(07) 3847 8119
Level 1, 116 Ipswich Rd, Woolloongabba QLD 4102
PO Box 234, Stones Corner QLD 4120
fbaa.com.au

Fleur Grey
Senior Specialist
Credit, Retail Banking and Payments
Financial Services
Australian Securities and Investments Commission

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Via email: responsible.lending@asic.gov.au

## FBAA Submission to CP309 - Update to RG 209: Credit licensing: Responsible lending conduct

The FBAA as the leading professional industry association to finance and mortgage brokers welcomes the opportunity to make a submission against CP309 - Update to RG 209: Credit licensing: Responsible lending conduct.

Our submission delivers some general points for consideration and then provides specific responses to the questions posed in the CP. We recognise the importance of responsible lending and want to strongly emphasise that there are some limitations that require care in its application.

### General Considerations

1. Responsible lending is principles-based and intended to be flexible, adaptable and technology neutral. There are genuine risks associated with guidance becoming too prescriptive. It would undermine the intentions of the responsible lending framework, stifle productivity and innovation and impede consumer access to regulated finance.

2. We have seen the regulation and enforcement of responsible lending growing more prescriptive since 2010. Several court judgments and ASIC enforcement action have highlighted shortcomings in the lack of detail in the responsible lending guidance and the open manner of the drafting of the legislation. This prompted a tightening of requirements for lenders operating in the small amount loans space and additional detail being provided in successive revisions of RG209.

3. If guidance becomes too prescriptive then:

    a) The law becomes more costly to comply with – putting the advantage back to the larger organisations that have economies of scale;

    b) It homogenises the industry;

    c) It may favour technological solutions that not all entities have access to;

    d) It ultimately won't prevent non-compliance by entities that are intent on not complying and those who will continually adapt to stay ahead of regulation. The impact of more prescriptive regulation will be most felt by the compliant.

4. More prescriptive regulation hits hardest at the slower moving entities who are trying to comply with the letter of the law (i.e. those who the changes are least aimed at impacting).

5. We remain cautious of ASIC guidance moving too far into the space which is intended to be occupied by legislation. ASIC insight and experience is invaluable for informing future law reform but its thinking is also heavily influenced to attempt to prevent misconduct whereas the significant majority of licensees are trying to comply. Care needs to be taken to avoid using responsible lending guidance to prescribe new standards of conduct that are not consistent with the principles-based drafting of responsible lending laws. To that end we find it extremely helpful where ASIC proposes changes to guidance, for it to indicate more specifically the concerns it is trying to address or the conduct it is trying to influence.

6. The assessment to support a responsible lending decision is somewhat paradoxical. Licensees are required to examine past behaviour to determine future capacity. This runs counter to other areas of financial services regulation such as the investment performance disclaimer that states "past performance is not a reliable indicator of future performance". Ironically, responsible lending stamped out a not entirely dissimilar practice of considering past behaviour to determine future capacity when lenders' reliance on a consumer's <u>propensity</u> to pay was replaced with an assessment of their capacity to pay.

7. Consumer finances are fluid. A point in time assessment is not. Enforcement action has been taken against licensees where ASIC staff have arrived at different numbers on their assessments than the licensee. This then takes on a feel of an assessment being defective if it is not perfect. The objective is not to achieve perfection but to assist to form a view that is reasonably held that the consumer has capacity to service the proposed credit commitment. It is not a promise that they will, for consumer behaviour is a significant factor.

8. Industry is working with the expectations of responsible lending but it becomes significantly more difficult if parties are trying to perfect the exercise.

9. We support further guidance but caution against becoming too prescriptive or revising guidance to tighten existing obligations in response to previous misconduct where such conduct already constituted a breach of responsible lending laws.

10. We favour an individual enforcement approach with harsher penalties for non-compliance rather than sweeping reforms to guidance. Changes to responsible lending assessments can have enormous impacts on the broader economy. We have recently witnessed a downturn in the housing market which no doubt has numerous contributing factors but one very significant one is the banks' imposing higher benchmarks for lending which has led to sharp increase in the rejection rate for finance applications. Consumers want to continue to have access to finance and the Australian economy is heavily reliant on consumers having that access. Responsible lending and responsible borrowing are not the same thing and we do not want to see responsible lending obligations on licensees being used to attempt to control consumer behaviour.

11. Measuring the full economic impact of changes to guidance is extremely difficult and so changes need to be made with extreme care.

### Consumer conduct

12. Consumers do not always provide complete and truthful information. Consumer conduct (both at the point of making full disclosure on application and later conduct such as taking on additional commitments after a credit facility is obtained) is highly material, yet does not appear to factor into the administration of responsible lending. We contend that it must become much more prominent.

13. We recommend further consideration be given to a safe harbour for licensees and representatives who carry out the requisite inquiries and who do not willingly disregard information. The safe harbour would operate as a defence to EDR and ASIC where responsible lending breaches are alleged.

## General Principles

### Preliminary vs final assessments of unsuitability

14. The responsible lending provisions under the NCCP Act include both a <u>preliminary</u> and <u>final</u> assessment of unsuitability. A preliminary assessment is performed by credit assistance providers and a final assessment undertaken by credit providers/ lessors. The administration of the responsible lending laws has seen preliminary and final assessments of unsuitability regulated equally whereas we believe the two should be different, with a preliminary assessment being an initial, less detailed indication of a consumer's potential capacity to service a product and a final assessment carrying a higher degree of scrutiny and accuracy where the credit provider is assessing a consumer's capacity to service a particular product. Without any functional differentiation between the two, the legislation doubles up on the obligation to assess the suitability of a proposed credit contract.

15. We believe there is considerable scope to separate out the level of detail, purpose and effect of a preliminary and final assessment of unsuitability. The preliminary assessment should be exactly that. An initial assessment aimed at determining potential capacity at a broad level. Intermediaries should be able to undertake a preliminary assessment with fewer inquiries than those required for a final assessment of unsuitability.

16. Such an approach to administration of responsible lending would deliver a practical outcome whereby intermediaries could conduct a preliminary assessment of a consumer's situation with fewer verification obligations and the final assessment of unsuitability would become the more detailed, fully verified analysis of a consumer's capacity. There is no consumer detriment under the approach. Consumers are still subject to a detailed, fully verified, final assessment prior to entering into a credit contract. Credit providers that rely on the assessments of unsuitability performed by intermediaries may still impose obligations to the standard of the final assessment of unsuitability onto their intermediaries. The revision of RG209 is an opportunity to revisit the distinction between a preliminary and final assessment of unsuitability and to realign the regulatory burden associated with the level of detail required in each of the preliminary and final assessments of unsuitability.

