



ASIC

Australian Securities & Investments Commission

REGULATION IMPACT STATEMENT

ASIC implementation of the credit legislation: Responsible lending conduct

February 2010

About this Regulation Impact Statement

This Regulation Impact Statement (RIS) addresses ASIC's proposals for the new responsible lending obligations for credit licensees under the *National Consumer Credit Protection Act 2009*.

What this Regulation Impact Statement is about

- 1 This Regulation Impact Statement (RIS) addresses ASIC's proposals for the new responsible lending obligations for credit licensees under the *National Consumer Credit Protection Act 2009*.
- 2 In developing our final position, we have considered the regulatory and financial impact of our proposals. We are aiming to strike an appropriate balance between:
 - maintaining, facilitating and improving the performance of the financial system and entities in it;
 - promoting confident and informed participation by investors and consumers in the financial system; and
 - administering the law effectively and with minimal procedural requirements.
- 3 This RIS sets out our assessment of the regulatory and financial impacts of our proposed policy and our achievement of this balance. It deals with:
 - the likely compliance costs;
 - the likely effect on competition; and
 - other impacts, costs and benefits.

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A Introduction

Background

Credit legislation

- 4 The *National Consumer Credit Protection Act 2009* (National Credit Act), the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act) and the *National Consumer Credit Protection (Fees) Act 2009* (Credit Fees Act)—collectively the Consumer Credit Protection Reform Package—outline a new national consumer credit regime. The new regime:
- (a) gives effect to the Council of Australian Governments' (COAG) agreements of 26 March and 3 July 2008 to transfer responsibility for regulation of consumer credit, and a related cluster of additional financial services, to the Commonwealth; and
 - (b) implements the first phase of a two-phase Implementation Plan to transfer credit regulation to the Commonwealth endorsed by COAG on 2 October 2008.
- 5 The Consumer Credit Protection Reform Package establishes the key components of the proposed national credit regime, which include:
- (a) a comprehensive licensing regime for those engaging in credit activities via an Australian credit licence (credit licence) to be administered by the Australian Securities and Investments Commission (ASIC) as the sole regulator;
 - (b) industry-wide responsible lending conduct requirements for credit licensees;
 - (c) improved sanctions and enhanced enforcement powers for the regulator; and
 - (d) enhanced consumer protection through dispute resolution mechanisms, court arrangements and remedies.
- 6 The reforms introduce a comprehensive national licensing regime, which is to be distinguished from the current regulation of financial services under the *Corporations Act 2001* (Corporations Act).
- 7 Regulation of consumer credit in the new regime will be the responsibility of ASIC. A key component of the new credit regime is that businesses that provide credit services or that are engaged in other 'credit activities' will be

required to be licensed and meet a range of ‘responsible lending obligations’, set out in Ch 3 of the National Credit Act.

- 8 The rationale for introducing legislative responsible lending obligations was discussed in the Explanatory Memorandum to the National Credit Act: see paragraphs 3.8-3.18.
- 9 In summary, the May 2008 final Productivity Commission’s report on the Review of Australia’s Consumer Policy Framework (the PC Report) noted an increased use of credit in Australia over the last 20 years.
- 10 The Productivity Commission in its review of consumer protection noted that poor lending practices have contributed to a growing number of borrowers experiencing financial stress, and recommended consideration, in the context of a national credit regime, of what, if any, initiatives are required to promote ‘responsible lending’.
- 11 The responsible lending obligations were initially proposed to be introduced via State based legislation in the form of the Finance Brokers Bill (NSW) in November 2007.
- 12 However, before the draft Finance Brokers Bill was finalised the States agreed to the transfer of responsibility for credit to the Commonwealth, allowing for the introduction of a national approach to licensing that extends to all persons engaging in credit activities.
- 13 This led to responsible lending obligations being included under the Commonwealth regime, which is discussed below.

Obligations on licensees under the credit legislation in relation to responsible lending

- 14 Among other things, the responsible lending obligations require a credit licensee to undertake certain steps before they suggest, assist with, or provide a new credit contract or lease, to a consumer. In summary, the provisions in the National Credit Act require the credit licensee to:
- (a) make reasonable inquiries about the consumer’s objectives and requirements in relation to the credit contract and their financial situation;
 - (b) make an assessment as to whether the credit contract will be ‘not unsuitable’ for the consumer (and, if requested, provide the consumer with an assessment in writing that the credit contract is ‘not unsuitable’ for them); and
 - (c) not enter into a credit contract with a consumer who will be the debtor under the contract if the contract is unsuitable for the consumer under the relevant subsection.

