable presumption that the code does *not* apply. [Section 13](#) of the Code provides:

- (2) It is presumed for the purposes of this Code that credit is not provided or intended to be provided under a contract wholly or predominantly for any or all of the following purposes (a Code purpose):
 - (a) for personal, domestic or household purposes;
 - (b) to purchase, renovate or improve residential property for investment purposes;
 - (c) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential

property for investment purposes;

if the debtor declares, before entering the contract, that the credit is to be applied wholly or predominantly for a purpose that is not a Code purpose, unless the contrary is established.

13. There are now more stringent rules to prevent abuse of these declarations. So stringent in fact that it tends to make them worthless. [Section 13](#) of the Code provides:

(3) However, the declaration is ineffective if, when the declaration was made, the credit provider or a person (the prescribed person) of a kind prescribed by the regulations:

(a) knew, or had reason to believe; or

(b) would have known, or had reason to believe, if the credit provider or prescribed person had made reasonable inquiries about the purpose for which the credit was provided, or intended to be provided, under the contract;

that the credit was in fact to be applied wholly or predominantly for a Code purpose.

14. The whole point of the original UCCC declaration was that lenders were not to be burdened with having to investigate what a borrower was going to do with the money. [Section 13](#)(3)(b) of the Code cancels that out by effectively requiring the lender to make reasonable inquiries. As 'reasonable' is not defined it will have to be determined in due course by the case law but in the meantime, lenders will be plagued with uncertainty.

15. [Section 13](#)(6) of the Code provides that brokers and others (including lenders) who procure false declarations will now be liable to criminal prosecution:

(6) A person commits an offence if:

(a) the person engages in conduct; and

(b) the conduct induces a debtor to make a declaration under this section that is false or misleading in a material particular; and

(c) the declaration is false or misleading in a material particular.

Criminal penalty: 100 penalty units, or 2 years imprisonment, or both.

(7) Strict liability applies to paragraph (6)(c).

16. Of course there should of course never be strict liability in any offence that carries a jail sentence. Also unsatisfactory is the fact that as drafted, if a lender advised a borrower that it only lends on non-code regulated loans, and that induced the borrower to make a false and misleading declaration, then the lender could be sent to jail.

What is credit?

17. The Act defines credit by simply referring to the definition in the Code. [Section 3](#) of the Code defines credit as:

- (1) For the purposes of this Code, credit is provided if under a contract:
 - (a) payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred; or
 - (b) one person (the debtor) incurs a deferred debt to another (the credit provider).
- (2) For the purposes of this Code, the amount of credit is the amount of the debt actually deferred. The amount of credit does not include:
 - (a) any interest charge under the contract; or
 - (b) any fee or charge:
 - (i) that is to be or may be debited after credit is first provided under the contract; and
 - (ii) that is not payable in connection with the making of the contract or the making of a mortgage or guarantee related to the contract.

What is credit activity?

18. Only persons engaged in credit activities are affected by the registration and licensing regime. Mortgage lenders are caught by [section 6](#) of the Act which defines credit activity:

Item	Topic	A person engages in a credit activity if:
1	credit contracts	<ol style="list-style-type: none">(a) the person is a credit provider under a credit contract; or(b) the person carries on a business of providing credit, being credit the provision of which the National Credit Code applies to; or(c) the person performs the obligations, or exercises the rights, of a credit provider in relation to a credit contract or proposed credit contract (whether the person does so as the credit provider or on behalf of the credit provider); or
4	mortgages	<ol style="list-style-type: none">(a) the person is a mortgagee under a mortgage; or(b) the person performs the obligations, or exercises the rights, of a mortgagee in relation to a mortgage or proposed mortgage (whether the person does so as the mortgagee or on behalf of the mortgagee); or
5	guarantees	<ol style="list-style-type: none">(a) the person is the beneficiary of a guarantee; or(b) the person performs the obligations, or exercises the rights, of another person who is a beneficiary of a guarantee or proposed guarantee, in relation to the guarantee or proposed guarantee (whether the person does so on the person's own behalf or on behalf of the other person); or

Who is a credit provider?

19. Credit provider is defined in [section 204](#) of the Code and as a “person that provides credit, and includes a prospective credit provider”. So, credit providers are:
 - (e) lenders under a credit contract;
 - (f) lenders or their representatives in relation to mortgages; and
 - (g) beneficiaries of guarantees or their representatives in relation to guarantees.

Registration

20. Registration is an interim precursor to licensing. Persons conducting credit activities between 1 July 2010 and 1 January 2011 must register between 1 April 2010 and 30 June 2010 (sections [11](#), [Schedule 2](#), to the [Transitional Act](#)). Persons not registered by 30 June 2010 will be unable to engage in credit activity business until registered. ASIC recommends that registration applications are made by no later than 18 June 2010 to ensure that they are processed by 30 June 2010 ([Regulatory Guide 202](#)).
21. Registration is regulated by the [National Consumer Credit Protection \(Transitional and Consequential Provisions\) Act 2009](#).
22. [Credit representatives](#) do not need to register separately from the person on whose behalf they engage in credit activity.
23. Representatives should not register separately if they expect to be authorised by a principal. This is because an authorised representative cannot simultaneously be a registered principal.
24. The requirements to be registered do not apply to a credit contract made before 1 July 2010.
25. Registration requires completing and lodging online ASIC [Form CS01 Application for registration to engage in credit activities](#), after 1 April 2010 and before 30 June 2010.
26. Prior to preparing the registration application each applicant will need to take the following steps:
 - a) if the applicant is a company or an Australian Financial Services licensee, ensure that the details on ASIC’s registers are correct. Lodge a [Form 484 Change to company details](#) and/or a [Form FS20 Change of details for an Australian Financial Services Licence](#) (as appropriate) to effect any changes;
 - b) become a member of an ASIC-approved [External Dispute Resolution](#) scheme ([section 12\(1\) Schedule 2, Transitional Act](#)). [Financial Ombudsman Service](#) and [Credit Ombudsman Service Limited](#) are both approved;
 - c) conduct background checks on directors, company secretaries, partners and trustees for the purpose of statements about past conduct. ([section 12\(1\) Schedule 2, Transitional Act](#)). Documentary proof is not required, but the person submitting the application must be satisfied that the statements are true (and prudent practice would include complying with [Standards Australia HB 322 — 2007 Reference Checking in the Financial Services Industry](#);

- d) ensure all people who need to make a declaration authorise the person submitting the application to make those declarations on their behalf;
- e) determine whether registration under the [Financial Sector \(Collection of Data\) Act 2001](#) (Cth) is required and if so, register. A business is required to register if its total assets exceed \$5 million; and its sole or principal business in Australia is borrowing money and provision of finance; or its assets arising from the provision of finance exceed 50 per cent of its total assets in Australia. Exemptions include authorised deposit-taking institutions, insurance companies regulated by APRA and trustees authorised by government to conduct trustee business;
- f) read ASIC [Regulatory Guide 202](#) prior to commencing the application. ASIC expects that at least small businesses should be able to lodge the application without professional assistance (see [RG 202](#) at 202.15) Small businesses should also read [ASIC INFO 97](#) *Guidance for Small Credit Businesses*.

Statement about past conduct

27. The application requires the following statement to be made about past conduct of the applicant and, if relevant, each director, secretary, partner or trustee ([section 12\(1\) Schedule 2, Transitional Act](#)):
- a) is not subject to a current banning order or disqualification order under [Part 2-4](#) of the Act or [Div 8](#) of Part 7.6 of the Corporations Act.
 - b) is not banned from engaging in a credit activity under a law of a state or territory (whether as a result of a licence or registration being suspended or cancelled, or as a result of injunctions or other orders of a court);
 - c) if the person is or has been registered, then the registration is or was neither suspended nor cancelled;
 - d) any Australian Financial Services licence of the person is neither suspended, nor has been cancelled within the last seven years, because of mental or physical incapacity, or after a hearing;
 - e) is not insolvent;
 - f) has not been disqualified from managing corporations;
 - g) has not been convicted of serious fraud within the last 10 years; and
 - h) a prescribed state or territory order is not in force against the person (the prescribed orders are orders under the [Crimes \(Criminal Organisations Control\) Act 2009 \(NSW\)](#)).
28. There are criminal sanctions for making false or misleading statements in, or omitting a material matter from, the application.
29. The person submitting the application is required to declare that all information provided is complete, accurate and true to the knowledge of that person. Actual inquiries are required to meet this obligation, and it would be prudent to obtain written declarations in statutory declaration form from each person who is required to make the statement about past conduct.