## Finding balance between licensee protection and consumer protection

17. One outcome of this review is that we would hope to see some better protection for licensees in disputes with their consumers and where EDR becomes involved. Anecdotally, responsible lending appears to be becoming the ambit complaint basis for a broad range of consumer complaints that frequently have no origin in the lending decision or serviceability assessment. More commonly, complaints relate to consumer dissatisfaction with a product or service, other issues such as a refusal to grant hardship relief, buyer's remorse or finding a better deal elsewhere after the fact.

18. In asset finance, consumers unhappy with the item they have leased or purchased can claim breach of responsible lending to try to void a binding contract.

19. In other forms of finance, consumers with buyer's remorse are able to assert breaches of responsible lending to raise a dispute with an expectation the licensee will void the transaction.

20. We support reforms that would provide licensees with a mechanism to have responsible lending complaints quickly addressed with a pragmatic assessment of the unsuitability assessment. Disputes alleging responsible lending breaches often become ensnared by immaterial differences in assessment methodologies, treatment of certain expenses and the accuracy of the assessment – the cost of which often means the licensee will lose regardless of the outcome of the complaint.

## Scalability

21. One area of responsible lending where the settings do not appear to be correctly set sits around the notion of reasonable inquiries and scalability.

22. Under the current administration of responsible lending laws the most prescriptive and arguably onerous obligations are imposed on the smallest financial transactions (small amount loans). We recognise the conduct of certain entities within that industry have brought the additional regulation onto themselves however in an effort to close down misconduct, ASIC and the Government have set certain expectations for minimum inquiries which it appears difficult to step back from when almost all other financial products are higher value or more complex than a small amount loan.

23. We support a view that responsible lending laws have never allowed licensees to scale inquiries down to zero or to disregard relevant information in the guise of 'scaled inquiries'. We see that many of the enforcement outcomes achieved by ASIC which now inform the revision of RG209 revolve around contraventions of existing law as opposed to a lack of adequate guidance. We support ASIC in its revision of RG209 but wish to reinforce the need for the revision to avoid taking the form of prescriptive guidance aimed at responding to certain non-compliance with existing laws.

24. Scalability must be preserved. The value of the relevant transaction must be more prominent in the approach to regulating scalability. The level of inquiries required to be undertaken by small amount lenders exceeds that undertaken by a major financial institution issuing a residential mortgage backed loan. The cost of undertaking such detailed inquiries for small transactions appears largely to make this sector unviable. A flow on consequence of this is that it will reduce the number of options consumers (particularly those with impaired credit histories) have to

access credit. As the compliance cost of providing credit increases, the dollar value of transactions will need to increase and the margins will also need to increase. This will continue to adversely impact consumer access credit at reasonable cost and will drive up the minimum amount consumers will be required to borrow.

25. The risk of disputes involving allegations of responsible lending breaches and the difficulty of defending them cheaply and fairly will also impact access to credit by consumers with impaired credit histories.

26. Alternately it may drive consumers to forms of finance offered with minimal human intervention (e.g. self-selection through comparison websites or approaching lenders with automated decisioning) and this has potential to produce poor consumer outcomes.

27. Scalability should also be relevant where the size of a proposed credit commitment (or repayments under that commitment) represents a very low percentage of the applicant's income once that income is over a certain amount.

28. A challenge with responsible lending is the proper treatment of a consumer's disposable income. Every household has fixed expenses and minimum spending required to meet basic requirements. Higher income earners tend to have higher fixed expenses but also have a higher amount of disposable income. The current administration of responsible lending laws means licensees are being required to obtain large amounts of personal and financial information even from consumers looking for a credit commitment that could be for a very small percentage of their disposable income. For example a consumer earning $200,000 per annum will have sufficient flexibility in their financial commitments that they could service a personal loan or credit card where their repayments are less than 10% of their take home income simply by changing how they spend their disposable income. What truly determines whether the consumer will manage to service such a commitment is the consumer's conduct.

29. Consideration should be given to a safe harbour for credit providers undertaking limited inquiries for a credit facility where the repayment obligations are below a minimum percentage of the consumer's income. Income verification plus a credit check identifying existing fixed credit commitments would be sufficient to determine whether such a consumer should be able to meet the new facility.

## Hardship

30. Lenders are reporting higher numbers of hardship applications with consumers having an expectation that they are entitled to a hardship variation once applied for. Many hardship situations are not caused by an unexpected change in the consumer's circumstances. Causes frequently include overspending and taking on additional credit after the original facility was approved. More consumers are also choosing which credit providers to seek hardship relief from. Consumers with multiple credit facilities may only apply for hardship with one or more providers and will be reluctant to disclose if they have applied for hardship with other credit providers. Some consumers obtain more credit after applying for hardship with current providers.

31. Licensees are faced with a dilemma in that a decision to not grant hardship relief is appealable to EDR where minimum costs of scheme fees and their own time quickly exceed the value of matters in dispute. AFCA encourages licensees to offer a hardship variation as part of the early dispute resolution process involving a refusal of hardship variations.

32. There are additional risks of a single complaint initiating further AFCA-directed investigation of the basis of the loan or compliance with responsible lending. There appears to be a noticeable increase in the number of licensees being targeted by AFCA over cited potential systemic issues. The minimum AFCA fee for a systemic issue is $3,685 and internal costs of responding to potential systemic issues raised by AFCA quickly runs into the thousands regardless of fault or the outcome.

## Unregulated products

33. There has been considerable recent focus on the unregulated buy now, pay later sector. We are observing a clear trend in consumer behaviour. Consumers are committing more and more of their regular income to short-term repayment obligations. As there is no obligation to demonstrate capacity to service, there are few barriers to consumers entering into many new short-term payment arrangements at any one time. This is having two readily observable effects:

    a) This is directly impacting regulated credit providers who report seeing much higher numbers of hardship applications and say that an increasing number are supported by evidence of a consumers experiencing hardship because of taking on too many payment commitments to short-term providers. They seek hardship relief from the regulated credit provider in order to continue to meet their payment commitments to their short-term providers.

    b) Consumers are damaging their borrowing capacity for more substantial credit transactions. Where consumers commit a high portion of their disposable income towards buy now, pay later, they erode their surplus income over expenses which dramatically reduces their serviceability assessment capacity. Members report much higher numbers of consumers failing initial serviceability assessments because of their excessive use of facilities that do not require any form of verification of their capacity.

34. Further work is required to establish a level playing field so that regulated credit providers are not disadvantaged by having to comply with the law.

