



ASIC

Australian Securities & Investments Commission

REPORT 180

Response to submissions on CP 113 Training and competence for credit licensees

December 2009

About this report

This report highlights the key issues that arose out of the submissions received in response to Consultation Paper 113 *Training and competence for credit licensees* (CP 113) and details our responses 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 206 *Credit licensing: Competence and training* (RG 206).

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A Overview/Consultation process

1 Under the *National Consumer Credit Protection Act 2009* (National Credit Act), a credit licensee must maintain their organisational competence, and ensure that their representatives are adequately trained and competent, to engage in the credit activities authorised by their licence: see s47(1)(f) and s47(1)(g). In Consultation Paper 113 *Training and competence for credit licensees* (CP 113), we consulted on proposals relating to how we would assess whether credit licensees are competent to provide the credit activities they are licensed to provide. We also consulted on how credit licensees should ensure that their representatives are suitably trained and competent to engage in the role they are required to perform.

Note: All section references in this report are to the National Credit Act.

2 The proposals were formulated to provide certainty for credit licensees about the requirements in qualifications and experience they must meet, and flexibility to take into account the wide variety of roles that exist in the credit industry.

3 CP 113 divided proposals between:

- organisational competence; and
- representative training.

4 This report highlights the key issues that arose out of the submissions we received in response to CP 113 and our responses to those issues. Sections B–D cover the issues relating to organisational competence, while Sections E–G cover the issues relating to representative training.

5 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 113. We have limited this report to the key issues.

6 For a list of the non-confidential respondents to CP 113, see the Appendix. Copies of these submissions are on the ASIC website at www.asic.gov.au/cp under CP 113.

Responses to consultation

7 We received 25 responses to CP 113 from a wide variety of sources including mortgage broking businesses, industry bodies, banks, training organisations and financial planning businesses. We are grateful to respondents for taking the time to send us their comments.

- 8 The majority of the submissions were generally supportive of ASIC's proposals relating to organisational competence and representative training. We have therefore decided to proceed with the publication of our regulatory guide based on these proposals, with some small modifications to take into account some of the concerns raised in the submissions. Our finalised regulatory guide is Regulatory Guide 206 *Credit licensing: Competence and training* (RG 206).
- 9 The main issues raised by respondents related to:
- how ASIC should assess organisational competence;
 - the requirement for responsible managers to have two years relevant problem-free experience and a qualification;
 - the number of continuing professional development (CPD) hours required per year for responsible managers;
 - the training requirements for representatives;
 - the training required for financial planners who advise on mortgages; and
 - the definition of 'mortgage broker'.

B How ASIC should assess organisational competence

Key points

Submissions were generally supportive of our proposal to assess organisational competence by looking at the qualifications and experience of responsible managers.

Some respondents suggested that Australian financial services (AFS) licensees should be able to rely on their proof of organisational competence under the AFS regime to establish competence for the credit regime.

Other respondents expressed concern about how the proposal would work in relation to small businesses.

Respondents who will automatically be granted a credit licence under streamlining provisions were concerned about whether it was appropriate to require them to meet these obligations.

- 10 In CP 113, we proposed to assess organisational competence by looking at the qualifications and experience of the people in the organisation required to meet the ‘fit and proper’ test (as set out in s37(2)(h)), or a subset of these people. Submissions were generally supportive of this approach. We proposed to refer to these people as ‘key people’. Following feedback received during the consultation period, we have decided that it will cause less confusion if we refer to these individuals as ‘responsible managers’ to correspond with the terminology used in the AFS regime. However, this is merely a terminology change as the model we are proposing to use is still the same. Consequently, throughout the rest of this report, we will use the term ‘responsible managers’ instead of the term ‘key people’ that was used in CP 113.

Treatment of AFS licensees in the credit regime

- 11 Some respondents expressed the view that the approach used in the AFS licensing regime, where licensees were able to nominate responsible managers, was a more appropriate system for ASIC to use in assessing organisational competence.
- 12 Some respondents stated that AFS licensees should be able to rely on proof of their AFS organisational competence to establish competence for the credit regime. They submitted that the AFS regime is already rigorous and it is an unnecessary level of duplication to require people who operate in both regimes to again prove their organisational competence when they have already done so to obtain their AFS licence.

ASIC's response

While there may be synchronicities in businesses that involve both AFS and credit licensees, where their responsible managers will be the same and their qualifications and experience will also be sufficient for both regimes, we do not believe this will always be the case. We therefore consider it is appropriate to treat the two regimes separately and to require applicants who hold AFS licences to prove the competence of their responsible managers for the credit regime.