Declined registration applications

30. ASIC may decline an application if it has reason to believe that the application is false in a material particular or materially misleading, or there is an omission of a material matter ([section 12\(3\) Schedule 2, Transitional Act](#)). ASIC must provide reasons ([section 12\(4\) Schedule 2, Transitional Act](#)).
31. There is no provision express avenue for appeal prescribed. The appropriate avenue is likely application to the Administrative Appeals Tribunal.
32. If the application is declined and the applicant addresses the matter that resulted in the declination, it can apply for registration again.

After registration but before licensing

33. Following registration, general conduct obligations apply under the [Transitional Act](#) and [section 47](#) of the Act including:
 - a) membership of an approved External Dispute Resolution scheme;
 - b) compliance (including taking reasonable steps to ensure that representatives comply) with the credit legislation and any conditions applied on registration;
 - c) ensuring that clients are not disadvantaged by any conflicts of interest that arise wholly or partly in relation to credit activities engaged in; and
 - d) engaging in credit activities efficiently, honestly and fairly.
34. Except membership of an approved External Dispute Resolution scheme, conduct obligations do not commence until 1 July 2010.

Appointment of Credit Representatives

35. Once registered, a person can commence appointing credit representatives ([section 32A Schedule 2, Transitional Act](#), which applies [section 64](#) and [65](#)) of the Act). Directors and employees are automatically representatives and do not require appointment.
36. To appoint a credit representative, the registered party must:
 - a) ensure that the credit representative is eligible ([sections 64\(5\) and 65\(6\)](#) of the Act);
 - b) appoint the credit representative in writing, specifying the credit activities for which they are authorised;
 - c) notify ASIC of the appointment by lodging Form CS03 *Notifications* (not yet released by ASIC) about credit representatives within 15 business days of the authorisation ([s71](#) of the Act).
37. Credit representatives authorised during the registration period are deemed to be authorised as at 1 July 2010. An authorisation can be revoked or changed. If it is, ASIC must be notified by lodging Form CS03 *Notifications* about credit representatives within 10 business days of the revocation or change ([s71](#) of the Act).
38. Any credit representatives authorised during registration become credit representatives of the licensee following licensing ([RG 202.137](#)). Changes or

revocations to authorisations after licensing must be notified to ASIC by lodging Form CL31 *Revoke a credit representative* or Form CL32 *Vary the details of a credit representative* within 10 business days of the revocation or change.

Eligibility of Credit Representatives

39. To be eligible for appointment, a credit representative must:
- a) be a member of an [External Dispute Resolution](#) scheme (section [64\(5\)\(c\)](#) of the Act); and
 - b) not be subject to a banning or disqualification order (and if a company is appointed as a credit representative, its directors, secretaries, and senior managers must not be subject to a banning or disqualification order) (section [64\(5\)\(b\)](#) of the Act); and
 - c) not have been convicted within the last 10 years of serious fraud (section [64\(5\)\(e\)](#) of the Act); and
 - d) not be a licensee in their own right (section [67](#) of the Act).
40. A person can be appointed by two or more licensees provided the licensees consent or are related bodies corporate (section [66](#) of the Act).
41. It is an offence to appoint a credit representative who is an ineligible person (section [69](#) of the Act). A registered person must revoke an authorisation if the credit representative becomes ineligible (section [70](#) of the Act).

Liability for Representatives

42. A registered person is liable to the consumer for conduct of its representatives (section [78\(3\)](#) of the Act). Credit representatives may indemnify licensees, and licensees may indemnify other licensees for the conduct of their credit representatives (section [78\(3\)](#) of the Act).

Maintenance of Financial Records

43. A registered person must maintain financial records that correctly record and explain the transactions and financial position of its business of engaging in credit activities, and comply with requirements in relation to the keeping and location of those records (section [88](#) of the Act). ASIC may require the licensee to obtain an audit report about credit activities engaged in by the licensee or their representatives (section [49](#) of the Act).

Responsible Lending Conduct

44. The responsible lending obligations in [Chapter 3](#) of the Act apply to lenders and people who provide credit assistance in relation to credit contracts. For non authorised deposit-taking institutions the requirement not to arrange or provide credit that is unsuitable applies from on 1 July 2010, and the remaining responsible lending obligations (including disclosure requirements) commence on 1 January 2011. The obligations are [Responsible lending](#).

Licensing

Who must be licensed?

45. Generally, any person who engages in any credit activity must be licensed or authorised by a licensee, regardless of whether the person engaging in the credit activity does so on their own behalf, or on behalf another person (section [29](#) of the Act).
46. There are two broad categories of people engaged in credit activity who must be licensed:
 - (a) credit providers (lenders); and
 - (b) credit service providers (brokers).
47. In addition to engaging in credit activity, the person must also carry on the business of providing credit in Australia (defined in section [12](#) of the Act).
48. A physical presence in Australia is unnecessary. Using the internet or intermediaries to offer consumer credit to persons in Australia is sufficient.

Person Conducting Credit Activity	Needs a License?
Lender under a credit contract	Yes, provided: <ul style="list-style-type: none"> • customer is a natural person or strata corporation; • the credit is wholly or predominantly for personal, domestic or household purposes, or relates to a residential investment property; and • a charge is made for the credit.
Assignee of lender, mortgagee or beneficiary of a guarantee (e.g. lender's mortgage insurer, debt buyer)	Yes.
Mortgagee	Yes, if the mortgage secures obligations under a regulated credit contract.
Mortgage Manager	Yes, providing that the mortgage secures obligations under a credit contract or related guarantee that is subject to the Code, and the mortgage or guarantee is granted by a consumer.
Beneficiary of a guarantee	Yes, if the guarantee secures obligations under a regulated credit contract.
Other types of intermediary (including	Yes, if:

Person Conducting Credit Activity	Needs a License?
aggregators and originators)	<ul style="list-style-type: none"> • the intermediary is in the 'chain' between consumer and lender, even if there is no direct contact with the consumer; and • the role played is wholly or partially aimed at obtaining credit for the consumer.

49. ASIC has provided guidance on this issue in [Regulatory Guide 203](#).

Employees and directors

50. Pursuant to section [29\(3\)](#) and [64](#), of the Act, a license is not needed by a person who is:

- (a) an authorised credit representative, or an employee or director of a licensee (or of a related body corporate); and
- (b) where the credit activities are engaged on behalf of the licensee; and
- (c) where the principal holds a credit licence authorising the credit activities being undertaken.

51. Licensees who appoint authorised credit representatives or have employees or directors engaged in credit activities on their behalf must ensure that representatives are competent to engage in the authorised credit activities (section [47](#) of the Act).

52. Employees and directors of a licensee are representatives of the licensee when their conduct relating to credit activities is within the scope of their employment or duties as a director, respectively, and within the activities authorised by the license.

53. Principals must authorise credit representatives in writing, and the activities authorised must be within the scope of the principal's licence.

54. A credit representative may be a body corporate. If so, the credit representative may sub-authorise a natural person to be a credit representative. The natural person is considered to be a credit representative of the licensee, who must provide written consent to the sub-authorisation. No other form of sub-authorisation is permitted under the Act ([section 65](#)).

55. A credit representative may be authorised to engage in credit activities on behalf of more than one principal, if all the principals consent or are related bodies corporate.

56. Authorisations must be in writing. Section [64\(4\)](#) of the Act sets out circumstances where an authorisation will be ineffective, these include where the authorisation purports to authorise credit activity:

- a) that is not authorised by the licensee's licence;
- b) by a person subject to a banning order or disqualification order;
- c) by a person who is not a member of an approved external dispute resolution scheme;

d) by a person who has been convicted, within the last 10 years, of serious fraud.

