



ASIC

Australian Securities & Investments Commission

REPORT 179

Response to submissions on CP 111: Financial resources arrangements for credit licensees

December 2009

About this report

This report highlights the key issues that arose out of the submissions received to Consultation Paper 111 *Compensation and financial resources arrangements for credit licensees* (CP 111) regarding our proposals to administer the financial resource requirements and details our responses in relation to those issues.

The submissions we received about the requirements for compensation arrangements for credit licensees are discussed in Consultation Paper 125 *Compensation requirements for credit licensees: Further consultation* (CP 125).

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 National Credit Act, the Corporations Act 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 207 *Credit licensing: Financial requirements* (RG 207) and Consultation Paper 111 *Compensation and financial resources arrangements for credit licensees* (CP 111).

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A Overview/Consultation process

Key points

We consulted on the financial resource requirements ASIC should impose on Australian credit licensees.

There was general support for our proposals relating to financial resource requirements.

- 1 Under the *National Consumer Credit Protection Act 2009* (National Credit Act), a person who engages in a credit activity will be required to obtain an Australian credit licence and will be subject to the conduct obligations under Ch 2 of the National Credit Act, including the obligation to have adequate financial resources.
- 2 In Consultation Paper 111 *Compensation and financial resources arrangements for credit licensees* (CP 111), ASIC consulted on the financial resource requirements we should impose on the holder of an Australian credit licence.
- 3 CP 111 proposed that credit licensees must:
 - (a) self-assess whether they have adequate financial resources to conduct their business in compliance with the National Credit Act and their licence obligations;
 - (b) monitor their cash flows on an ongoing basis and have reasonable grounds to believe that they will have sufficient funds to meet their obligations as they fall due; and
 - (c) confirm on an annual basis that they have sufficient financial resources to comply with their licence obligations and are able to meet any debts as and when they become due and payable.
- 4 In CP 111, we also consulted on our proposals regarding the requirement under the National Credit Act to have adequate compensation arrangements. We have decided to consult further on this issue. The submissions we received in response to our proposals in CP 111 on adequate compensation arrangements are discussed in Consultation Paper 125 *Compensation requirements for credit licensees: Further consultation* (CP 125).
- 5 This report highlights the key issues that arose out of the submissions received to CP 111 about the obligation to have adequate financial resources and our responses to those issues.

- 6 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 111. We have limited this report to the key issues.
- 7 For a list of the non-confidential respondents to CP 111, see the Appendix. Copies of the submissions are on the ASIC website at www.asic.gov.au/cp under CP 111.

Responses to consultation

- 8 We received 15 responses to CP 111 from a variety of sources including credit providers and other participants in the credit industry (both large and small), relevant industry bodies, legal bodies and law firms. We are grateful to respondents for taking the time to send us their comments.
- 9 The submissions we received were largely supportive of the proposals in CP 111 in relation to the financial resource requirements. Most respondents only provided feedback on a small number of key issues of particular concern to them.
- 10 The main issues raised by respondents related to:
- whether ASIC should impose any financial resource requirements on credit licensees; and
 - whether ASIC should impose more prescriptive requirements on how to comply with the financial resource requirement.
- 11 Our finalised regulatory guide is Regulatory Guide 207 *Credit licensing: Financial requirements* (RG 207).

B Composition of the financial resource requirements

Key points

We have consulted on whether ASIC should:

- introduce financial resource requirements for credit licensees (see paragraphs 12–14); and
- impose more prescriptive obligations on how to comply with the financial resource requirement (see paragraphs 15–18).

Should we impose financial resource requirements for credit licensees?

- 12 Subject to a small number of exceptions, the submissions we received were almost unanimous in their support for the proposal that we impose some general financial resource requirements for credit licensees as outlined in the CP 111. In CP 111 we said that a credit licensee should self-assess whether it has adequate financial resources to comply with its credit licence obligations
- 13 Two respondents recommended that ASIC should not impose financial resource requirements because any risk is borne by the credit provider and not the consumer. According to this argument the financial resource requirements do not assist consumers because they will not suffer financial detriment if a credit provider fails. If the credit business fails the loans are either assigned pursuant to the contractual terms, or the receiver, if appointed, seeks to wind down the loan book according to the contractual terms.
- 14 One respondent suggested that if a lender does not have adequate financial resources then they will simply not lend and therefore consumers are not at risk of suffering loss.

ASIC's response

Our proposal received generally positive feedback.

The financial resource requirements will contribute to a credit licensee's capacity to meet its financial commitments, including obligations to consumers. The financial resource requirements are concerned with minimising the likelihood that insufficient resources will put compliance with the National Credit Act and a credit licensee's obligations at risk. A credit licensee can only conduct its business in compliance with the National Credit Act and its licence obligations if it has adequate resources, including financial resources, to do so.

Should we impose more prescriptive obligations?

- 15 In CP 111 we proposed that we should not impose minimum financial resource requirements as part of the credit licence conditions. We also proposed that we expect that a credit licensee's responsible financial manager will monitor cash flows and ensure that the credit licensee has access to sufficient financial resources to meet their obligations as they fall due.
- 16 One respondent supported these proposals but encouraged ASIC to provide more prescriptive guidance on how credit licensees would comply with the requirement to maintain adequate financial resources, particularly for small businesses.
- 17 By contrast, one respondent submitted that adopting a more prescriptive approach would be based on the incorrect assumption that all credit licensees are the same and therefore have the same financial requirements. According to this respondent, such an approach may discourage credit licensees from assessing what financial requirements are adequate for their particular needs. Imposing more prescriptive requirements would encourage credit licensees to simply satisfy the minimum requirement, regardless of whether this is appropriate to meet their obligations under the licence.
- 18 We did not receive any significant objections to our proposal that the credit licensee should monitor its cash flows and have sufficient cash to meet obligations that may arise within the next three months.

ASIC's response

We do not believe that we should prescribe minimum financial requirements because the general conduct obligations, including the financial resource obligations, are intended to be principle-based so that credit licensees can be flexible in adopting practices that suit their organisation: see the Explanatory Memorandum to the National Consumer Credit Protection Bill 2009, para 2.105.

We believe that because of the large range in the activities, the scale and types of credit licensees, each credit licensee is best placed to understand their business and the particular risks that business faces. Therefore, the credit licensee should be responsible for determining what constitutes adequate financial resources taking into account the nature, scale and complexity of their business in assessing what is adequate.

We will expect as a minimum that a credit licensee should ensure that they have access to sufficient financial resources to be able to meet their debts as and when they become due and payable. We also expect that a credit licensee will plan and monitor to ensure that have sufficient cash flow to adequately meet the obligations as a credit licensee under the National Credit Act.

ASIC's response (cont.)

We have not included in our final policy any specific future time period when licensees should consider their cash flow. We want to ensure that licensees continually review their financial resources and that they only operate while they can pay their debts as and when they become due.

Appendix: List of non-confidential respondents

- AAMC Training
 - Australian Bankers' Association
 - Australian Collectors and Debt Buyers Association
 - Australian Finance Conference
 - Challenger
 - Dun & Bradstreet
 - Finance Brokers Association of Australia
 - Financial Planning Association
 - Financiers Association of Australia
 - Institute of Mercantile Agents
 - Insurance Council of Australia
 - Legal Aid Queensland
 - Mortgage & Finance Association of Australia
 - National Financial Services Federation
 - Principled Mortgage Investments
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Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
consumer	A natural person or strata corporation Note: See s5 of the National Credit Act.
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
s35 (for example)	A section of the National Credit Act (in this example numbered 35), unless otherwise specified