Peter J White MAICD
Managing Director
e. pwhite@fbaa.com.au

*Answers to Consultation Paper Questions follow …..*

## Consultation Paper Questions

Proposal B1

B1 We are considering whether to identify particular inquiries and verification steps in RG 209 that we think would generally be reasonable to provide greater certainty to licensees about complying with their obligations.

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| B1Q1 Would it be useful for licensees if ASIC were to identify the inquiries and verification steps that we consider should be taken? Why or why not? | We support some additional guidance being provided around expense verification. Guidance around income verification is clear (reflecting the fact that income verification is usually much more straightforward than expense verification). We are mindful of the issues identified in paragraphs 10 to 12 of CP309 wherein ASIC identifies that there are risks with taking either approach of being more, or less prescriptive with its guidance.<br><br>In paragraphs 13 and 14 of the CP ASIC identifies that its work to date has highlighted observations of licensees failing to take sufficient steps to comply with their obligations. It is not clear how much of this non-compliance is caused through a lack of clear guidance and how much is caused by contraventions of already existing laws. There is an opportunity to provide clearer guidance on specific approaches ASIC has observed that it is comfortable with.<br>We support changes to guidance where they provide clarification around areas that appear to be misunderstood and which may be causing licensees to fall short of their obligations. We also support guidance that raises minimum standards, as this should impact those not already doing enough whilst requiring little to no change for licensees that meet or exceed reasonable standards of inquiries and verification. We do not want to see guidance being modified to change the meaning or effect of the law or to impose additional obligations on licensees.<br>It would be helpful if ASIC is able to link revisions to RG209 to the specific conduct or concerns it is trying to address. |
| B1Q2 If there are particular examples of industry practice that you consider should be reflected in any guidance, please provide details of those practices. | We support practices which include both the consumer and licensee with both being accountable for their role in the application.<br><br>The general approach we support is to require consumers to provide information about their income and major expenses together with an estimate of their monthly household spending and then comparing the consumer's estimates to an index, taking the higher of the two figures. Income and major expenses are verified. Where serviceability is tight, additional inquiries are made in relation to day to day expenditure and discretionary spending. This approach combines specific information with a validation against a benchmark figure. Income and major fixed repayment commitments are factored into an assessment together with a realistic figure for monthly spending. It is not intended that this figure be exact or that a detailed line by line analysis of a consumer's past spending |

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| | behaviour would produce the same dollar figure. It will however produce the same conclusion, which is that a consumer should be able to service the proposed credit contract after taking fixed expenses and a reasonable amount for household expenses away from their verified income. Whether the consumer services the contract will then depend on their own conduct (they must be responsible and must prioritise meeting repayments ahead of discretionary spending).<br><br>We support an approach that places responsibility on consumers as well as licensees. Where assessments are fair and objectively reasonable, licenses should be comfortable that they are complying. Assessments should not have to be perfect. If consumers provide misleading information at the time of the application and the licensee reasonably relies on this information as part of the assessment this should provide licensees with an absolute defence to later issues relating to serviceability. A similar defence should be available where the consumer has taken on further commitments after contract is entered into or has not spent responsibly. At the present time, whilst poor consumer conduct may theoretically absolve a licensee of liability, the cost of defending a dispute through IDR coupled with the risk of EDR means it is more time and cost efficient to try to settle with the consumer even though the licensee is not at fault. |
| B1Q3 Are there any kinds of credit products, consumers or circumstances for which you consider it may be reasonable to undertake fewer inquiries and verification steps? Please identify the kinds of products, consumers and circumstances and particular features you think are relevant. | Products: Specific asset finance. ASIC should recognise products and services where the needs and objectives are implicit from the transaction. Licensees should not fear being penalised for defective written assessments of unsuitability where their assessments do not record the consumer's needs and objectives such as "to buy vehicle XYZ". For example, where a consumer applies to a motor vehicle financier for finance to purchase a specific motor vehicle, the fact of the application is sufficient to satisfy that the needs and objectives of the consumer are clear (to obtain finance to buy the vehicle). We are aware some case law has suggested that credit providers should undertake more inquiries into the consumer's proposed use of the credit however we do not support this approach. A credit provider should only have to determine that the product(s) they offer are not at cross purposes with the consumer's objectives. We are concerned to prevent guidance around reasonable inquiries into the consumer's needs and objectives overstepping into a product comparison obligation or something more.<br><br>It is very important that any changes to the guidance do not redirect the focus of the obligation to make inquiries into the consumer's needs and objectives onto the underlying transaction and away from the consumer's needs and objectives relating to the credit they wish to obtain.<br><br>Beyond ensuring that a consumer does not acquire a product that is demonstrably unsuitable for the consumer's stated purpose, it is not the role of credit licensees to question the consumer's use of the credit. |

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| | There is an opportunity to consider reduced inquiries for applicants where the proposed commitment is only small proportion of their income. We can see a framework that permits limited inquiries into a consumer's expenses where the proposed credit represents an amount below a percentage of a consumer's net income. Under the current approach, a consumer seeking any regulated credit should provide some evidence of expenditure and for small amount loans must provide 90 days' bank statements. ASIC may be contemplating extending the small amount loans requirements of making bank statements mandatory for all assessments. We support an exemption to expense verification where proposed repayments under a credit contract fall below a certain percentage of net income. High income earners have a higher percentage of discretionary expenditure and can alter their discretionary spending to service a small additional commitment.<br><br>Refinance. Some consumers who have been meeting repayment obligations under an existing contract find they are unable to pass serviceability assessments when seeking to refinance – even to a lower rate. Examples include where consumers come to the end of a motor vehicle loan and have a residual balance (balloon) which they want to finance rather than pay out or where consumers want to refinance their principal mortgage. In such situations, a consumer's past repayment conduct is more relevant than their ability to pass a current serviceability assessment. Credit providers should not be liable for breaches of responsible lending where they deal with an existing product in such a way as to either not change, or give the consumer a superior outcome. Any such exemption would be limited to prevent licensees doing anything that increases the total overall cost to the consumer (such as extending the term to bring down repayments). |
| B1Q4 In your view, what aspects of the consumer's financial situation would a licensee need to inquire about in all circumstances? If you think some aspects of the consumer's financial situation do not need to be inquired about, please explain why. | Income in all instances.<br><br>Fixed repayment commitments in all circumstances.<br><br>It is reasonable to make some assumptions about household and discretionary expenditure in conjunction with an expenditure index. If only inquiring about fixed expenses the household spending assumptions should be based on a higher estimate than Henderson Poverty Index or HEMs. Licensees could choose to apply the fixed expenses + generous buffer approach or conduct a more detailed assessment if they are seeking to commit a consumer to repayment commitment that push consumers closer to the full capacity. This approach would see the level of detail and accuracy of an assessment increase with the percentage of income the consumer is committing to the proposed facility.<br><br>There is scope to provide relief from a detailed analysis of expenses in some circumstances such as for high income earners and favourable refinance consumers – particularly with respect to discretionary and day to day expenses as opposed to identifying fixed, substantial credit |