We have, however, simplified the licensing process for AFS licensees with sections of the application automatically being prefilled from data already provided through existing systems.

Small businesses

- 13 Some feedback suggested that ASIC's proposal to use the people identified by the 'fit and proper' test as a basis for assessing organisational competence was an approach better suited to larger entities with multiple staff rather than smaller independent operators. The concern was that small business owners would regard their sole staff member as being the responsible manager in their business even though it was unlikely that such a staff member would be able to make the lending decision. While these staff members would probably be involved in all the credit-checking activities of the consumer, the final decision would remain with the owner. The concern was that the rigidity of the list in s37 that defines the people who need to meet the 'fit and proper' test could result in staff members of small entities being caught if they hold the title of senior manager, when in reality only the small business owners would make significant decisions.
- 14 One submission highlighted two scenarios where the people identified in the 'fit and proper' test would not be appropriate in terms of assessing their training:
- (a) when a business is family run and is owned through a family trust—if the trustee is a professional trustee, they may have nothing to do with the operation of the business; and
 - (b) when a business is family run and owned by a family company where the directors may be the husband, children or similar—it may not always be the case that these people would be appropriate as responsible managers.

ASIC's response

We have clarified in RG 206 that in small businesses, such as those with only a couple of employees, we expect the responsible manager to be the person ultimately responsible for making the decisions in providing the credit activities of the business—that is, the owners of the business (rather than their employees), if they are the ones who approve all the decisions.

We have also clarified that the responsible managers in the business must be those who are involved in the day-to-day decisions relating to credit activities, not those people who have nominal control of the business but are not involved in the operation of the business.

Streamlined businesses

- 15 The Australian Bankers' Association (ABA) noted that s37, which contains the 'fit and proper' test, explicitly does not apply to authorised deposit-taking institutions (ADIs). This is in recognition of the fact that banks are subject to the 'fit and proper' organisational competence obligation imposed by the Australian Prudential Regulation Authority (APRA) and set out in Australian Prudential Standard 520 (APS 520). The ABA stated therefore that, as the s37 test did not apply to banks, they should not have to comply with ASIC's proposed requirements for demonstrating organisational competence. The ABA was concerned that, if its understanding was not correct and the test should also apply to banks, it did not know which people ASIC intended to be named as 'responsible managers' in its organisations— if it was the same as in the APS 520 model, these people would not be able to meet the 20 hours of CPD per year because they dealt with many other areas besides credit in their day-to-day decision-making processes.

ASIC's response

While ASIC must grant a credit licence to an ADI under s38, and so does not initially assess the ADI's organisational competence, the licence is granted on the basis that the ADI will comply with its obligations as a licensee. This includes meeting the organisational competence obligation on an ongoing basis. It is therefore appropriate that ADIs are required to meet this obligation in the same way as other licensees.

We have made it clear in RG 206 that in large organisations, such as ADIs, the responsible managers will be a subset of the people who need to meet the 'fit and proper' test, rather than the people who are responsible for the overall direction of the business that includes credit. In our view, this should ensure that it is the people who are most directly involved in decisions relating to credit activities that are bound by the requirements, rather than those identified for the purposes of APS 520 who tend to be board level individuals with responsibilities that encompass much more than credit. This should also mean that the proposed CPD requirement is not unnecessarily burdensome.

C Qualifications and experience requirements for responsible managers

Key points

Most submissions were generally supportive of our proposal to require responsible managers to have at least two years relevant problem-free experience and a credit industry-specific qualification.

Several submissions stated the approach was too inflexible. They believed that extensive experience alone should be sufficient to qualify someone as a responsible manager.

- 16 In CP 113 we proposed to require responsible managers to have:
- at least two years relevant problem-free experience that is not marred by significant non-compliance issues; and
 - a credit industry-specific qualification or a more general higher level qualification relevant to their role (e.g. a diploma or university degree).

Experience

- 17 Some submissions stated that the approach was too inflexible and people with extensive experience and no qualification should be able to be responsible managers. They thought that reliance on educational standards to demonstrate competence created a bias that devalues business experience as inferior to academic qualifications, and that educational standards cannot bring value to an industry that comprises businesses ranging from sole traders to highly complex banking organisations.
- 18 Some submissions did not support an approach that accepted extensive experience alone without a qualification. The view was that credit personnel work in highly structured environments that do not expose the individual to the full range of functions that the National Credit Act addresses. While a person may appear to have extensive experience, it is often only in relation to a narrow range of credit functions and responsibilities. Requiring a qualification to supplement experience provides comfort that the responsible manager has studied all the necessary areas of credit, even if their experience is limited to certain areas.