Exemptions from the requirement to be licensed

Person Conducting Credit Activity	Exempt?
Credit representatives	Yes, if credit activity authorised by and undertaken on behalf of a licensee.
Director or employee	Yes, if credit activity is within the scope of authority as an employee or director, and undertaken on behalf of a licensee.
Third parties (regulation 22)	Yes, if credit activity undertaken by a person who: <ul style="list-style-type: none"> • sells or transports property of a consumer or guarantor on behalf of a lender; or • gives or sends a notice to a consumer or guarantor on behalf of a lender.
Securitisation entity (regulation 24)	Yes, provided the entity meets the requirements set out in the regulation.
Legal practitioner (regulation 25 (2)-(4))	Yes, if credit activity engaged in as a result of: <ul style="list-style-type: none"> • credit assistance provided in a professional legal capacity (e.g. providing legal advice on credit contracts); or • carrying out client instructions.
Passing on factual information in response to a request (regulation 25 (8))	Yes, if: <ul style="list-style-type: none"> • credit activity is responding to a request by a consumer for factual information about the cost, estimated likely cost or terms and conditions of a credit contract; and • the request is complied with by providing the consumer with equivalent information about one or more other credit contracts.
State Licensed Debt Collector, Repossession Agents (regulation 21)	Yes, for credit activities such as demanding or receiving payments from consumers under credit contracts and enforcing rights in relation to taking possession of property secured by a mortgage, engaged in by a state regulated debt collector or repossession agent on behalf of a licensee or person authorised

Person Conducting Credit Activity	Exempt?
	to engage in the credit activity. Exempt from the Act until 1 July 2011.
Referrals (regulation 26(2))	Yes, for mere referrals of the consumer to a credit licensee or representative, provided full disclosure of benefits (such as commissions) received from the lender is made.

Licensing

57. Applications for an Australian Credit Licence must be made by 31 December 2010. Registrations will be cancelled by ASIC on 31 December 2010 in the absence of a licence application, or after licenses are granted or declined. The Transitional Act allows ASIC up until to 30 June 2011 to complete the transition from registration to license.
58. Unlike registrations, ASIC will provide a hearing before it declines a license application, provided that the applicant has complied with any direction by ASIC to apply for a credit license (section [41](#) of the Act).
59. Streamlined application procedures are available for:
 - a) authorised deposit-taking institutions,
 - b) lenders mortgage insurers;
 - c) persons who are authorised to engage in credit activities under an existing state law which requires a person to demonstrate that they are a ‘fit and proper person’.
60. Licensing requires completing and lodging ASIC Form CL01 Application for an Australian credit licence (form not yet released by ASIC), online, prior to 31 December 2010.

Prior to preparing the licence registration application

61. Non-streamlined applicants need to take the following steps:
 - a) decide what types of credit activities will be conducted so that appropriate authorisations can be applied for (there are three categories: all credit activities other than as a lender; credit activities as a lender; both);
 - b) familiarise themselves with ASIC’s guidance on general conduct obligations of credit licensees (set out in section [47](#)). General conduct obligations must be met by licensees immediately upon issue and the license applicant must confirm in the application that arrangements and systems are in place to ensure compliance;
 - c) complete background checks on each person who will manage the credit business for the purposes of obtaining the supporting information and statements about past conduct. Documentary proof is not required, but the person submitting the application must be satisfied that the statements are true (and prudent practice would include obtaining documentation supporting each statement to be made);

- d) ensure all people who need to make a declaration authorise the person submitting the application to make the declaration on their behalf;
 - e) if the applicant is a company or an Australian Financial Services licensee, ensure that the details on ASIC's registers are correct. Lodge a [Form 484](#) Change to company details and/or a [Form FS20](#) Change of details for an Australian financial services licence (as appropriate) to effect any changes.
62. The person submitting the application should read ASIC [Regulatory Guide 204 Applying for and varying a credit license](#) and ASIC [Regulatory Guide 205 Credit licensing: general conduct obligations](#) prior to commencing the application.

Authorisation - engage in credit activities as a lender

63. This authorisation covers:
- a) providing credit to which the Code applies;
 - b) performing the obligations or exercising the rights of a lender, mortgagee, beneficiary of a guarantee in relation to: a credit contract; a mortgage that secures obligations under a credit contract; a guarantee that guarantees obligations under a credit contract, where the licensee is the lender; and
 - c) providing credit assistance to a consumer in relation to a credit contract where the licensee is the lender.
64. It is likely that 'providing credit extends to pre-contractual conduct for the purpose of entering credit contracts as a lender.
65. This authorisation will likely be appropriate for most lenders including authorised deposit-taking institutions, responsible entities of managed investment schemes that provide credit (such as a mortgage scheme), sellers of goods or real property by instalments, lenders mortgage insurers, and assignees of debts for the purpose of collecting those debts (assignee debt collectors).

Authorisation - engage in all credit activities

66. This authorisation covers lenders who also provide credit services, or perform obligations and exercise rights, in relation to credit contracts that are provided by other licensees, such as authorised deposit-taking institutions engaging in credit activities in relation to credit contracts that are provided by other licensees.

Persons involved in managing credit business must be 'fit and proper'

67. The people who must be fit and proper are:
- a) directors, company secretaries, and any senior managers of bodies corporate who will perform duties in relation to credit (section [37\(2\)\(h\)\(i\)](#) of Act);
 - b) the partners or trustees who will perform duties in relation to credit (section [37\(2\)\(h\)\(i\)](#) of Act);
 - c) if a partner or trustee is a body corporate - the directors and company secretaries of the partner or trustee (sections [37\(2\)\(h\)\(i\)](#), [37\(2\)\(h\)\(ii\)](#) of the Act);
 - d) any natural person who is a licensee ([section 37\(1\)\(c\)](#) of the Act);

68. For an organisation to be a ‘fit and proper person’ each person involved in managing the credit business must be ‘fit and proper’ to perform that role. A ‘fit and proper person’ must:
- a) be competent to operate a credit business (as demonstrated by the person’s knowledge, skills and experience);
 - b) have the attributes of good character, diligence, honesty, integrity and judgement;
 - c) not be disqualified by law from performing their role in the credit business; and
 - d) not have a conflict of interest in performing their role in the credit business, or, if a conflict exists, it will not create a material risk that the person will fail to properly perform their role in the credit business.
69. These criteria are consistent with the criteria for responsible persons of authorised deposit-taking institutions set out in [Prudential Standard APS 520 *Fit and Proper*](#).
70. Assessment of ‘fit and proper’ also takes into account whether any person has been the subject of specified regulatory outcomes (section [37\(2\)](#) of the Act). Being subject to such an outcome is not necessarily grounds for ASIC to refuse an application for a credit licence. ASIC will seek an explanation of the matter and assess the application on its facts.
71. Applicants must provide ASIC with a statement of personal information. The statement of personal information sets out whether the person has, within the last 10 years, been subject to, whether in Australia or overseas:
- a) refusal or restriction of authorisations required by law for a trade, business or profession; disciplinary action or investigations that may result in disciplinary action; licence cancellations;
 - b) reprimand or disqualification or removal by a professional or regulatory body or External Dispute Resolution scheme in matters relating to the person’s honesty, integrity or business conduct; claims against PI insurance in relation to advice given by the person; refusal of PI insurance; denial of accreditation by a lender, mortgage manager or mortgage insurer;
 - c) use of different names to those in the application;
 - d) administrative, civil or criminal proceedings or enforcement action, which were determined adversely to the person; and
 - e) declaration of bankruptcy or insolvency; involvement in the management of any companies or businesses that have had an external administrator appointed, or entered a compromise or scheme of arrangement with creditors, or been declared insolvent.
72. The summary business description should include:
- a) the credit activities in which the licensee will engage;
 - b) the types of credit products to which the credit activities will relate;
 - c) how applications for credit will be assessed (e.g. whether you will provide ‘low’ or ‘no’ document loans);

- d) the distribution model;
- e) the remuneration structure;
- f) how many offices the licensee will have, how geographically diverse the business is and how representatives are supervised if they are located away from the main offices; and
- g) if functions will be outsourced, to whom the licensee will outsource those functions, where the outsourced service provider is located and how they were chosen as an appropriate person to provide those functions.