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| | commitments which would be identified through obtaining a credit report.<br><br>It is reasonable to have to inquire about the consumer's current expenses and to expect them to provide honest answers. We believe the correct setting is for a credit provider to be able to rely on a consumer's representations at the time of applying and that credit licensees should have a readily available reasonableness defence to quickly shut down claims of breaches of responsible lending where the consumer has omitted or obscured pertinent information. This would not operate to exculpate a licensee that did not conduct adequate other inquiries.<br><br>Materiality is also an important issue. Where a licensee makes certain assumptions or does not conduct a detailed assessment, compliance with responsible lending should not be assessed against the accuracy of the responsible lending assessment but whether the decision to lend was reasonably supported. For example, a lender conducts a cursory assessment of a high-income earner with substantial capacity and in the course of doing so does not include $1,000 of monthly discretionary expenses in their assessment. The lender should not be at risk of breaching responsible lending where the repayment commitment is comfortably accommodated. Disregarding that same amount for a consumer on a much lower income would be material. Under the current administration of responsible lending, both files would be assessed and failed yet the outcomes are vastly different.<br><br>A licensee would always be expected to make further inquiries where information in their possession conflicts with the basis of their decision. |
| B1Q5 In your view, what aspects of the consumer's financial situation would a licensee need to verify in all circumstances? If you think some aspects of the consumer's financial situation do not need to be verified, please explain why. | As with the above question, discretionary expenditure stands out as an aspect of a consumer's finances where relief from verification could be required.<br><br>Discretionary expenses are highly variable, fluid and difficult to quantify. We are aware of many disputes involving assessments of unsuitability where arguments are had over the licensee's recognition of amounts that fall under discretionary spending. Consumers can and do change their spending habits after taking on additional commitments yet elements of an assessment of unsuitability focus on past spending behaviour before the new commitment is taken on. We see scope to provide protection to credit licensees that obtain agreement from their customers that they will change their discretionary spending in order to manage their repayments under a proposed commitment. This could be included in the form of a positive affirmation in an assessment of unsuitability or held elsewhere on file (such as in a fact find / data collection form).<br><br>Past discretionary expenditure can be observed from bank statements |

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| | and other records but they do not provide much probative value for assessing current/future capacity. For that reason we do not support strengthening guidance around verifying past discretionary expenses.<br><br>We support guidance that focuses on verification of **income** and **fixed commitments**. Household expenditure is better estimated using a proxy such as a weighted index or index with buffer. The remaining difference between a consumer's income minus fixed commitments and estimated household expenditure represents their serviceability capacity. Consumers without commitments will generally spend much of this while a smaller number save some or all of it. Looking at past savings history is generally unreliable because spending behaviours change in response to events such as taking on a new commitment.<br><br>It is difficult to see how any concept of scalability is being applied if licensees are required to verify all income and expenses in all circumstances. |
| B1Q6 What would be the effect on consumers of ASIC identifying particular inquiries and verification steps? For example, what would be the effect on access to and cost of credit for consumers? | All changes which impose additional obligations will add cost to the process. These additional costs always work their way through to a consumer cost either in the form of higher fees, higher margins or excluding unprofitable transactions) thereby changing the eligibility criteria for consumers). |
| B1Q7 What would be the effect on business costs of ASIC identifying particular inquiries and verification steps? Please provide details of the effect on compliance costs for the licensee, and any factors that are likely to affect the level of cost or cost savings. | All changes translate through to business costs. The costs will vary widely from one licensee to the next although responsible lending is at the heart of all consumer credit models and therefore changes to responsible lending requirements will have a material cost impact on all consumer credit licensees. Costs will include system design changes, IT solutions, changes to assessment models and methodologies, staff training, changes to intermediary platforms that feed into lender platforms and changes to record keeping practices.<br><br>Changes that are most expensive for licensees are IT changes that involve changes to their systems, programs or processes. |
| B1Q8 In your view, what would be the effect (either positive or negative) on | In general terms any tightening of responsible lending obligations will drive a significant amount of inquiry towards unregulated options where consumers perceive the products to be more agile and easy to manage. |

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| competition between licensees? Please provide details. | Larger licensees in the regulated space will have more financial capacity to address any material changes. Smaller licensees have a higher cost per transaction which will only further increase. |

## Proposal C1

C1 We propose to amend the current guidance in RG 209 on forms of verification to:

(a) clarify our guidance on kinds of information that could be used for verification of the consumer's financial situation, and provide a list of forms of verification that we consider is readily available in common circumstances; and

(b) clearly state that views on what are 'reasonable steps' will change over time, as different forms or sources of verifying information become available. For example, developments in open banking and data aggregation services will assist licensees to efficiently confirm the financial situation of a consumer (including allowing simultaneous inquiry about and verification of some information).

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| C1Q1 Please provide details of any particular types of information that you consider should be reflected in the guidance as being appropriate and readily available forms of verification? | We support the sources identified in the proposed Appendix 1. We acknowledge the challenges this brings such as the list being interpreted as exhaustive. |
| C1Q2 Do you consider that the examples included in Appendix 1 are appropriate? Why or why not? | Yes. The examples in the Appendix 1 are appropriate.<br><br>Existing debts/Liabilities<br>**Credit Reports**<br>We note the comment under the section title *Credit reports* that credit reports are not readily available to credit assistance providers. We agree and offer this in further support of a call to introduce a clearer distinction between a preliminary assessment and a final assessment of unsuitability.<br><br>**Information from other credit providers**<br>It can be notoriously difficult to get information from other credit providers regarding a consumer's commitments because of Privacy law but also some credit providers being unwilling to divulge this information. |
| C1Q3 Are there particular issues with using data aggregation services | Consumers are already faced with a large volume of documents, disclosures and consent forms when going through an application.<br><br>Consideration must be given to balancing out the need for further |

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| that you consider should be raised in our guidance? Please provide details of those issues, and information that you consider should be included in our guidance. For example, would it be useful to include specific guidance on matters the licensee could, or should, raise with the consumer before obtaining the consumer's consent to use this kind of service? | permissions to be given against the effectiveness of seeking genuinely informed consent.<br><br>Privacy law is becoming an increasingly more complex area for licensees to manage.<br><br>Industry would welcome guidance on an acceptable approach to more efficiently gaining informed consumer consent for the numerous inquiries licensees must make and for the sharing of information that must take place for a licensee to carry out all necessary steps to deal with an application. |

Proposal C2

C2 We propose to expand our guidance on what are reasonable steps to verify the financial situation of a consumer by:

(a) more clearly stating that it is not sufficient merely to obtain verifying information but not have regard to it, or to use a source of information to verify only one aspect of the consumer's financial situation if it contains other (potentially inconsistent) information about other aspects of the consumer's financial situation; and

(b) including an 'if not, why not?' approach—that is, if a licensee decides not to obtain or refer to forms of verifying information that are readily available, they should be able to explain why it was not reasonable to obtain or refer to those forms of verification in the circumstances of the particular consumer involved.