Note: Unless otherwise mentioned, references to a 'contract' or 'credit contract' also include reference to a consumer lease.

- 15 In addition, the responsible lending obligations also apply where a credit licensee:
- (a) increases the limit on an existing credit contract, suggests that a consumer increase the limit or assists the consumer to increase the limit; or
 - (b) suggests to a consumer that they remain in an existing contract or consumer lease.
- 16 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.

Regulatory impact of the credit legislation

- 17 The regulatory impact of the credit licence obligations established under the credit legislation was assessed in the RIS attached to the Explanatory Memorandum to the National Credit Bill (Explanatory Memorandum).¹
- 18 In summary, that RIS found:
- (a) The main group affected is industry participants who will need to become holders of a credit licence in order to continue engaging in credit activities.
 - (b) The most significant impact will be on those who only conduct business in states or territories where there is currently no licensing or registration scheme. It can be anticipated that these businesses will face significant transitional costs.
 - (c) Licensing will involve one-off costs associated with applying for a credit licence, together with ongoing fees for lodging various documents. There will also be costs of complying with the ongoing obligations associated with the licence, including, in particular:
 - (i) training and supervision costs; and
 - (ii) maintaining adequate compensation arrangements (e.g. professional indemnity insurance).
- 19 The size of the affected population was also addressed in the RIS attached to the Explanatory Memorandum. However, there is some degree of uncertainty about the size and structure of the market, as there is no

¹http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4180_ems_668afa2a-603f-4c9c-ba71-f405d60faad3%22

nationally consistent registration or licensing framework to provide that information.

- 20 In terms of industry participants, the licensing system existing in Western Australia provides some guidance as to the regulatory population. Western Australia has reported that there are approximately 190 credit providers registered in that jurisdiction, of whom approximately 100 operate nationally. These figures do not include authorised deposit-taking institutions (ADIs) registered under the *Banking Act 1959* (approximately 500 nationally) that may operate in Western Australia, as ADIs are not required to be licensed under the WA legislation.
- 21 In addition to credit providers, the proposed regulatory framework also covers persons whose business involves suggesting consumers enter into credit contracts, and assisting them to enter into credit contracts. Such participants would primarily (though not exclusively) be comprised of finance brokers. There are approximately 3,000 licensed finance brokers in Western Australia and, of those, around 200 have addresses outside Western Australia.
- 22 Persons other than brokers that are part of the credit supply chain and may be covered by aspects of the proposed regulatory framework include aggregators and mortgage managers. It is estimated that between one and two hundred persons would fall into those groups. Persons whose business is the collection of debts (either as assignee or as agent of a credit provider) will also be subject to aspects of the proposed regime, including licensing.
- 23 Based on the above, it is estimated that the affected population, in terms of industry participants, could be as high as 10,000 nationally.
- 24 There are some overlaps between the new credit licence regime and the existing Australian financial services (AFS) licence regime administered by ASIC. It is likely that some of the affected parties are already subject to regulation by ASIC in some way, including, for example, existing holders of an AFS licence.

What this RIS is about

- 25 This RIS assesses the regulatory impact of ASIC's proposals associated with implementation of the credit legislation. It does not deal with the decision to require credit providers to be licensed, as this is an obligation imposed under the National Credit Act. Rather, this RIS assesses the regulatory impact of those decisions within ASIC's discretion that are necessary for implementation of the credit legislation by ASIC.

- 26 Because the national credit regime is new, ASIC will continue to monitor the impact of our regulation on the industry, and will revise our approach if necessary.

Assessing the problem

- 27 The National Credit Act introduces a licensing regime for all persons engaging in credit activities. A credit licensee must comply with, among other obligations, the responsible lending obligations under Ch 3 of the National Credit Act.

Current approach

- 28 Currently, the states and territories regulate credit and consumer lending through the Uniform Consumer Credit Code (UCCC). There are no comprehensive responsible lending obligations imposed on lenders under the UCCC. The National Credit Act introduces a new obligation on a credit licensee to conduct an assessment as to whether a proposed credit contract or proposed credit increase will be unsuitable for the consumer.