Declined license applications

73. ASIC must decline to grant a license if:
- a) a banning order or disqualification order under [Part 2-4 of the Act](#) or [Div 8 of Part 7.6 of the Corporations Act](#) is in force against the applicant; or
 - b) an order under the [Crimes \(Criminal Organisations Control\) Act 2009](#) (NSW) or the [Serious and Organised Crime \(Control\) Act 2008](#) (SA) is in force against the applicant or one of its 'fit and proper' people.
74. ASIC may decline to grant a license if the applicant does not meet all of the requirements in:
- a) [section 37 of the Act](#) (for standard applicants); or
 - b) [section 38 of the Act](#) (for authorised deposit-taking institutions);
 - c) [reg 8\(5\) of the Regulations](#) (for lenders mortgage insurers); or
 - d) [reg 8\(1\) and 8\(3\) of the Regulations](#) (for holders of 'A' or 'B' class licences under the [Finance Brokers Control Act 1975](#) (WA)).
75. If ASIC forms the view that an applicant does not meet the requirements for grant of a license, it may seek further information from the applicant. ASIC must offer the applicant a hearing prior to declining to grant a license. If grant of a license is declined following the ASIC hearing, review of that declinature is by way of application to the Administrative Appeals Tribunal.

Suspension, cancellation or variation of a license by ASIC

76. Failure to lodge or fully disclose compliance breaches in an annual compliance certificate may lead to suspension, cancellation or variation of a credit licence ([reg 15 of the Regulations](#)). Pursuant to [section 53 of the Act](#), failure to lodge a compliance certificate with ASIC within 45 days after the licensee's licensing anniversary in each year is a strict liability offence.

Conduct obligations

Overview of conduct obligations

77. Applicants must have in place, prior to applying for a license, and maintain, adequate arrangements and systems, and written plans documenting those arrangements and systems, for compliance with the general conduct obligations set out in [section 47 of the Act](#).

78. The license applicant must declare in the application that arrangements and systems required to comply with [section 47 of the Act](#) are in place. ASIC may request a copy of the documentation.
79. Each conduct obligation is also subject to compliance obligations. That is, a license applicant must have compliance procedures in place for general conduct obligations.
80. The nature, scale and complexity of the credit activities engaged in are to be taken into account when considering the adequacy of compliance in relation to ([section 47\(2\) of the Act](#))
- ensuring that clients are not disadvantaged by a conflict of interest ([section 47\(1\)\(b\) of the Act](#));
 - training representatives ([section 47 \(1\)\(g\) of the Act](#));
 - having adequate compliance arrangements ([section 47 \(1\)\(k\) of the Act](#)); and
 - for licensees that are not regulated by APRA, having adequate resources and risk management systems ([section 47\(1\)\(l\) of the Act](#)).
81. ASIC will also take the nature, scale and complexity of the credit activities engaged in into account when assessing compliance with other general conduct obligations ([RG205](#) at 205.22). Nature, scale and complexity include:
- the credit activities engaged in;
 - the diversity and structure of operations (including the geographical spread of operations and the extent to which functions are outsourced);
 - the volume and size of the transactions;
 - whether credit assistance is provided;
 - whether the main business is undertaking credit activities; and
 - the number of people in the organisation.
82. The following are the major conduct obligations:

Type of Obligation	General Conduct Obligation	ASIC Guidance
Broad Compliance Obligations	Engage in credit activities efficiently, honestly and fairly (section 47(1)(a) of the Act) Comply with license conditions (section 47(1)(c) of the Act) Comply with the credit legislation (sections 47(1)(c) (d) and 47(1)(m) of the Act)	Section C of RG205 INFO 97
Internal Systems	Risk management systems (if licensee not regulated by APRA)(section 47(1)(l)(ii) of the	Section D of RG205

Type of Obligation	General Conduct Obligation	ASIC Guidance
	<p>Act)</p> <p>Arrangements for ensuring that clients are not disadvantaged by conflicts of interest (section 47(1)(b) of the Act)</p> <p>Dispute resolution system (sections 47(1)(h)(i), 47(1)(h)(ii), 47(1)(i))</p>	<p>Section D of RG205</p> <p><i>Licensing: Internal and external dispute resolution (RG165)</i> but note that credit legislation update not yet released. Consultation Paper 112 (CP112) outlines the updates.</p>
People	<p>Ensure representatives comply with the credit legislation and license conditions (section 47(1)(e) of the Act)</p> <p>Ensure representatives are adequately trained and are competent (section 47(1)(g) of the Act)</p> <p>Maintain competence to engage in credit activities (section 47(1)(f) of the Act)</p>	<p>Section E of RG205</p> <p>Regulatory Guide 206 <i>Credit licensing: Competence and training</i> (RG206)</p>
Resources	<p>Adequate human and technological resources (if licensee not regulated by APRA) (section 47(1)(l)(i) of the Act)</p> <p>Adequate financial resources (if licensee not regulated by APRA) (section 47(1)(i) of the Act)</p>	<p>Section F of RG205</p> <p>Regulatory Guide 207 <i>Credit licensing: Financial requirements</i> (RG207)</p>
Compensation	<p>Have compensation arrangements in place (section 47(1)(i) and section 48 of the Act)</p>	<p>Consultation Paper 125 <i>Compensation requirements for credit licensees: Further consultation</i> (CP125)</p>
Compliance	<p>A written plan documenting adequate arrangements and systems to ensure compliance (sections 47(1), 47(1)(k) of the Act)</p>	<p>Section B of RG205</p>

83. The general conduct obligations are principles-based and appear to be designed to apply in a flexible way. Although ASIC has provided guidance on the obligations that guidance is not prescriptive (in [RG205](#) at 205.7).
84. These obligations are both stand-alone obligations and obligations that encompass the other general conduct obligations, with the effect that:
- a) failure to comply with one or more of the other general conduct obligations is also likely a breach of the broad compliance obligations. Conduct that fails to

comply with a general conduct obligation is unlikely to be conduct that is 'efficient, honest and fair'; and

- b) compliance with all of the general conduct obligations does not preclude breach of the broad compliance obligations.

Compliance arrangements

85. An applicant must have in place and maintain adequate compliance arrangements and systems for monitoring compliance with [section 47 of the Act](#), including:
- a) a written plan documenting compliance arrangements and systems, specifying how often compliance with procedures is monitored and reported on;
 - b) regular review of the effectiveness of the compliance arrangements and systems to ensure they remain up-to-date;
 - c) addressing any compliance breaches;
 - d) people in the business responsible for ongoing monitoring and reporting, including a director or senior manager with responsibility for overseeing compliance measures and reporting;
 - e) arrangements in place to ensure that clients will not be disadvantaged by any conflicts of interest that arise in relation to credit activities;
 - f) processes for monitoring outside service providers to ensure that they are suitable, their ongoing performance is monitored, and the licensee can deal effectively with any breaches of the outsourcing agreement or actions that lead, or might lead, to a breach of the license obligations (the [APRA Prudential Standard APS 231](#) Outsourcing, whilst only applying to [APRA](#) regulated bodies, will likely be helpful in this regard);
 - g) reporting system for compliance including reports on compliance and non-compliance;
 - h) sufficiently resourced compliance area/team with access to relevant records.
86. Licensees are required to certify compliance each year within 45 days of the anniversary of licensing ([section 53 of the Act](#)). There is no requirement to report individual breaches of the Code to ASIC as they occur. Prudent licensees will review breaches as and when they occur to determine whether to report the breach to their professional indemnity insurer.
87. Guidance about adequacy of compliance procedures is provided by ASIC at Sections B and C of [RG205](#).