ASIC's response

We believe it is necessary to demonstrate both qualifications and experience to be a responsible manager because experience alone does not necessarily expose a person to the full range of

knowledge they may be required to draw upon, while qualifications will ensure that key competencies necessary to perform a credit role will have been studied. We have therefore implemented our proposal in RG 206.

Qualifications

- 19 The majority of submissions were generally supportive of our approach. A few submissions expressed a wish to see more guidance and examples of what qualifications would be sufficient. We have drafted RG 206 to provide more examples of what qualifications are acceptable for different positions in the credit industry.
- 20 A few respondents considered that for small-sized organisations a Certificate IV level was an appropriate minimum qualification for responsible managers, but for medium-to-large organisations a higher level qualification should be required depending on how many employees a manager was responsible for or, alternatively, the value of the credit provided. It was thought that diplomas should be held by responsible managers in medium-sized organisations, while in large organisations, degrees should be held.
- 21 Concerns were also expressed about the impact of ASIC's proposal on small businesses. One respondent pointed out that educational courses cost over \$1000, and at the smaller end of the market, small businesses would often have two responsible managers out of a small number of staff. With the cost of training, registration, external dispute resolution, professional indemnity insurance and other licensing requirements, the submission estimated that costs for some credit licensees could be in excess of \$20,000 in the first year of operation.
- 22 Some respondents expressed the view that responsible managers should have at least diploma level qualifications as per the AFS regime. They considered that, even if these qualifications do not currently exist for all types of responsible managers, there are existing competencies that could be developed into a diploma of financial services qualification with the assistance of an education provider.

ASIC's response

We believe our proposal to require at least a Certificate IV in a credit-specific qualification, or a higher general qualification in a relevant field, is appropriate. We note that this is a minimum requirement and we expect that businesses can determine for themselves if they should require higher level qualifications from their responsible managers. We have therefore implemented our proposal in RG 206.

D CPD requirements for responsible managers

Key Points

Submissions received from mortgage brokers indicated that they were generally comfortable with our proposal to require 20 hours of CPD per year from responsible managers.

Submissions representing small businesses considered the proposal too burdensome.

One respondent thought 20 hours would be excessively burdensome for credit licensee responsible managers whose credit advice was incidental to or an occasional part of the business.

Some respondents thought that the range of activities that could count towards CPD should be increased.

- 23 In CP 113, we proposed that a credit licensee's responsible managers should undertake 20 hours of CPD per year. We also proposed that this would be set out in a licence condition which would require licensees to keep a record of the CPD activities undertaken by their responsible managers each year.

Number of CPD hours

- 24 Submissions from mortgage brokers indicated that they were generally comfortable with this proposal. Other small businesses thought the proposal was not useful and too burdensome, vastly exceeding what is required of other professionals such as lawyers (who are required to complete 10 hours of CPD per year). One respondent noted that medical colleges require 30 hours of CPD per year, and so considered that 20 hours in the credit industry was too high, considering the level of technical expertise required for a responsible manager compared, for example, to a surgeon. The submission stated that the proposal was predicated on the resources available to big business and a geographic location that makes attendance at various forums possible. It asserted that the proposal was consequently biased against small businesses in remote areas. It queried, for example, what subject matter could justify a total of 20 CPD hours per year for debt collectors.

ASIC's response

We consider that 20 hours is not an excessive amount of CPD to require from responsible managers, as we note that in other industry sectors between 10 and 30 hours appears to be standard. We have therefore implemented our proposal in RG 206. We acknowledge that it may be more difficult for people

located in remote geographical locations to access some of the training opportunities noted in CP 113, such as attending seminars and providing training. However, this is not an insurmountable obstacle. RG 206 notes that other activities, such as online training, viewing recordings of professional development training, and completing online quizzes are also acceptable methods for engaging in CPD training.

Responsible managers whose credit role is incidental

- 25 One respondent stated that 20 hours was excessively burdensome for responsible managers whose credit activities were incidental to or an occasional part of the wider financial planning business—they thought that four hours of CPD per year was more appropriate for businesses in their situation. Another submission thought it was more appropriate to let the licensee determine the appropriate level of CPD for their responsible managers.