Note: Any future reference to a 'credit contract' also includes reference to an increase in credit limit.

- 29 While responsible lending is a new statutory obligation, many lenders already have voluntarily developed their own responsible lending procedures through industry codes of conduct. For example, the Australian Bankers' Association (ABA) has rules for its members under the Code of Banking Practice. Rule 14 of the ABA Code of Banking Practice *Account suitability* states that the member will provide details of accounts suitable for the customer's needs if the customer states (or the member becomes aware) that they are a low income earner or a disadvantaged person.
- 30 Other associations, such as the Mortgage & Finance Association of Australia (MFAA) and Senior Australians Equity Release Association (SEQUAL), have similar codes of conduct that apply to their members. Furthermore, some lenders may already have internal policies and procedures relating to verifying a potential borrower's capacity to repay. For many of these lenders, the responsible lending obligations may not be that different from the processes already implemented by them. Nonetheless, this may be a completely new obligation for many other lenders.

Problems

- 31 The new National Credit Act imposes an obligation on a credit licensee to conduct an assessment as to whether a proposed credit contract or proposed credit increase will be unsuitable for the consumer. The Act imposes a high-

- level principle-based obligation, but does not provide any specific guidance on as to how the responsible lending obligation should be met.
- 32 Although many lenders and brokers have adopted industry codes or internal practices in relation to responsible lending, these approaches are not mandatory, and hence some parts of the credit industry have not adopted responsible lending practices. As the responsible lending requirements under the National Credit Act apply to all credit licensees, those licensees who have not already adopted voluntary procedures will require guidance on what they need to do in order to comply with the legislative obligation.
- 33 As this is a new responsibility for ASIC, ASIC has not previously provided any guidance on this obligation. There is no current existing equivalent obligation for Australian Financial Services (AFS) Licensees.
- 34 The lack of standards or guidance as to what assessment should be undertaken by credit licensees means that a variety of different and potentially inconsistent approaches could be taken across the industry in order to comply with the requirement.
- 35 This has the potential to cause confusion for industry in determining the behaviour required in order to comply with the law. This in turn poses a risk that consumers seeking credit may find it more difficult to compare one lender with another. It may also create confusion about the requirements, which has the potential to undermine consumer confidence. Such impacts would be detrimental to the economy.
- 36 Government intervention to clarify the requirements under the law could address this potential problem.

Objectives of government action

- 37 According to the Explanatory Memorandum, the responsible lending provisions are intended to:
- (a) introduce standards of conduct to encourage prudent lending and leasing, and to 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).
- 38 In relation to implementation of the credit legislation in general, ASIC's proposals seek to achieve the objectives stated in the Explanatory Memorandum, and to:
- (a) maintain, facilitate and improve the performance of the financial system and entities in it;

- (b) promote confident and informed participation by investors and consumers in the financial system; and
- (c) administer the law effectively and with minimal procedural requirements.

39 The key responsible lending obligation is that licensees must ensure that they do not provide a credit contract or lease to a consumer (or suggest to, or assist, a consumer to enter into a credit contract or lease) that is unsuitable for the consumer.

The responsible lending obligations in the National Credit Act are designed to ensure that credit licensees, prior to entering into a credit contract with a consumer, conduct appropriate inquiries of the consumer to ensure that the credit is provided responsibly. For example, a credit licensee must make reasonable inquiries about a consumer's financial situation to determine whether the consumer has the capacity to repay the credit contract. The responsible lending obligations enhance consumer protection by ensuring that credit licensees do not provide credit to consumers who do not have the capacity to repay the credit, or is otherwise unsuitable for the consumer.

B Options and impact analysis

40 Possible options for the responsible lending obligations that ASIC could impose on a credit licensee are:

Option 1: ASIC imposes minimum requirements on credit licensees on how to comply with the responsible lending obligations;

Option 2: ASIC provides indicative guidance on our expectations regarding the processes credit licensees should use to assess whether a credit contract is 'not unsuitable' for a consumer, in compliance with the National Credit Act (preferred option); and

Option 3: ASIC does not provide any guidance, but existing voluntary industry standards will continue to apply to some credit licensees.

41 Option 2 (our preferred option) sets out our expectations on how a credit licensee might meet the responsible lending obligations in the National Credit Act, without imposing mandatory requirements on the licensee.