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| C2Q1 Do you consider that the proposed clarification of guidance on reasonable verification steps would be useful? Are there any other aspects of our guidance on verification that you consider would be | Additional guidance may be assistive and we support the approach.<br><br>We believe it is already understood that merely obtaining information and not considering it as part of an assessment would not meet the responsible lending obligations however we support clearer guidance on this issue if ASIC has identified a need.<br><br>The guidance should make it clear that steps taken to verify income and expenses should relate to <u>material</u> amounts. Consistent with our answer at B1Q5, verification should focus on income and fixed expenses. ASIC could also consider recommending more thorough verification as serviceability margins get tighter. |

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| useful? | The objective of a responsible lending assessment is not to achieve perfect accuracy with all amounts, but to develop an informed opinion on whether a consumer has capacity to service a proposed commitment.<br><br>Clearer guidance around materiality may give comfort to licensees that they will not risk being subjected to regulatory action merely because their assessments are not dollar perfect. |
| C2Q2 Would an 'if not, why not' approach encourage improvements to current verification practices? Why or why not? | We can see some challenges with an 'if not, why not' approach. The primary concern is that it may lead to much heavier compliance burdens on licensees to create additional records to identify what information they didn't take into account or what steps they didn't take. A clearly written assessment of unsuitability should make it clear what records were considered. This then stands as a record of what steps the licensee took and what conclusion they reached.<br><br>We strongly support a positive approach to record keeping and responsible lending assessments and believe an "if not, why not approach" increases the risk of disputes focusing on what was not done rather than the adequacy of what was done.<br><br>We want to avoid creating obligations on licensees to make notes of things they didn't do and information they didn't consider.<br><br>An "if not, why not" approach may work at a licensee level where a particular approach to responsible lending is set at a policy or procedural level but it must not extend down to individual responsible lending assessments. |
| C2Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)? | Consumer benefits – there are likely few consumer benefits to clarifying responsible lending guidance. Consumers will bear the brunt of any new treatment arising because of changed responsible lending standards but they will remain uninformed as to the reasons for the change.<br><br>If licensees are required to ask for more information or specific types of information then consumers who cannot produce it will be excluded. We do not consider this a large risk since all consumers should be able to produce records that evidence income and expenditure.<br><br>If the changes increase operating costs for business then they will flow through to consumers. Operating cost increases have a significant impact on the marketplace. They place more pressure on smaller licensees that cannot absorb higher operating costs and must pass them on to the consumer. This increases the cost of using services while larger licensees that have more efficient economies of scale can absorb increased operating expenses. This has the direct effect of lessening competition.<br><br>Unless concessions are given to scaling down inquiries for certain groups |

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| | (such as high income earners seeking a relatively modest loan) all consumers are likely to have to produce more personal information to enable licensees to demonstrate that they have met their obligations. |
| C2Q4 What additional business costs would be involved in this approach? | If the guidance merely reinforces an expectation that all licensees must obtain verification documents for both income and expenses and must consider those documents as part of their assessments, then little should change. |
| C2Q5 In your view, what would be the effect (either positive or negative) on competition between licensees? Please provide details. | Large licensees and those able to invest heavily in technological solutions will always gain commercial advantage from an increase of regulatory obligations. |

## Proposal C3

C3 We propose to clarify our guidance in RG 209 on the use of benchmarks as follows:

(a) A benchmark figure does not provide any positive confirmation of what a particular consumer's income and expenses actually are. However, we consider that benchmarks can be a useful tool to help determine whether information provided by the consumer is plausible (i.e. whether it is more or less likely to be true and able to be relied upon).

(b) If a benchmark figure is used to test expense information, licensees should generally take the following kinds of steps:

(i) ensure that the benchmark figure that is being used is a realistic figure, that is adjusted for variables such as different income ranges, dependants and geographic location, and that is not merely reflective of 'low budget' spending;

(ii) if the benchmark figure being referred to is more reflective of 'low budget' spending (such as the Household Expenditure Measure), apply a reasonable buffer amount that reflects the likelihood that many consumers would have a higher level of expenses; and

(iii) periodically review the expense figures being relied upon across the licensee's portfolio—if there is a high proportion of consumers recorded as having expenses that are at or near the benchmark figure, rather than demonstrating the kind of spread in expenses that is predicted by the methodology underlying the benchmark calculation, this may be an indication that the licensee's inquiries are not being effective to elicit accurate information about the consumer's expenses.

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| C3Q1 Do you consider that the proposed | We believe it is already clear to licensees attempting to comply with the law that benchmark figures do not provide positive confirmation of a |

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| clarification of guidance about use of benchmarks would be useful? Why or why not? | consumer's expenditure or meet the requirement to verify information. Entities using benchmarks and making no other inquiries are likely already contravening exiting law. We support ASIC clarifying this position further should it see a need to do so. In this respect the subpoints listed under C3 above appear reasonable.<br><br>Benchmarks are not a substitute for making inquiries. What benchmarks can do is provide an impartial, external reference point against which to check information provided to the licensee during the application. They provide a meaningful second line of defence to a serviceability assessment.<br><br>Expense information is difficult to compile, particularly if it is a manual process. As we have identified elsewhere in our submission, a consumer's expenses and spending habits are fluid and apt to change in response to taking on additional commitments.<br><br>We recognise that many consumers overstate their income and understate their expenses. By providing consumers with an opportunity to provide truthful and considered estimates and then taking the higher of their declared expense figure or a statistical benchmark, consumers are being protected from unreasonably low estimates putting them into substantial hardship. Lenders are protected from consumers underestimating their expenses where they use a higher living expense figure than the consumer claims they live on. When coupled with a credit report identifying any significant fixed credit commitments, an approach which uses reasonable expense estimates will see consumers being placed into credit commitments that they can afford to service. Where the expense estimate is lower than their current monthly expenses, a benchmark figure will tell you that they should be able to service the contract even if it means making changes to spending habits. If the expense figure used in the assessment is higher than the figure provided by the consumer then the licensee should be fully protected from claims of responsible lending breaches.<br><br>Paragraph 38 of the Consultation Paper cites a passage from the Federal Court judgement of *Channic*. We do not agree with the conclusion stated in that passage. We do agree that ignoring a consumer's circumstances and instead using a benchmark figure may fall short of reasonable inquiries or verification steps, however we disagree that this approach is unreasonable where the consumer is asked to estimate their own expenses first. In the first scenario of applying a benchmark figure to a consumer's assessment regardless of their stated expenses, the licensee is ignoring information which may be material to the assessment. In the second scenario where a consumer is asked to estimate their expenses and then the higher of the consumer's estimate or the benchmark figure is used, the consumer has been given the opportunity to be part of the assessment. Consumers <u>must</u> share responsibility for the information |