Supervising and training representatives

88. An applicant must have in place adequate arrangements to:
- a) supervise and monitor the activities of representatives to ensure compliance with credit legislation, and ensure that any breaches are identified and remedied;
 - b) ensure that representatives are adequately trained, and are competent to engage in the credit activities covered by the credit licence (including ensuring relevant responsible managers engage in at least 20 hours of continuing professional development annually);

- c) ensure that there are measures in place for complying with new requirements as they arise;
 - d) regularly review organisational competence and arrange for its maintenance or improvement as necessary, including keeping records of those reviews and steps taken.
89. An applicant must also have in place:
- a) a training register (which is maintained);
 - b) documented processes for monitoring and supervising all representatives;
 - c) employee screening prior to appointment (referee reports, search of ASIC's register of banned and disqualified persons and police check);
 - d) processes to ensure credit representatives are and remain members of an approved External Dispute Resolution scheme.
90. ASIC's minimum requirements for responsible managers are at least two years relevant experience unmarred by significant compliance issues and either:
- a) credit industry qualifications to at least the Certificate IV level; or
 - b) another general relevant higher level qualification (e.g. a diploma or university degree).
91. Until 30 June 2014, ASIC will accept responsible managers of lenders who can demonstrate five years relevant experience unmarred by an significant compliance issues even if they do not meet the minimum qualification requirements set out above.
92. If industry training standards exist for particular sectors of the credit industry or for specific products, representatives should be trained to at least the level of the industry standard. Guidance about supervising and training representatives is provided by ASIC in [RG206](#).

Adequacy of resources

93. An applicant must have in place adequate financial, human and information technology (IT) resources to engage in credit activities, and carry out supervisory arrangements, and have adequate risk management systems (unless the licensee is a body regulated by [APRA](#)) including:
- a) a written plan documenting measures for ensuring financial and other resources are adequate, and monitoring financial and other resources to ensure they remain adequate;
 - b) a business planning process that includes consideration of employees and other representatives needed to engage in the credit business;
 - c) a designated financial manager;
 - d) recruitment, succession, induction, training, performance management, retrenchment and redundancy management systems;
 - e) IT systems to support the business processes.

94. Licensees must not carry on a credit business whilst insolvent. Guidance about adequacy of resources is provided by ASIC at Section F of [RG205](#).

Dispute resolution and hardship applications

95. An applicant must have in place a dispute resolution system that comprises:
- a) internal dispute resolution procedures that meets the requirements in ASIC Regulatory Guide 165 Licensing: internal and external dispute ([RG165](#)) including documented procedures (available to clients), a nominated person responsible for Internal Dispute Resolution, and procedures requiring information about unresolved complaints to be provided to the applicant's External Dispute Resolution scheme;
 - b) membership of an External Dispute Resolution scheme; and
 - c) if the licensee is a lender procedures for receiving and assessing requests to vary credit contracts on the grounds of hardship. Separate procedures for these applications should be maintained because they are generally of an urgent nature.
96. In [Regulatory Guide 165 Licensing: Internal and External Dispute Resolution](#) ASIC states, at 165. 37, that it considers AS ISO 10002-2006 to be the starting point for establishing and assessing Internal Dispute Resolution procedures. Although that guide was published in May 2009, it specifically contemplates lenders and others licensed under the Act being subject to the dispute resolution requirements.
97. AS ISO 10002-2006 is a comprehensive standard providing that those who are required to have Internal Dispute Resolution processes in place must provide accessibility, independence, fairness, accountability, efficiency, and effectiveness for that Internal Dispute Resolution service. This is likely to be an onerous requirement on small businesses with Approved Credit Licences.

Risk management

98. An applicant must have in place adequate risk management systems (unless the licensee is a body regulated by [APRA](#)) including documented:
- a) processes to identify, evaluate, treat and communicate risks in the business (focussing on risks that adversely affect consumers or market integrity including risks of non-compliance with the credit legislation), and to monitor and report on risk management issues;
 - b) processes to establish and maintain controls designed to manage the risks identified, including the risk that financial resources available will not be adequate;
 - c) assessment of the risks associated with the business and the probability of those risks occurring; and
 - d) risk management training for relevant representatives.
99. The following guides may be of assistance:
- a) Australian and New Zealand Standard AS/NZS 4360:2004, Risk Management and the related handbook, HB 436:2004, Risk Management Guidelines—Companion to AS/NZS 4360:2004;

- b) Joint Forum High-level principles for business continuity (August 2006); and
- c) Section D of [RG205](#).

Compensation arrangements

- 100. A credit licensee must have arrangements in place for compensating clients for loss they suffer if the licensee breaches its obligations under the Act. Generally, adequate professional indemnity insurance cover will be sufficient compliance.
- 101. Authorised deposit-taking institutions and registered finance corporations are exempt from the obligation to hold PI insurance. Related bodies corporate of these entities may also be exempt if they hold a guarantee that has been approved by ASIC ([reg 13\(3\) of the Regulations](#) details licensees that are exempt from the requirement to hold PI insurance).
- 102. If an applicant will (if granted a licence) be a licensee that is only authorised to engage in certain credit activities as a lender, they will be exempt from the obligation to hold PI insurance cover ([reg 13\(3\) of the Regulations](#)).
- 103. ASIC's approach to compensation and insurance arrangements, including what features PI insurance must have to be 'adequate', is set out in the draft regulatory guide attached to [CP125](#).

Carried over instruments

- 104. In general, the requirements to be registered or licensed do not apply to credit activities (other than providing credit services) engaged in by or on behalf of lenders after 1 July 2010 in relation to carried over instruments.
- 105. If a person only engages in credit activities in relation to carried over instruments, they are not required to apply for either registration or a licence, but may be registered or granted a licence. The [Transitional Act](#) and associated regulations have special provisions for the registration and licensing of people who engage in those credit activities.
- 106. If a person who engages in credit activities (other than providing credit services) in relation to a carried over instrument:
 - a) applies for registration, ASIC will register them to engage in those credit activities ([reg 16 of the Transitional Regulations](#)) and impose a condition on the registration that the registered person is only authorised to engage in those credit activities. The registered person will not be able to change their business after registration to engage in credit activities in relation to other credit contracts, unless ASIC agrees to vary the registration to remove the condition;
 - b) is registered under [reg 16 of the Transitional Regulations](#), and that registration has not been cancelled as at 30 June 2011, they will be granted a credit licence during the transition period ([reg 8\(2\) of the Transitional Regulations](#));
 - c) is not registered, and they apply for a credit licence, ASIC will grant them a credit licence, unless they are a person who cannot be granted a licence by reason of [section 40 of the Act](#) ([reg 8\(3\) and \(4\) of the Transitional Regulations](#));

- d) is granted a license, ASIC will impose a condition on the licence that the licensee is only authorised to engage in those credit activities. The licensee will not be able to change their business after they are granted a licence to engage in credit activities in relation to other credit contracts, unless ASIC agrees to vary the licence to remove the condition.

Responsible lending

107. [Chapter 3](#) imposes responsible lending obligations on Australian credit licensees that are intended to ([Explanatory Memorandum to the National Consumer Credit Protection Bill](#) at [3.16] and [3.11]):
- a) introduce standards of conduct to encourage prudent lending and leasing, and impose sanctions in relation to irresponsible lending and leasing; and
 - b) curtail undesirable market practices, particularly where intermediaries are involved in lending.
108. Essentially, responsible lending is about enhanced disclosure and product suitability.
109. The obligations apply (but not necessarily equally) to all lenders and except authorised deposit-taking institutions and Registered Finance Corporations at and from 1 July 2010. The obligations apply to authorised deposit-taking institutions and Registered Finance Corporations from 1 January 2011.
110. ASIC has published Regulatory Guide 209 Credit Licensing: Responsible Lending Conduct ([RG209](#)) which should be consulted by all lenders, and their representatives. ASIC, on considering a licensee's compliance with the responsible lending obligations will also take into account the general conduct obligations in [section 47 of the Act](#), the consumer protection provisions in the [Australian Securities and Investments Commission Act 2001 \(Part 2, Div 2\)](#), and any other relevant credit legislation ([RG209](#) at 209.13 – 209.14). ASIC has not specified what it considers 'other relevant credit legislation'.

Overview of responsible lending

Required Conduct	Overview of Obligation – Lenders
Conduct reasonable inquiries about the consumer	<p>Before final 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, requirements and objectives; • take reasonable steps to verify the consumer's financial situation; and • verify any matter, in the manner, prescribed by the regulations (sections 130 and 153 of the Act).
Based on those inquiries, assess whether the proposed credit contract is 'not	<p>The credit contract is 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, or could only comply with substantial hardship, with their financial obligations

Required Conduct	Overview of Obligation – Lenders
unsuitable' for the consumer	under the proposed credit contract; or <ul style="list-style-type: none"> • it will not meet the consumer's requirements or objectives (sections 131(1) and 154(2)).
Provide a written copy of the assessment to the consumer upon request	Provide a written copy of the assessment to the consumer upon request and within the prescribed timeframes (within 7 business days if <i>credit day</i> 2 years ago or less, otherwise within 21 business days), free of charge (sections 132 and 155).