42 As stated above, the National Credit Act imposes the obligation on a credit licensee to conduct reasonable inquiries of a consumer prior to entering them into a credit contract, and prohibits the licensee from entering the consumer into a credit contract that is unsuitable for the consumer. In our recommended approach, we are not imposing new obligations; we are merely setting out our expectations about how a credit licensee will meet the responsible lending obligations under the National Credit Act.

Option 1: ASIC imposes minimum requirements on credit licensees

Description of option

43 Under this option, we would impose minimum requirements that credit licensees will need to comply with in order to meet the responsible lending obligations. These requirements would be set out in a regulatory guide. This could include minimum requirements in relation to:

- (a) factors that all licensees will need to consider when conducting reasonable inquiries about the consumer;
- (b) verification of information; and
- (c) the content of the written assessment.

Impact on industry

- 44 Providing minimum requirements that credit licensees must follow in order to meet the responsible lending obligations would provide predictability for industry, and ensure consistency in the application of the credit legislation by licensees. It would ensure that all credit licensees conduct certain checks and verifications to meet the responsible lending obligations. Credit licensees and customers would know beforehand what minimum factors would need to be checked and verified, regardless of the type, size and complexity of the loan, or characteristics of the consumer.
- 45 However, this option is relatively inflexible and would not allow industry to tailor, as appropriate for their businesses, the processes they use to ensure that they comply with the responsible lending obligations. This lack of flexibility would likely lead to greater compliance costs, as industry would be required to change their process and IT systems to meet the ASIC minimum standards, and this might not always be the most efficient approach for the business concerned. For example, the legislation requires credit licensees to make ‘reasonable inquiries’ about the consumer’s financial situation. What is ‘reasonable’ in a given circumstance is best determined by the credit licensee in light of their business model, the type of customer, the size of the loan, and the overall processes undertaken by the licensee to assess whether a particular credit contract is ‘not unsuitable’ for a consumer.

Impact on consumers

- 46 Setting minimum requirements is likely to result in inquiries and verification processes that are more predictable and consistent for consumers. As there will be base-level, consistent factors across the board for all lenders, it may also reduce the possibility of a consumer ‘shopping’ for verifications—where the consumer is refused credit by one provider, but attempts to locate a different lender who conducts different inquiries to arrive at a different assessment on unsuitability.
- 47 Furthermore, imposing a minimum level of reasonable inquiries arguably offers greater consumer protection—credit licensees must meet a minimum level of inquiries, which would not exist under Option 2, and therefore conduct a more stringent level of investigation, thereby reducing the likelihood that licensees will not conduct sufficient inquiries.
- 48 However, there may be an unintended consequence that some licensees will only conduct the inquiries provided by ASIC, and not conduct further inquiries where it is appropriate due to the characteristics of the loan or circumstances of the consumer. That is, a ‘minimum requirements’ checklist could allow less scrupulous licensees to ignore other relevant issues that fall

outside the scope of the factors set by ASIC and hide behind technical compliance. This could result in a lower standard of consumer protection.

- 49 Also, while the inquiries may be more consistent for consumers, there is also a likelihood of consumer dissatisfaction and complaints where they may be requested to answer questions and produce documents that they perceive to be irrelevant for that type of loan.

Impact on government

- 50 The imposition of the minimum reasonable inquiries may improve the compliance with the National Credit Act and general licence obligations. This would have the effect of reducing the incidence of non-complying behaviour requiring regulatory action by ASIC, and accordingly limit enforcement costs in pursuing matters. However, it may also increase costs for ASIC as it is likely that licensees would need to regularly apply for relief from the minimum requirements.

Option 2: ASIC provides indicative guidance to credit licensees on responsible lending obligations (preferred option)

Description of option

- 51 Under this option, we would not impose any set minimum requirements, but instead provide indicative guidance on our expectations about what credit licensees should do in order to comply with the responsible lending obligations under Ch 3 of the National Credit Act.
- 52 This guidance could include, for example, a list of factors that could be taken into account when conducting reasonable inquiries. However, as opposed to Option 1, the factors would not be considered mandatory, but instead be aimed at providing assistance to credit licensees in the formulation of their own compliance measures.
- 53 Under this option, we would provide indicative guidance about our expectations for compliance, including:
- (a) That the obligation to conduct reasonable inquiries of the consumer is scalable. That is, what constitutes making ‘reasonable inquiries’ will vary depending on the circumstances in which the credit contract is entered into. We would also provide indicative guidance about the types of inquiries that could be considered ‘reasonable’, as well as guidance about what could constitute ‘reasonable steps to verify information’. For example, we would provide guidance that 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 relative to the consumer’s capacity to repay the loan.