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| | provided and relied on as part of responsible lending.<br><br>We advocate against placing too much emphasis on the judicial comments from *Channic* and *The Cash Store* cases. In both cases the defendants' conduct fell well below the standards of conduct engaged in by responsible, law abiding licensees. It did not take a court case or a Judge to tell hard-working licensees that the conduct of the licensees in the two cases was unacceptable. We contend that these entities were either intentionally non-complaint or wilfully ignorant to their obligations. Revised regulatory guidance will not reach entities intent on engaging in misconduct. |
| C3Q2 Please provide information on what buffer amounts you currently apply, or would otherwise consider to be reasonable. | Different industry groups and licensees within each group apply different buffers to their expense estimates. We defer to other submissions for this question. |
| C3Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)? | The benefits of having greater clarity around an approach that ASIC deems reasonable include greater efficiency and consistency in assessments and greater licensee certainty. Compliance with responsible lending laws remains a key area of focus and worry for licensees. We believe that any changes to guidance need to flow through into the approaches employed in dispute resolution which may give more consistency in outcomes at EDR also.<br><br>Responsible lending assessments will never prevent some consumers defaulting on repayment obligations no matter how perfect they are. Dependable results with good consumer outcomes are achieved by verifying income and material fixed expenses, involving the consumer to allow them to estimate their expenses and checking this against an impartial refence such as a benchmark.<br><br>A buffer over a benchmark is no more accurate at verifying a consumer's expenses than the benchmark figure itself. If a buffer is too high it will exclude more consumers.<br><br>Prudent consumers with very low expenses may be disadvantaged with higher buffers. While licensees can accept a consumer's expense figure that is below the benchmark (for example where a consumer can demonstrate below-average spending) they are taking on more risk. A licensee would have more difficulty defending a responsible lending dispute where the expenses figures used in an assessment are below benchmarks. This remains true even if they have performed a very detailed assessment. The risk v reward trade-off for licensees departing from standardised approaches just does not exist for most licensees. |

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| C3Q4 What additional business costs would be involved in this approach? | Specifically relating to use of benchmarks, there could be considerable cost to licensees if they are expected to know exactly what items are included from and excluded from a benchmark and then required to obtain additional information from consumers to bridge any gaps. No two consumers spend money on the same things or in the same proportions. We support the reasonable use of benchmarks. Reliance on them would become unworkable if licensees are required to dissemble them and introduce additional steps to cover any gaps. Again this comes back to materiality and whether, once a licensee has information about a consumer's fixed expenses, the consumer's own estimate of household expenses and a comparison to a reasonable index whether anything omitted from an assessment from that point on would be material to the consumer's ability to service the proposed contract. We contend that t would not. Issues subsequent to the assessment are more likely to relate to consumer conduct or change of circumstances after the event. |

## Proposal C4

C4 We propose to update the current guidance in RG 209 on reasonable inquiries about the consumer's requirements and objectives to reflect the findings and guidance in Report 493 Review of interest-only home loans: Mortgage brokers' inquiries into consumers' requirements and objectives (REP 493).

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| C4Q1 Do you consider that the proposed clarification of guidance about understanding the consumer's requirements and objectives would be useful? Why or why not? | The guidance must recognise the scalability of inquiries. The considerations for a home loan are at the highest end of the scale and the guidance will have to reflect this.<br><br>We contend that ASIC's view in relation to the obligation to make inquiries into a consumer's requirements and objectives are too binary.<br><br>In our response to B1Q3 we identified that for some products and services, the consumer's needs and objectives are evident from the transaction. An assessment of unsuitability that does not explicitly identify the consumer's desire to finance or rent the specific product should not automatically be assessed as defective. The example given was presenting a motor vehicle to a motor vehicle financier. An assessment which fails to state that the consumer wishes to purchase a motor vehicle with finance offered by a particular licensee is not defective per se. For a consumer lease, if a consumer applies to rent a product through a consumer lessor, the lessor should be able to take on face value that the consumer wishes to rent the goods. If a consumer enters a vehicle hire store and asks for a vehicle the company is entitled to assume the consumer is there to rent a car and not buy one. It should not be any different for finance.<br><br>Again we say that consumer conduct must be taken into account here. |

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| | Where a consumer applies with a particular provider – whether directly or through an intermediary, the provider should be entitled to accept that the consumer wishes to acquire their product (if deemed not unsuitable). Providers should provide the consumer with an opportunity to request specific features, and should make further inquiries (or decline to offer finance) if they cannot meet them, but should not be expected to go further so as to positively determine that the consumer has not applied in error. We have concerns that proposed revisions to RG209 are skewing towards credit providers being required to exhaustively determine that the consumer really wants the product they are asking for.<br><br>Even with the example of an interest only home loan, if a consumer applies to a lender for an interest only home loan, we do not believe that lender should then be required to interrogate the consumer to ensure they aren't misinformed by an external source (whether it be a broker, an adviser, from reading articles on the internet etc) or that they have considered the advantages and disadvantages of their interest only loan over other options. They should be able to proceed to deal with the consumer on the basis that the consumer actually wants the product they have applied for and should only be required to decline if the consumer identifies a specific requirement that cannot be met by it.<br><br>This is to be contrasted to a situation where a consumer seeks guidance on the best product for their given objectives. Consumers can and do carry out their own research and they must be accountable for their decisions.<br><br>A considerable number of the findings in Report 493 are capable of being interpreted in more than one way. For example Rep 493 circa paragraph 246 references findings from REP 445. ASIC observes that for interest only loans where offset accounts were used, consumers were generally further ahead on repayments when compared to principal and interest accounts. The report notes that no broker applications identified *minimising overall* cost as the consumer's overriding objective but that a number of reviewed applications stated the consumer's objective as *paying off the loan quicker*. The suggestion in REP 493 was that improvement was required in the broker's records to better identify the consumer's objectives. In or view these two objectives are aligned. Our reading of this outcome is that the broker provided the most effective means of delivering on the consumer's primary objective and recorded that in the application. It comes down to semantics as to whether *minimising overall cost* is the same as *paying off the loan quicker*. Objectively, both needs are satisfied by the result.<br><br>Paragraph 63 of CP309 recites ASIC's observation in REP 493 that "a loan with an interest-only period *could* [emphasis added] be significantly more expensive for a consumer". This is just one possible outcome of |