111. Lenders should be able to demonstrate that they have adequate policies, arrangements, systems and processes in place to ensure that:
- a) reasonable inquiries are made about the consumer's financial situation, requirements and objectives;
 - b) reasonable steps are taken to verify the consumer's financial situation;
 - c) substantial hardship and ability to service debts are properly considered, including processes for calculating what amounts a person needs to pay for basic living expenses (in order to determine how much they can borrow);
 - d) representatives are adequately supervised and trained to engage in refinancing activities (if appropriate);
 - e) proper assessment of a credit contract is completed and recorded.

Reasonable inquiries – consumer's financial situation

112. The purpose of "reasonable inquiries" is to understand the consumer's ability to meet all the repayments and transaction costs of the proposed credit contract ([Explanatory Memorandum to the National Consumer Credit Protection Bill](#) at [3.69] and [3.139]. See also [3.70], [3.72], [3.140] and [3.141]).
113. What is "reasonable" depends on the circumstances, however relevant factors include:
- a) the potential negative impact on the consumer of entering into an unsuitable credit contract. More extensive inquiries should be made when the potential negative impact on the consumer of an unsuitable credit contract is likely to be relatively serious e.g. if the loan is large relative to the consumer's capacity to repay the loan. Even comparatively small loans can cause financial difficulties for consumers on low incomes. In those circumstances more inquiries should be made to meet the responsible lending obligations. (See also [Explanatory Memorandum to the National Consumer Credit Protection Bill](#) at [3.71]);
 - b) the complexity of the credit contract. Less extensive inquiries should be necessary when the credit contract has relatively simple terms most consumers can easily understand. The converse also applies (extreme care must be taken with reverse mortgages and bridging loans);
 - c) whether what is sought by the consumer is debt consolidation or refinancing. More extensive inquiries should be made so that a proper and adequate

- comparison can be made between the credit contract to which the consumer is already party, and any credit contracts that are to be suggested;
- d) the nature of the service offered to the consumer and by whom the services are provided;
 - e) the consumer's ability to understand the credit contract;
 - f) the consumer's apparent sophistication as regards lending.
114. More inquiries about the consumer's requirements and objectives should be made when it is apparent that:
- a) the consumer has limited capacity to understand the credit contract;
 - b) the consumer has conflicting objectives, is confused about their objectives, or has difficulty articulating them; or
 - c) there is an apparent mismatch between the consumer's objectives and the product being considered by the consumer.
115. Rather than expecting lenders to routinely evaluate consumers' ability to understand the credit product, ASIC expects this factor to be taken into account if it is clearly an issue (see [RG209](#) at 209.18).
116. Less extensive inquiries about the consumer and steps to verify information may be appropriate where the consumer is an existing consumer and the relevant information is already held. The converse also applies.
117. Reasonable inquiries about a consumer's financial situation could include inquiries about (see [RG209](#) at 209.27):
- a) the current quantum and source of income or benefits, nature (e.g. full-time, part-time, casual or self-employed) and length of employment;
 - b) how repayment obligations are to be met;
 - c) fixed expenses such as rent, repayment of existing debts, child support and recurring expenses such as insurance;
 - d) variable expenses and drivers of variable expenses such as dependants and any particular or unusual circumstances;
 - e) whether and to what extent existing debts are to be repaid from the credit advanced;
 - f) credit history;
 - g) the circumstances, including age (particularly where the consumer may be a minor or elderly) and number of dependants;
 - h) the nature and value of the assets;
 - i) any reasonably foreseeable significant changes to the financial circumstances such as a change in repayments for an existing home loan due to the ending of a fixed rate interest rate period, or in impending child support payments following a divorce, or to employment arrangements such as seasonal employment or impending retirement;

- j) geographical factors, such as remoteness, which may require consideration of specific issues such as potentially higher living costs compared to urban areas.

Reasonable inquiries – consumer’s requirements and objectives

118. 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 credit contract meet this purpose or, if not, to suggest credit contracts that do match the consumer’s purpose ([Explanatory Memorandum to the National Consumer Credit Protection Bill](#) at [3.68] and [3.138]). Reasonable inquiries about a consumer’s requirements and objectives could include ([RG 209](#) at 209.28):

- a) the amount of credit needed or the maximum amount of credit sought;
- 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.

119. For credit cards there is a limited requirement to understand the consumer’s requirements and objectives ([Explanatory Memorandum to the National Consumer Credit Protection Bill](#) at [3.5]). However, the maximum limit the consumer requires on the card is part of the consumer’s requirements and objectives, and must be enquired about.

Verification of financial information

120. Regardless of whether the assessment is preliminary or final, reasonable steps must be taken to verify financial information. What is reasonable depends on all the circumstances, and may accordingly differ for preliminary and final assessments.

121. Types of information that could be used to verify a consumer’s financial situation include:

- a) for PAYG employees: recent payroll receipts/payslips; confirmation of employment with the employer (subject to the requirements of the [Privacy Act 1988](#));
- b) for self-employed persons: income tax returns; business activity statements; a statement from the consumer’s accountant;
- c) for all consumers: credit report; information/reports from other lenders (subject to the requirements of the [Privacy Act 1988](#)); bank account or credit card records and other information held about an existing consumer.

122. ‘Reasonable steps’ should involve making additional inquiries where the information provided is:

- a) inconsistent with other information held about the consumer (e.g. in a credit report or account information for existing consumers); and/or

- b) 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).
123. “No doc” loans will not comply with the responsible lending criteria as it can never be reasonable to deliberately refrain from (or simply not) make inquiries about or verify a consumer’s financial position, or make inquiries about the consumer’s requirements and objectives.
124. “Lo doc” loans may comply with the responsible lending criteria, depending on all of the circumstances. In some circumstances, for example lending a relatively small amount (low LVR) to a sophisticated consumer, minimal inquiries and verification will likely be sufficient. It is likely that there will be some circumstances where stated income from a consumer supported only by an account’s certificate will be acceptable.
125. Conversely, it is extremely unlikely that it could ever be reasonable to fail to inquire into and verify income of PAYG recipients.

Assessment of a credit contract

126. Assessment of a credit contract requires lenders to determine whether the credit contract is ‘not unsuitable’. The assessment:
- a) should be based on information obtained from reasonable inquiries (and verified where appropriate);
 - b) must specify the period it covers ([sections 116, 129 and 152](#));
 - c) must be made within 90 days of the credit contract being entered into ([sections 115, 128, 138 and 151](#));
 - d) must be recorded and retained for at least seven years;
 - e) takes into account information reasonably believed, or which ought reasonably to be believed, by the lender and also any additional information the lender would have reasonably believed had they made reasonable inquiries or verification ([sections 118\(4\), 119\(4\), 131\(4\), 141\(4\), 142\(4\) and 154\(4\)](#));
 - f) must include an assessment of whether the consumer can meet the financial obligations of the credit contract without substantial hardship;
 - g) must include an assessment of whether the credit contract will meet the consumer’s requirement and objectives;
 - h) may require consideration against the background of credit contracts commonly available in the market.
127. Lenders must not:
- a) provide credit assistance to a consumer by suggesting they remain in an unsuitable credit contract, or by assisting the consumer to enter into, or increase the limit on, an unsuitable credit contract ([section 123](#) and [124 of the Act](#));
 - b) enter into a credit contract or increase the limit on a credit contract that will be unsuitable for the consumer ([section 133 of the Act](#)).