- (b) Detailing various factors that a licensee could take into account when determining whether a credit contract or credit increase would be ‘not unsuitable’ for a consumer (depending on the type of credit contract or increase). This section would also include guidance about the factors that licensees could take into account when assessing whether entering into a credit contract would cause substantial hardship for the consumer. For example, we would provide guidance that credit licensees may use ‘cost of living’ benchmarks to determine if a particular consumer will experience substantial hardship as a result of entering into the loan.
- (c) Setting out the information a credit licensee should include in the written assessment that a credit contract is ‘not unsuitable’.

54 See Consultation Paper 115 *Responsible Lending*, which sets out in more detail the indicative guidance which RG 209 *Credit licensing: Responsible lending conduct* would incorporate.

Impact on industry

55 Similar to Option 1, the impact on industry of this option will vary from one credit licensee to another. Entities that already engage in a level of inquiries as to a borrower’s capacity to repay may not have to change their processes significantly in order to comply with the new obligations. However, the impact under this option is expected to be less than under Option 1 as it will not be based on a set minimum level of inquiries or verification for all credit licensees, but instead allow licensees to tailor their inquiries based on the characteristics of the loan and target consumer.

56 This approach also allows far greater flexibility than Option 1—we would provide some general factors that should be considered for *most* credit contracts; however, we would not impose any minimum level of inquiries. Instead, credit licensees would ultimately be responsible for determining the relevant inquiries for assessing whether a credit contract is ‘not unsuitable’ in order to meet the responsible lending requirements. As such, credit providers would be able to tailor the type and level of inquiries and verification based on the type, size and complexity of the credit contract and the characteristics of the consumer. This approach also recognises that the type of inquiries that may be deemed reasonable for one credit product may not be as relevant for another credit product.

57 Flexibility in the level of inquiries will affect the resulting cost of compliance. As credit licensees will not be expected to conduct inquiries based on a fixed minimum list, it will arguably be less costly for credit licensees to comply with this obligation than Option 1. This may be particularly true for some smaller lenders who offer a very limited product

range and can tailor the reasonable inquiries and processes so that they are appropriate for the product(s) offered. Costs to licensees will therefore vary, depending on the type of loan product and customer base. As a result, it is likely that lenders will already have processes in place to conduct similar inquiries.

- 58 In CP 115, this flexible approach was referred to as a ‘scalable’ approach. That is, what a licensee needs to do to meet the responsible lending obligations can be ‘scaled up’ or ‘scaled down’ depending on the circumstances.
- 59 Most respondents to CP 115 were in favour of a scalable approach to the reasonable inquiries obligation. Many submissions sought clarification on our expectations for the obligations, but moved away from any suggestion that we should provide a ‘checklist’ of factors. Rather, many submissions recommended that we provide non-exhaustive and non-compulsory factors that licensees can take into account when complying with the reasonable inquiries obligation.
- 60 Although industry will incur compliance costs to meet the responsible lending obligations imposed by the Act, this option imposes no or limited additional compliance costs for credit licensees by ASIC’s indicative guidance. Meeting the responsible lending obligations will involve compliance costs (e.g. changes to IT systems and additional record keeping), as well as economic costs (e.g. a licensee may be restricted from selling credit products to some consumers). However, these are compliance costs resulting from the obligations under the National Credit Act, rather than as a result of this option.
- 61 For example, section 117(1)(a) and 130(1)(a) requires credit licensees to make reasonable inquiries about the consumer’s requirements and objectives. From our consultation process, we understand that these types of inquiries are not currently always made. The legislation makes these inquiries mandatory in all cases, and therefore requires credit licensees to alter their systems to ensure that these inquiries are made. This option (ie indicative guidance from ASIC) would merely assist licensees in meeting their existing obligations, but does not itself impose any new obligations.