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| | an interest only loan. It could also be significantly more flexible, it could allow the consumer to utilise funds elsewhere, it could allow the consumer to focus on paying off other debt more quickly, it could provide the consumer with a significantly better outcome when paired with other financial strategies (offset accounts, investments in negatively geared assets etc) that are outside of the ambit of the credit provider's knowledge.<br><br>We do not support revisions to guidance where such changes are being made to address selectively identified scenarios that are presented as more general consumer risks.<br><br>It is not the role of credit providers to anticipate every possible outcome that could or should be within the consciousness of a consumer. We absolutely support inquiries that enable a credit provider to determine whether a proposed product will not meet the consumer's needs and objectives. We believe this is already being done. A recommendation that is unsuitable because it does not have the attributes required by the consumer is already unsuitable and breaches current responsible lending laws. Guidance cannot clarify all that which lies between and our concern is that more guidance in this area starts to move towards the realms of product advice and finding the most suitable product for a consumer rather than one that is not a complete mismatch and which would be unsuitable. |
| C4Q2 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)? | There are many risks of imposing more prescriptive inquiries for a consumer's needs and objectives. They could make the application process even more invasive and convoluted than it already is. Consumers already put up considerable resistance to having to provide detailed financial information claiming it is invasive and time consuming for them to collate the records. Many consumers are gravitating towards the unregulated sector such as buy now pay later. Retailers are actively directing consumers towards unregulated products knowing that a consumer can be approved for a buy now pay later arrangement in minutes whereas a credit card application or other form of regulated finance takes time to complete and has a higher risk of being rejected where a consumer doesn't have capacity to service. |
| C4Q3 What additional business costs would be involved in this approach? | One response to REP493 was for some lenders to impose additional requirements on brokers prior to submitting an interest only loan. In ways not dissimilar to the thinking of ASIC, some lenders required brokers to complete a set of questions that essentially positively affirmed that the broker had explored all options with the consumer and determined the interest only loan was the right product for them. Brokers were required to discuss the consequence of higher repayments after the interest only period ceases and to address other costs and benefits of interest only loans. In summary, lenders sought to protect |

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| | themselves from further backlash by placing all of the obligations of making additional inquiries onto their brokers. From the lender perspective, once they received the completed questionnaire they treated the loan application in exactly the same way as before the changes were introduced. Increased obligations trickle down from lender to broker to consumer. |

Proposal D1

D1 We propose to include new guidance in RG 209 on the areas where the responsible lending obligations do not apply.

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| D1Q1 Are there any forms of lending where the responsible lending obligations are being used by licensees in situations where the law does not require the responsible lending obligations in the National Credit Act to apply? Please describe the situations where this takes place. | Some licensees in commercial lending apply responsible lending principles either directly to unregulated credit or indirectly through writing consumer and commercial deals on consumer paper. |
| D1Q2 Are there any forms of small business lending where licensees are unsure about whether the responsible lending obligations in the National Credit Act apply? Please describe the situations which give rise to this uncertainty. | We are not aware of any forms of small business lending where it is unclear about the application of responsible lending.<br><br>We are aware that entities offering credit and that are not caught by responsible lending laws have significantly more freedom to offer credit to customers. Their operating costs are much lower, their processes much simpler and their customers perceive the product as being better and easier because they are not being asked to provide so much information when applying.<br><br>There is a considerable gap between regulated and unregulated entities in terms of the inquiries they must make and the documents they must create for each transaction.<br><br>Consumers appear more supportive of simple processes, less onerous application requirements and less paperwork which favours unregulated options. |

Proposal D2

D2 We propose to include new guidance in RG 209 on:

(a) the role of the responsible lending obligations, and in particular the obligation to take reasonable steps to verify information provided about the consumer's financial situation, in mitigating risks involved in loan fraud; and

(b) risk factors that might indicate that additional verification steps should be taken.

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| D2Q1 Would specific guidance about loan fraud and the impact on responsible lending obligations of the licensee be useful? Would guidance encourage broader improvements in processes for identifying fraud and reduce the risk of consumers entering unsuitable credit contracts as a result of fraud? Why or why not? | We reject any notion that licensees have an obligation to protect consumers from their own attempts to commit fraud. Moreover we support stronger sanctions against consumers who provide false statements in applications for finance.<br><br>We agree with ASIC's observations at paragraph 73 of the CP that current guidance is adequate to assist licensees to identify overstated income. We support stronger action against consumers who deliberately or recklessly provide misleading information in support of an application. We also support a safe harbour for licensees that find themselves in dispute with consumers who have provided false information at the time of applying for credit. The (relatively small) protections for licensees written into credit contracts that make providing misleading information a breach of the contract are rarely relied upon in consumer disputes. Consumers should forfeit rights to EDR and licensees should be able to defend against disputes at no charge where consumer fraud is involved.<br><br>Licensees understand that taking reasonable steps to review records and verify information given to them should assist them to detect unsophisticated fraud.<br><br>We do not disagree that the examples listed in paragraph 76 would be likely to cause a lender to raise doubts about the reliability of information provided as part of an application, however we do not believe they are representative of true scenarios. For example, it would be uncommon for a licensee to have any means by which it could become aware of another licensee investigating a consumer for loan fraud without a central registry where licensees could report suspect borrowers. The other examples listed in paragraph 76 are equally possible, but implausible. They are matters a licensee would already act on if aware but which rarely come to a licensee's attention early enough in the process.<br><br>Members can provide countless examples of where they have detected suspicious activity and declined credit. These are not recognised by ASIC – only the instances where investigations reveal adequate action was not taken. We understand that as an enforcement agency ASIC focuses on situations where things go wrong rather than all the times licensees with |