Assessing whether a consumer can meet the financial obligations

128. The likely maximum amount to be repaid under the credit contract, inclusive of fees, should be considered ([Explanatory Memorandum to the National Consumer Credit Protection Bill](#) at [3.69] and [3.139]). How the loan will affect the consumer's living standards can also be taken into account. 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).
129. * shorten? 'Substantial hardship' is not defined in the Act and ASIC does not provide any definitive formulation of its meaning ([RG 209](#) at 209.59). What 'substantial hardship' means will be left to the Courts to determine. The test is a subjective test, and 'substantial hardship' will be construed broadly given the beneficial nature of the legislation.
130. ASIC will take the following factors into account in considering whether a transaction is likely to result in substantial hardship ([RG 209](#) at 209.61):
- a) the money the consumer is likely to have remaining after living expenses have been deducted from after-tax income;
 - b) consistency and reliability of the consumer's income (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; and
 - f) whether the consumer is likely to have to sell assets to repay the loan.
131. Generally, consumers should be able to meet contract obligations from income rather than equity in an asset. There may be circumstances where this is not a reasonable expectation such as bridging loans and reverse mortgages. Where a consumer establishes they could only meet repayments by selling their residence, the onus is on the lender to establish that the contract is 'not unsuitable' ([sections 118\(3\), 131\(3\), 142\(3\) and 156\(3\)](#)).

Assessing whether a credit contract meets the consumer's requirements and objectives

132. Whether a credit contract meets a consumer's stated requirements and objectives will vary depending on the circumstances, but some factors that could be taken into account include:
- a) the nature of the credit requested by the consumer, and the consumer's stated objectives in obtaining the credit;
 - 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.
133. If no credit contract meets the requirements and objectives for a given consumer then a credit contract must not be entered into with or suggested to the consumer, and no assistance to apply for a credit contract can be provided to the consumer.

Additional considerations for 'Switching' or Refinancing

134. ASIC advises that additional analysis should be conducted when engaging in switching and refinancing activities, including considering whether entering the new credit contract ([RG 209](#) at 209.75 – 209.79):
- a) would result in overall costs savings to the consumer that are likely to override any loss of benefits when all of the costs of switching are taken into account (e.g. break fees, broker fees); or
 - b) may result in minimal costs 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).
135. ASIC's advice appears to impose a 'more suitable' test to the new credit contract (when compared to the old contract), rather than the 'not unsuitable' test imposed by the Act. Although these requirements are not set out in the Act, they are recommended by ASIC and lenders should comply with them in the same manner as other responsible lending requirements, keeping in mind that a breach of the responsible lending requirements carries significant penalties, including imprisonment for up to five years.
136. 'Reasonable inquiries' are likely to be more extensive when the consumer is refinancing, particularly where they are having difficulties meeting repayments, or are already in arrears, on their existing credit contract. If the consumer cannot meet repayments at the amount being charged under the current contract, a new contract with repayments at the same or a similar level will prima facie be unsuitable.

Providing a written assessment

137. Written assessments should:
- a) be concise and easy for consumers to understand;
 - b) reference the relevant factual information provided by the consumer as to financial position and requirements and objectives used to assess the credit contract as 'not unsuitable';
 - c) assist consumers in understanding that the credit contract has been assessed as 'not unsuitable' for them;
 - d) contain information specifically about the statutory concepts of 'requirements and objectives', 'capacity to repay' and 'reasonable inquiries';

- e) state the purpose of the loan;
- f) be checked by the consumer to ensure the factual information is accurate;
- g) assist the lender to demonstrate compliance with responsible lending obligations;
- h) be no more than 90 days old when the credit assistance is provided ([section 115 of the Act](#));
- i) be no more than 120 days old when credit is provided ([section 128 of the Act](#) and [reg 27 of the Regulations](#)).

138. A written assessment is not required to be provided to the consumer if no credit or credit assistance was provided to the consumer.

Documentary disclosure obligations

139. Under Part 3 lenders, and credit representatives must provide a credit guide to the consumer:

- a) for lenders – as soon as practicable after it becomes apparent to the lender that the consumer is likely to enter into a credit contract with them ([sections 126\(1\) and 149 of the Act](#));
- b) for credit representatives – at the same time they provide the credit guide of the licensee they represent ([section 158 of the Act](#)).

140. Credit representatives must provide the consumer with credit guides for both the licensee and the credit representative.

141. Failure to provide the credit guide is a strict liability offence. The requirement to disclose commissions paid to employees or directors is novel. The credit proposal disclosure document must set out a reasonable estimate of:

- a) fees or charges payable by the consumer and lender in relation to the credit application;
- b) commission to be received by any employee, director, or credit representative, and how the amount is calculated;
- c) total fees payable to third parties (e.g. valuers);
- d) and the amount of credit available after making those payments.

When responsible lending obligations do not apply

142. A licensee, acting as an intermediary, engaging in credit activity not involving providing credit assistance to a consumer, will not trigger the responsible lending obligations.

143. By way of example, disclosure is not required by ‘up the line’ intermediaries who are not dealing with the consumer (such as aggregators) unless a person providing credit assistance to the consumer is a credit representative of the ‘up the line’ entity.

Two-tiered commencement of responsible lending criteria

144. Lenders who are not authorised deposit-taking institutions or Registered Finance Corporations may be at a competitive disadvantage from 1 July 2010 because the responsible lending criteria apply to them from that date. The responsible lending criteria do not apply to authorised deposit-taking institutions or Registered Finance Corporations until 1 January 2011.

Default procedures

Direct debit default notice

145. Lenders are required to serve a one-off notice on a consumer and any guarantor on the first occasion a direct debit payment dishonours ([Section 87 of the Code](#)). The information to be included in this notice will be prescribed by the regulations. Failure to issue the notice is a strict liability offence. Also see [Regulation 69](#) which modifies this requirement where the default is rectified within 10 days. [Regulation 85](#) prescribes the form.

Default notice prior to enforcement

146. Prior to commencing enforcement proceedings section [88](#) requires a default notice with the following information to be served and 30 days of non-compliance to pass:

- a) the nature of the default; and
- b) the action necessary to remedy the default; and
- c) a period for remedying the default; and
- d) the date after which enforcement proceedings in relation to the default, and, if relevant, repossession of mortgaged property may begin if the default has not been remedied; and
- e) that repossession and sale of mortgaged property may not extinguish the debtor's liability; and
- f) the information prescribed by the regulations about the debtor's right to:
 - g) make an application to the credit provider under section 72; or
 - h) negotiate with the credit provider under section 94; or
 - i) make an application to the court under sections 74 and 96; and
 - j) the information prescribed by the regulations about:
 - k) the approved external dispute resolution scheme of which the credit provider is a member; or
 - l) the debtor's rights under that scheme; and
 - m) that a subsequent default of the same kind that occurs during the period specified for remedying the original default may be the subject of enforcement proceedings without further notice if it is not remedied within the period; and
 - n) that, under the Privacy Act 1988, the debt may be included in a credit reporting agency's credit information file about the debtor if:
 - o) the debt remains overdue for 60 days or more; and
 - p) the credit provider has taken steps to recover all or part of the debt; and

q) any other information prescribed by the regulations.

147. [Regulation 86](#) prescribes the form.

148. Default notices may be combined with other notices, such as [section 57\(2\)\(b\) Real Property Act](#) or [section 111\(2\)\(b\) Conveyancing Act](#) notices ([section 88 \(8\)](#) and [183\(2\) of the Code](#)).

Application for hardship and postponement of enforcement proceedings

149. The Code provides for hardship and postponement of enforcement proceedings applications to be made (sections [72](#), [74](#), [94](#) and [96](#) of the Code). The threshold amount for which hardship applications can be made has increased to \$500,000 (presently \$374,330 under the UCCC).

150. When a hardship or postponement application is made the lender must respond in writing within 21 days, and if the application is declined, set out the reasons for the declination and provide details of its External Dispute Resolution scheme including the debtor's rights under that scheme (sections [72](#) and [94](#) of the Code). Failure by the lender to respond within 21 days is a strict liability offence.

151. If the lender agrees to provide relief and vary the terms of the credit contract, then in addition to the notice referred to in sections [72](#) and [94](#) of the Code the lender must confirm the details of the change in writing within 30 days.

152. Hardship applications may be oral or written. To enliven the provision, the debtor must reasonably be unable, because of illness, unemployment or other reasonable cause, to meet the debtor's obligations under the credit contract and must also reasonably expect that the debtor will discharge the varied obligations. Reasonable expectation will take into account credit history, source of income, assets and liabilities.