Impact on consumers

- 62 Without the imposition of a minimum threshold of inquiries, there is a risk that some credit providers may not always conduct a suitable level of inquiries to meet the obligation.
- 63 However, it is expected that consumers will also derive benefits from this option through the tailored and appropriate inquiries for their requested credit product, which is a better outcome from a consumer protection

perspective. Appropriate inquiries for particular credit products should mean that consumers are required to answer inquiries and produce information that is more relevant to their requested credit product. In contrast, as noted above, a mandated checklist (as in Option 1) could allow less scrupulous licensees to ignore other issues and hide behind technical compliance.

Impact on government

- 64 This option will require ASIC to monitor compliance with the responsible lending obligation to ensure that credit licensees are conducting inquiries that are appropriate to the credit product offered. However, it offers a ‘middle road’ between Options 1 and 3, and carries a lower impact than either of these options. As the guidance can be flexibly applied, it will not need to be constantly updated (as would be required under Option 1). In addition, it will provide a framework for ASIC to monitor compliance by industry (which is lacking under Option 3).

Option 3: ASIC takes no action

Description of option

- 65 Under this option, we would not provide guidance on how a credit licensee would comply with the responsible lending obligation under the National Credit Act. Instead, as part of its normal industry consultation and compliance work, we would encourage industry to develop its own policies on the obligation, and decide for itself how best to comply.

Impact on industry

- 66 In our view, this option is not realistic. The obligation under the National Credit Act is a high-level principle and providing no guidance would place a heavy burden on industry in determining the behaviour required to comply with the obligation. Our consultation has indicated that industry would like guidance from us on how to comply with the responsible lending obligations and issuing guidance will save industry the cost of developing its own policies.
- 67 Failure to provide any guidance may also result in industry applying vastly inconsistent approaches and standards in attempting to comply with the obligation, potentially diminishing the level of compliance with the requirements.
- 68 The number of issues raised by stakeholders in the submissions to CP 115 also highlights the need for clarification on various aspects of the requirements.

- 69 Without any guidance from ASIC, it may be more difficult for lenders to develop their own standards and thus be more costly.

Impact on consumers

- 70 This option would arguably lead to a lower level of consumer protection than if ASIC provided any level of guidance, as the interpretation of what is required to meet the responsible lending is likely to vary considerably between licensees. The absence of guidance could have detrimental effects on consumers, as it may lead some licensees to adopt procedures that do not adequately meet the high-level principles of the responsible lending obligation. For example, if the licensee does not implement procedures to adequately verify the customer's income, this option could result in a consumer being sold a loan that leads to over indebtedness.

Impact on government

- 71 ASIC would not be required to issue a new regulatory guide but would be required to devote resources to assist industry in developing its own policies. We would also need to have our own internal policy about meeting the responsible lending obligations.
- 72 It is likely that we will need to allocate greater resources to monitoring compliance with the obligation. As industry will have minimal guidance, it is likely that disparate standards will be applied across the industry and, therefore, there is a greater risk that some licensees may not be conducting sufficient inquiries to meet the obligation.
- 73 We do not believe that this option would provide significant savings to ASIC when compared to the above options and, in fact, would be likely to lead to increased costs due to the complexity of determining whether a licensee's own policy complies with the high-level principles in the National Credit Act.

Conclusion and recommended option

- 74 We recommend Option 2. The requirements set out in the regulatory guide under this option will help to ensure that a credit licensee will satisfy the responsible lending obligations under the National Credit Act to conduct reasonable inquiries as to whether a credit contract is 'not unsuitable' for a consumer. Unlike Option 1, however, the recommended option achieves the regulatory objectives without imposing the unreasonable burden on credit licensees in conforming to a minimum list of factors when complying with the obligation, as well as the difficulty in conforming to a fixed list of factors no matter regardless of the type of credit product. We also believe that the

cost to industry of developing its own policies under Option 3 is prohibitive when compared to Options 1 and 2, and also presents a greater risk to consumers.

C Consultation

- 75 On 2 September 2009, ASIC issued Consultation Paper 115 *Responsible Lending* (CP 115) to consult on the responsible lending requirements under the National Credit Act and our proposed guidance in relation to the requirement. We consulted on the guidance set out in Option 2, and we asked for feedback about whether this approach was useful for credit licensees, and whether other guidance was needed.
- 76 We received 40 responses to CP 115 from a variety of stakeholders, including credit providers and other participants in the credit industry (both large and small), relevant industry bodies, ombudsman services and consumer groups.
- 77 The submissions we received in relation to the responsible lending requirements were generally supportive of the proposals in CP 115. Most respondents provided feedback on a number of key issues of particular concern to them. The submissions provided valuable feedback and suggestions, and the guidance in CP 115 was amended to take into account this feedback where appropriate.
- 78 We have set out below a summary of ASIC's response to the feedback received in submissions to CP 115. For further detail, please see our report *Response to submissions on CP 115 Responsible lending* (REP 191).