ASIC's response

We consider it inappropriate for a responsible manager who manages the credit activities of a business to be required to only fulfil a proportion of the CPD requirement of other responsible managers merely because their responsibilities encompass more than just credit.

If they are responsible for the day-to-day management of the credit business, they should have a similar level of training to other responsible managers whose sole role is in relation to credit, otherwise this could result in the provision of a poorer quality of credit service to the consumer by 'part-time' responsible managers in comparison to 'full-time' responsible managers.

Range of activities counting towards CPD

- 26 Some respondents considered that the activities listed should be increased to attending seminars and conferences, viewing 'real time' DVDs of conferences and seminars, publishing articles or being a member of a relevant committee. They thought this would assist people who lived in rural or remote areas who would otherwise have practical difficulties attending the activities that could count towards CPD. They also thought ASIC should consider reducing the number of CPD hours required if the licensee was a member of a professional organisation, with the qualification that ASIC should have some oversight over who these professional associations were.

ASIC's response

We agree that it would be beneficial to extend the activities that may count towards CPD and have therefore clarified this in RG 206.

We do not agree with the submission that people should be able to reduce the number of CPD hours if they are a member of a professional organisation. We do not believe the fact that a professional organisation sends up-to-date material on the industry to its members is necessarily an indication that the member has indeed read and assimilated this information to the point that this could be relied on instead of requiring these people to meet the CPD requirement.

E Training requirements for representatives

Key points

In CP 113, we proposed not to set specific educational prerequisites for credit representatives other than for mortgage brokers.

Some submissions expressed concerns that mortgage brokers were being singled out for special treatment.

- 27 In CP 113, we proposed that other than for mortgage broking businesses, we would not set specific educational prerequisites or ongoing training requirements for credit representatives. Credit licensees should assess what training and competence their representatives need and embed this in their recruitment and training systems.
- 28 One respondent disagreed with this proposal as they thought that all representatives should have a nationally recognised qualification to at least Certificate IV level, as without this the training of representatives would be inconsistent across the credit industry. In their opinion, the Certificate IV qualification courses specific to the credit industry were flexible enough to be adapted to the needs of all representatives in the industry because they were competence based rather than prescribing how people should be trained.
- 29 Some submissions expressed concern that mortgage brokers were being singled out for special treatment in relation to education requirements when compared to the rest of the industry. They thought that all credit representatives should have some kind of Certificate IV qualification and be required to complete an equal number of CPD hours to those required from mortgage brokers.
- 30 Other submissions were supportive of there not being specific educational prerequisites for areas other than for mortgage brokers.

ASIC's response

We are sympathetic to concerns that mortgage brokers are being singled out for special treatment in relation to educational requirements. This different treatment arises not because they represent a particularly risky area of the credit industry but rather because mortgage broking industry bodies have formulated a suitable standard that clearly works for their members and merits being extended to the rest of the mortgage broking population. There is a lack of similarly clearly defined standards applicable to the rest of the credit industry. Also, the lack of specific qualifications tailored to other areas of the industry make it very difficult to prescribe suitable minimum qualifications that can be applied to the remainder of the credit industry.

We have modified our proposal and will not mandate particular educational requirements for any credit representatives—however, we expect licensees to ensure that their representatives are suitably qualified to engage in the role that they are employed to perform. We note that, in the case of mortgage brokers, this is the minimum qualification of a Certificate IV in Financial Services (Finance/Mortgage Broking).

F Training requirements for financial planners who advise on mortgages

Key points

Submissions were divided between those that thought financial planners ought to be exempt from the Certificate IV in Financial Services (Finance/Mortgage Broking) requirement, and those that thought all financial planners advising on mortgages should have the qualification.

- 31 In CP 113, we proposed that representatives who meet the Tier 1 training requirements in RG 146 and provide advice about mortgages incidentally to providing financial product advice would be exempt from the requirement to hold a Certificate IV in Financial Services (Finance/Mortgage Broking).
- 32 Submissions were divided between those that thought that AFS licensees who meet the Tier 1 training ought to be completely exempt from the Certificate IV requirement because the financial planning diploma is more comprehensive than any Certificate IV qualification, and those that thought a financial planner providing any advice on mortgages ought to have the Certificate IV qualification. The Financial Planning Association of Australia (FPA) considered that the financial planning diploma contained sufficient detail that only a short bridging course should be required for those planners whose activities took them into the realm of mortgage broking.
- 33 In our consultation, concerns were raised that ASIC should not exempt financial advisers from mortgage broking training because specific credit-related competencies covered in the Certificate IV in Finance/Mortgage Broking were not adequately dealt with in the RG 146 training.

