



ASIC

Australian Securities & Investments Commission

REPORT 178

Response to submissions on CP 110 General conduct obligations of credit licensees

December 2009

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 110 *General conduct obligations of credit licensees* (CP 110) and details our responses in relation to those issues.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Disclaimer

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

This report does not contain ASIC policy. Please see Regulatory Guide 205 *Credit licensing: General conduct obligations* (RG 205).

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A Overview/Consultation process

1 Under the *National Consumer Credit Protection Act 2009* (National Credit Act), Australian credit licensees (credit licensees) must comply with a number of ‘general conduct obligations’. In Consultation Paper 110 *General conduct obligations of credit licensees* (CP 110), we consulted on our proposed guidance for credit licensees about meeting these general conduct obligations under s47(1).

Note: All section references in this report are to the National Credit Act, unless otherwise specified.

2 This report highlights the key issues that arose out of the submissions received on CP 110 and our responses to those issues.

3 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 110. We have limited this report to the key issues.

4 For a list of the non-confidential respondents to CP 110, see the Appendix. Copies of the non-confidential submissions are on the ASIC website at www.asic.gov.au/cp under ‘CP 110’.

Responses to consultation

5 We received 20 responses to CP 110 from a broad range of stakeholders, including relevant industry bodies, individual companies and consumer protection groups. We are grateful to respondents for taking the time to send us their comments.

6 Responses were largely supportive of the proposals in CP 110.

7 Some respondents only provided feedback on a small number of key issues that were of particular concern to them.

8 The main issues raised by respondents related to:

- the proposed structure of the guidance for credit licensees; and
- our guidance about conflicts of interest.

B Response to feedback

Key points

In CP 110, we sought feedback on whether our proposed guidance for complying with the general conduct obligations in s47(1) was appropriate and whether there was other guidance we should consider providing.

Submissions generally supported our overall proposed approach.

We received specific feedback on:

- the structure of the regulatory guide (see paragraphs 9–11); and
- our guidance about the conflicts of interest obligation (see paragraphs 12–16).

Structure of the regulatory guide

- 9 In CP 110, we attached as an appendix an updated version of Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104). The updated RG 104 included our proposed guidance for credit licensees as well as existing guidance for Australian financial services (AFS) licensees.
- 10 We asked for feedback about whether we should provide guidance to credit licensees about their general conduct obligations in an updated version of RG 104, or in a separate new regulatory guide.
- 11 While some respondents preferred that RG 104 be updated to include guidance for credit licensees, others stated that the guidance should be contained in a new regulatory guide.

ASIC's response

As the wide range of submissions on this issue indicated, there are benefits in each approach. On balance, we have decided to issue the guidance for credit licensees in a new regulatory guide: Regulatory Guide 205 *Credit licensing: General conduct obligations* (RG 205).

We think this is the best approach as it will facilitate credit-specific guidance, which may be developed as necessary where issues arise in the future. It also simplifies the language used in the guidance and the structure of the guide.

Guidance about the conflicts of interest obligation

- 12 If you are a credit licensee, you must have internal systems in place to ensure that your clients are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by you or your representatives: see s47(1)(b).
- 13 In our proposed guidance, we stated that:
- this obligation also includes the obligation to manage and monitor any conflicts that arise in relation to any credit activities you engage in; and
 - the obligation for credit licensees is more explicit about the required outcomes for the consumer than the equivalent obligation for AFS licensees.
- 14 Some respondents asked us to provide more guidance about the conflicts of interest obligation.
- 15 Other submissions also noted that the Explanatory Memorandum to the National Credit Bill (Explanatory Memorandum) states that this obligation ‘only applies to conflicts of interest that arise by operation of law’: para 2.115, Explanatory Memorandum.
- 16 The feedback received in the submissions indicates that further guidance is required on this issue, particularly in relation to the text in para 2.115 of the Explanatory Memorandum.

ASIC's response

To address this issue, we have provided further guidance (based on the updated Explanatory Memorandum in para 2.117), which states that the obligation to ensure that clients are not disadvantaged by any conflicts of interest arises when a licensee's interests conflict with their legal obligation or duty to the borrower. This obligation can arise under the National Credit Act or at law (whether through statute, common law or a contractual arrangement).

We have also provided additional guidance about how the conflicts obligation for credit licensees relates to the conflicts obligation for AFS licensees. Our guidance is consistent with our stated view that the obligation for credit licensees in s47(1)(b) is more explicit about the required outcomes for the consumer than the obligation under s912A(1)(aa) of the *Corporations Act 2001* that applies to AFS licensees.

Appendix: List of non-confidential respondents

- AAMC Training Group
- Abacus Australian Mutuals
- Australasian Compliance Institute
- Australian Bankers' Association
- Australian Collectors & Debt Buyers Association
- Australian Institute of Credit Management
- Challenger Financial Services Group
- Dun & Bradstreet
- Financiers Association of Australia/Min-it Software (joint submission)
- GE Capital Finance Australasia
- Institute of Chartered Accountants in Australia
- Institute of Mercantile Agents
- Insurance Council of Australia
- Legal Aid ACT
- Legal Aid Queensland
- Mortgage & Finance Association of Australia
- National Financial Services Federation Limited
- Principled Mortgage Investments