Is guidance on responsible lending necessary?

- 79 The submissions we received for CP 115 were very supportive of our overall approach to providing guidance on responsible lending, with some respondents noting that the guidance would assist them in complying with the new requirements. Many submissions also requested that we provide more guidance on particular aspects of the legislation than that we proposed under CP 115, demonstrating the need for some level of guidance.
- 80 The submissions to CP 115 showed that guidance on the responsible lending obligations is vital for credit licensees in understanding their responsibilities under the legislation. There did not appear to be any indications from the submissions that guidance from us on the obligations would not be beneficial to licensees or consumers.
- 81 There is a strong chance that failure by ASIC to provide suitable guidance to industry on the responsible lending obligations will lead to difficulty for licensees in complying with the requirements, and may lead to a larger degree of unsuitable credit contracts being provided to consumers.

ASIC's response

82 We believe that ASIC should provide guidance to credit licensees to assist industry in complying with the new responsible lending obligations. This is why Option 3 above (i.e. ASIC takes no action) is not a viable option.

83 As the obligations are a new requirement to credit licensees and are high-level, principles-based obligations, we believe that, without any guidance, industry may have difficulty in interpreting the legislation. This may result in wide variation in the application of the standards, a poorer level of compliance, and, accordingly, a lower level of consumer protection. Failure to provide industry with any guidance may also result in greater cost to industry in attempting to develop new policies and procedures without ASIC's guidance.

84 We believe that providing guidance will assist licensees in interpreting the legislation and understanding our expectations, and will also result in a more consistent compliance across industry.

Guidance on specific issues relating to responsible lending

85 The main issues raised by respondents related to:

- (a) clarification on the level of reasonable inquiries expected by ASIC to meet the obligation;
- (b) the extent to which information needs to be verified, and the extent to which licensees can rely on information from the consumer;
- (c) the distinction between credit providers and credit assistance providers, and the different expectations for these groups of licensees in meeting the responsible lending obligations; and
- (d) our expectations regarding the content of the written assessment that a credit contract is 'not unsuitable' for the consumer.

86 Consistent with our overall approach, we suggested that these obligations should be scalable, depending on various factors of the proposed credit, such as the size, type and complexity of the credit contract.

87 There was strong support for this proposal from various stakeholders. In general, submissions stated that this would allow licensees to conduct an appropriate level of inquiries based on the characteristics of the proposed credit, and strike an appropriate balance between consumer protection and costs to the licensee.

88 A small number of submissions were in favour of establishing a minimum level of standards, stating that it would provide an appropriate level of consumer protection over a purely indicative approach. However, other

submissions emphasised the need for flexibility to conduct inquiries appropriate to the type of credit.

ASIC's response

- 89 We do not believe that we should prescribe a minimum level of conduct required to comply with the responsible lending obligations, such as a minimum list of reasonable inquiries, as the National Credit Act requires the lender to conduct *reasonable* inquiries of the consumer. We believe that imposing a set minimum list of factors to be considered for all credit products may lead to lenders having to conduct inquiries that may not be reasonable for that type of product.
- 90 We believe that, because of the wide range of credit products of differing complexity and possible size, as well as the range of consumers, credit licensees are best placed to decide the correct types of inquiries and verification that are appropriate based on the characteristics of the loan and consumer.
- 91 Providing indicative guidance will also assist industry in developing its own policies and procedures to comply with the responsible lending obligations. We believe that it will assist industry in developing more consistent policies and procedures, without the risk of forcing industry to conduct inappropriate inquiries, while ensuring that consumers are suitably protected.

D Implementation

- 92 Our recommendation will be implemented by the publication of a new regulatory guide providing industry with guidance on our expectations on responsible lending.
- 93 As this regime is new, we plan to learn from the feedback given to us during the first few years after implementation. Accordingly, we will continue to monitor our responsible lending requirements and revise our guidance as appropriate.