153. The credit contract may be varied to postpone payments for a specified period and/or reduce payments and extend the term. The interest rate cannot be changed. The court can make any orders it thinks fit to change the credit contract on hardship grounds.

Fee for credit license application

154. [RG204](#) (at 204.61 – 204.64) states that the license application fee payable is determined by adding together:

- a) the total amount of credit advanced in the financial year before the application is made;
- b) the total value of credit in applications submitted to lenders in the financial year before the application is made; and
- c) the total amount of rent payable by consumers under consumer leases entered into in the financial year before the application is made,
- d) and using the result to determine the fee by reference to the scale.

155. Only amounts that relate to provision of credit that is covered by the Act and Code is to be included in the calculation amounts. ASIC advises that, for example, if loans

were made to small businesses that are not covered by the Code, then those amounts are not to be included in the calculation.

156. Residential investment loans are clearly covered by the Code, but were not covered by the UCCC. Despite ASIC's guidance, it is not clear whether, because residential investment loans were not regulated by the UCCC in the 09/10 financial year, those loans should be included in the calculation of the licence fee.
 157. It appears that the method of fee calculation is likely to disproportionately penalise the securitised lending model in that, if different parties are separately licensed and handle different parts of the same transaction, the same annual fee must be paid by each of those licensees compared to a single fee paid by a licensee who processes the full transaction in-house.
-

Registration checklist

Task	Refer to	Completed
Read RG 202 <i>Credit registration and transition</i>		
Ensure ASIC details are up to date (companies and Australian Financial Services holders only).		
Obtain membership of Financial Ombudsman Service or Credit Ombudsman Service Limited.	RG 202 , FOS , COSL	
Complete background checks (applicant, directors, secretaries, partners, trustees).	RG 202	
Obtain authorisations from those who have to make declarations.	RG 202	
Lodge registration application online between 1 April and 30 June 2010.	RG 202	
Appoint credit representatives.	RG 202 , RG 203 , The Act , The Regulations	
Retain a copy of application and supporting documents.	RG 202	
On and from 1 July 2010, comply with general conduct obligations.	RG 202 , RG205 , The Act	

Licensing checklist

Task	Refer to	Completed
Read RG204 <i>Applying for and varying a credit licence</i>		
Read RG205 <i>Credit licensing: General conduct obligations</i>		
Read RG206 <i>Credit licensing: Competence and training</i>		
Read RG207 <i>Credit licensing: Financial requirements</i>		
Read RG208 <i>How ASIC charges fees for credit relief applications</i>		
Read RG209 <i>Credit licensing: Responsible lending conduct</i>		
Read RG165 <i>Licensing: Internal and external dispute resolution</i>		
Read CP112 Dispute resolution requirements for consumer credit ... lending		
Read CP125 <i>Compensation requirements for credit licensees: Further consultation</i>		
Check http://www.asic.gov.au/credit for further regulatory guides.		
Ensure ASIC details are up to date (companies and Australian Financial Services holders only).		
Obtain membership of Financial Ombudsman Service or Credit Ombudsman Service Limited.	RG204 , FOS , COSL	
Complete background checks (applicant, directors, secretaries, partners, trustees).	RG204	
Obtain authorisations from those who have to make declarations.	RG204	
Decide what authorisations are needed on license. Choose either: <ul style="list-style-type: none"> • Engage in credit activities as a lender; or • Engage in all credit activities. 	RG204	
Ensure that adequate policies, systems, processes and arrangements are in place to meet the general conduct	RG204 , RG205 , The Act	

Task	Refer to	Completed
obligations.		
Ensure that written plans have been prepared documenting the policies, systems, processes and arrangements in place to meet the general conduct obligations.	RG204 , RG205 , The Act	
Decide how many representatives you will have.	RG204 , RG205 , RG206	
Decide how many credit representatives you will have.	RG204 , RG205 , RG206	
Decide who your 'fit and proper' people are.	RG204 , RG206 , APS 520	
Obtain necessary documents for each 'fit and proper' person. Necessary documents: <ul style="list-style-type: none"> • statement of personal information; • particulars of any outcomes of concern listed in the statement of personal information; • criminal history check less than 12 months old; • bankruptcy check not more than 12 months old; • credit report less than three months old. 	RG204	
Decide who your 'responsible managers' are.	RG204	
Ensure that responsible managers have appropriate qualifications and experience.	RG204 , RG205 , RG206	
Prepare a summary business description.	RG204	
Obtain adequate professional indemnity insurance if needed.	RG204 , CP125 , The Act	
Determine total amount of credit advanced by you and total value in credit applications submitted to credit providers, in prior financial year for the purpose of determining application fee.	RG204	
Lodge license application online.	RG204	
Pay license application fee.	RG204	
Retain a copy of application and supporting documents.	RG204	

Task	Refer to	Completed
Comply with general conduct obligations after license issued.	RG204 , RG205 , The Act	
Comply with responsible lending obligations after license issued.	RG209 , The Act	
Comply with specific licensee obligations after license issued.	RG207 , The Act	

General conduct checklist

Obligation	Refer to	In place
Engage in credit activities efficiently, honestly and fairly.	RG205 , The Act	
Comply with license conditions.	RG205 , The Act	
Comply with credit legislation and regulations.	RG205 , The Act , The Regulations	
Risk management systems.	RG205 , The Act	
Conflict of Interest arrangements.	RG205 , The Act	
Internal Dispute Resolution.	CP112 , AS ISO 10002-2006, The Act	
External Dispute Resolution.	CP112 , AS ISO 10002-2006, The Act	
Ensure compliance by representatives with legislation, regulations and license conditions.	RG205 , The Act , The Regulations	
Ensure representatives are competent and adequately trained.	RG205 , RG206 , The Act	
Maintain organisational competence.	RG205 , RG206 , The Act	
Adequate financial, technological and human resources to engage in credit activities and carry out supervisory arrangements.	RG205 , RG206 , RG207 , The Act	
Compensation arrangements.	CP125 , The Act	
Written compliance plan.	RG205 , The Act	

Responsible Lending obligations checklist

Obligation	Refer to	In place
Provide a credit guide to consumers.	RG209, The Act	
Ensure that reasonable inquiries are made about consumer's financial position, and requirements and objectives.	RG209, The Act	
Ensure that consumer's financial information is verified.	RG209, The Act	
Ensure that each prospective credit contract assessed for substantial hardship and debt serviceability.	RG209, The Act	
Ensure that each prospective credit contract assessed for meeting consumer's requirements and objectives.	RG209, The Act	
Ensure that each prospective credit contract assessed for suitability and a written record made of assessment.	RG209, The Act	
Provide written quote and have it signed by consumer.	RG209, The Act	
Provider credit proposal disclosure document.	RG209, The Act	
Have process for providing assessment to consumers.	RG209, The Act	

Licensee obligations checklist

Obligation	Refer to	In place
Maintain financial records in required form, content and place.	The Act	
Maintain trust account and lodge statements and audit reports.	The Act	
Comply with audit requirements.	The Act	
Comply with ASIC information requests and notices.	The Act	
Lodge annual compliance certificate.	The Act	
Do not deal with unlicensed credit service providers.	The Act	
Disclose Australian Credit Licence on prescribed documents.	The Act , The Regulations	

Code changes checklist

Task	Refer to	In place
Change business purpose declaration to the new form.	The Act , The Regulations	
Review and change policies, systems, processes and arrangements to include residential investment properties as Code loans.	The Act , The Regulations	
Amend mortgages to remove goods now excluded.	The Act , The Regulations	
Change default notices.	The Act , The Regulations	
Prepare a direct debit default notice.	The Act , The Regulations	
Review and change policies, systems, processes and arrangements for hardship and postponement applications to include new monetary limit and response notices.	The Act , The Regulations	
Prepare new goods surrender/ possession notices.	The Act , The Regulations	
Include comparison rate warning on new documents as necessary.	The Act , The Regulations	
Change references in documents from UCCC to the Code, including section numbers.	The Act , The Regulations , Comparison Table	
Update credit contract and guarantee with new warning.	The Regulations	
Introduce new information sheets and other notices to replace UCCC documents.	The Regulations	