ASIC's response

We agree that Tier 1 training does not contain sufficient detail on mortgage broking to enable a financial adviser to provide competent and comprehensive mortgage broking services. We consider that when a financial planner provides advice relating to particular mortgage products, it is appropriate that they hold a Certificate IV in Financial Services (Finance/Mortgage Broking). However, we acknowledge that there are overlaps between the Financial Planning diploma and the Certificate IV in Financial Services (Finance/Mortgage Broking). We will work with industry bodies to determine appropriate exemptions in recognition of existing qualifications.

G How 'mortgage broker' is defined

Key points

Respondents had mixed views on our proposal to define a mortgage broking business as one that suggests consumers borrow money secured by real property, or assists them to do so, from a person other than the credit licensee.

Some respondents thought that the definition should incorporate the concept of deriving a benefit, while others thought it would be more appropriate to align the definition with credit assistance in relation to a credit product secured by real property. We have modified our proposal based on this feedback.

- 34 In CP 113, we defined a mortgage broking business as one that suggests consumers borrow money secured by real property, or assists them to do so, from a person other than the credit licensee. If a credit licensee provides mortgage broking services, then specific training requirements apply.
- 35 One respondent stated that it was not helpful defining a mortgage broking business as opposed to defining mortgage brokers themselves, as it was the individual mortgage broker who gave suggestions or assistance to the consumer, not the business. A few respondents were concerned that the definition captured financial planners in their day-to-day roles when they suggested a person obtain a new loan, even if they did not recommend a particular product. They considered this kind of advice to be peripheral to what mortgage broking really comprises and thought that financial planners performing this function ought not to be covered by the definition of mortgage broking such that they had to undertake further training.
- 36 Some submissions suggested incorporating the concept of deriving a benefit into the definition. They pointed out that the National Credit Act defines 'credit assistance' as when a person suggests the consumer apply for a provision of credit under a particular credit contract with a particular credit provider, or assists them to do so, and that ASIC's definition of mortgage broker was far wider than this.
- 37 A few submissions said that it would be better to align the definition of mortgage broker with that of credit assistance in the National Credit Act, and that this would be achieved by incorporating into it the concept of deriving a benefit. This would then tie the 'suggesting' or 'assisting' to the requirement for this to be in relation to a particular product (i.e. a mortgage broker would only recommend a particular product if they were to receive a benefit or a commission from doing so). Some financial advisers did not believe that incorporating this concept would assist with their concerns. Their view was

that financial advisers who receive commissions or referral fees from introducing a client to a mortgage broker are only providing financial advice services, not mortgage broking, and should be exempt.

- 38 Other submissions did not consider that incorporating the concept of deriving a benefit into the definition was helpful as they believed that whether or not a benefit was derived did not affect the activity being undertaken. They thought that 'mortgage broker' ought not to be defined, as it is a term that is understood in the industry.

ASIC's response

We have modified our proposal and defined a mortgage broker as a person giving credit assistance in relation to a credit product secured by real property. 'Credit assistance' is defined in s8 and should capture all activities where a particular home loan with a particular lender is discussed. Such activity is likely to have a significant impact on consumers, regardless of whether or not the person providing this assistance is receiving a commission or fee. This activity should therefore require a specific qualification in mortgage broking that informs the mortgage broker about the duties owed to the consumer in providing advice on a mortgage.

We have provided some examples in RG 206 of activities that may or may not be considered mortgage broking to assist financial planners in working out when the training requirements apply to them.

Appendix: List of non-confidential respondents

- Principled Mortgage Investments Ltd
 - Dun and Bradstreet Australia Pty Ltd
 - Financial Planning Association of Australia Ltd
 - Insurance Council of Australia
 - GE Capital
 - Finance Sector Union of Australia
 - Mortgage and Finance Association of Australia
 - AXA Financial Planning Limited
 - Kaplan Professional
 - Australian Collectors & Debt Buyers Association
 - Institute of Mercantile Agents
 - CPA Australia
 - Challenger Financial Services Group
 - Australian Institute of Credit Management
 - Financiers Association of Australia and Min-it Software (joint submission)
 - National Financial Services Federation Limited
 - Legal Aid Queensland
 - Abacus
 - Australian Finance Conference
 - Universal Wealth Management Pty Ltd
 - Australian Bankers' Association
-