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| | good compliance have achieved the outcomes strived for by the regime. This also underscores our view that ASIC must take care with framing its guidance and its objectives for issuing specific additional guidance. It cannot be to try to reach those already intent on contravening the law as those entities will disregard any new guidance just as they have disregarded the previous guidance and their legal obligations.<br><br>Licensees can and do regularly identify loan fraud and many report that they refer suspected loan fraud to enforcement agencies including State police, ASIC and AUSTRAC and receive very little back by way of acknowledgement. We would like to see more support for those reporting suspected loan fraud including a mechanism whereby reports are investigated and the persons reporting it are informed. Licensees report that it is de-motivating to continue to refer suspect applications to authorities only to hear nothing back.<br><br>Loan fraud is a serious crime and those attempting to commit loan fraud should be punished. We fully support enforcement agencies in actions they take against anyone in our industry committing or complicit to loan fraud. The FBAA uses its Code of Conduct to take action against any member identified as having involvement in questionable activity.<br><br>Consumers who make false statements and provide false information as part of loan applications should also be prosecuted, yet consumers are almost never subjected to any reprimand for such conduct.<br><br>We do not believe loan fraud should be addressed under responsible lending guidance except other than to impress upon lenders that they must have measures in place to detect intermediary fraud. |
| D2Q2 Please provide details of any risk factors that you consider it would be useful to identify, and additional verifying steps you consider to be reasonable in those circumstances. | We have no submission against this question. |
| D2Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)? | We refer to our response in D2Q1. |

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| D2Q4 What additional business costs would be involved in this approach? | We have no submission against this question. |

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Proposal D3

D3 We propose to include guidance in RG 209 to clarify how repayment history information may be used, including that:

(a) the occurrence of repayment difficulties on one product will not necessarily mean that a new credit product will in all cases be unsuitable for that consumer; and

(b) this information should instead trigger the licensee to make more inquiries to enable it to understand those repayment difficulties, and the likelihood that the circumstances of the consumer leading to those difficulties will mean that the consumer would also be unable to meet financial obligations under the new product being considered.

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| D3Q1 Would guidance about use of negative repayment history information and hardship indicators reduce the risk that credit providers consider it necessary to refuse applications for further credit products that may in fact be affordable for the consumer? Why or why not? | We have no information to suggest that credit providers require further guidance on repayment history information and hardship information and how it should be used in subsequent assessments for consumers.<br><br>Credit providers each choose to weight these issues differently. Some will choose to decline applications based on poor credit scores and past defaults whereas other credit providers will assess an applicant on their current circumstances. Arguably, credit providers that approve credit to consumers with a poor history run a higher risk of being accused of either having ignored relevant information at the time of conducting their assessments (thus breaching their responsible lending obligations) or exploiting consumers with poor financial acumen.<br><br>Prior to responsible lending, consumer repayment history (their propensity to repay other credit commitments) was a significant factor for credit providers. Consumer behaviour remains a significant factor although a credit provider would be breaching its responsible lending obligations to extend credit to a consumer on the basis of their credit history alone. Anecdotally, a consumer's propensity to repay remains as strong an indicator as any financial assessment of current capacity to pay.<br><br>There are likely to be significant changes in the future when (and if) positive credit reporting becomes comprehensive and reliable.<br><br>At this time we do not see a need for further guidance on this issue. |
| D3Q2 What are the benefits, risks and costs for consumers in | The risk of providing further guidance along the lines contemplated under this question is that the guidance could be misconstrued as ASIC |

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| this approach (including any effect on access to and cost of credit for consumers)? | encouraging licensees to disregard negative repayment history and hardship indicators as part of their assessments. As per our response above, we believe each licensee should determine for itself what weight it chooses to put on consumer repayment history |
| D3Q3 What additional business costs would be involved in this approach? | We have no submission against this question. |

## Proposal D4

D4 We propose to include new guidance in RG 209 about maintaining records of the inquiries made and verification steps taken by the licensee, reflecting our findings and recommendations on good recording practices included in REP 493.

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| D4Q1 Do you consider that guidance on industry best practice for recording the inquiries and verification steps that have been undertaken would be useful for licensees? Why or why not? | We have some reservations about what constitutes 'industry best practice' and what we feel is a heavier emphasis on file notes over consumer outcomes.<br><br>We repeat our comments in the answer to C4Q1 above:<br>A considerable number of the findings in Report 493 are capable of being interpreted in more than one way. For example Rep 493 circa paragraph 246 references findings from REP 445. ASIC observes that for interest only loans where offset accounts were used, consumers were generally further ahead on repayments when compared to principal and interest accounts. The report notes that no broker applications identified *minimising overall* cost as the consumer's overriding objective but that a number of reviewed applications stated the consumer's objective as *paying off the loan quicker*. These two objectives are aligned. Our reading of this outcome is that the broker provided the most effective means of delivering on the consumer's primary objective and recorded that in the application. It comes down to semantics as to whether *minimising overall cost* is the same as *paying off the loan quicker*. Objectively, both needs are satisfied by the result. If 'industry best practice' guidance contemplates descending to such a level of detail we cannot support it.<br><br>We recognise that good record keeping is important for licensees to demonstrate compliance and to defend themselves in the event of a dispute. Record keeping breaches however are different to, and should be recognised differently from product related breaches. A consumer who is assisted into the right product but whose file notes are in poor condition is in a far superior position when compared to a consumer who is placed into an unsuitable product but whose files notes are in perfect order. |

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| | We want to ensure that guidance does not lean towards suggesting that licensees will be penalised / breaching their obligations if they do not follow what ASIC describes as 'best practice'. Licensee notes should not be seen as needed to rebut a presumption of failure / contravention.<br><br>We prefer that guidance explains the reason for creating clear records and also how a licensee might test their own records to determine whether they are comprehensive enough. We endorse creating file notes to support the transaction but not to explain why alternatives were not considered. Clear and useful written records should enable a third party to understand the transaction and material decision points along the way.<br><br>We believe that both ASIC and AFCA at times place too much reliance on the records and disregard the actual outcome of the service / credit assistance. The example cited from REP 445 serves to demonstrate this. It would be a poor outcome for a licensee to face consequences for providing the correct product to the consumer but falling short with their note taking. The overall outcome must carry more weight than the condition of the written records that support it. |
| D4Q2 Please provide any comments on the particular recording practices identified as 'best practice' by ASIC, and whether you consider those practices are generally appropriate for licensees. | We prefer more open guidance in this area. Record keeping practices are influenced by licensee scale and technology. Guidance should focus on the purpose of adequate record keeping and the test for how such is determined. In other words, guidance should focus on the WHY and not the HOW. It may be helpful if ASIC were to provide more detail about how it would approach a surveillance or enforcement action to determine whether a licensee is meeting its obligations. Real examples of what has been found to be inadequate are just as helpful as guidance about what is adequate. |
| D4Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)? | The largest risk of providing guidance on best practice is that it becomes the standard against which all practices are judged. Where a particular record might be identified in best practice guidance but absent from a licensee's records a dispute is more likely to arise over the reason a licensee did not follow best practice guidance rather than whether the records the licensee does obtain are sufficient. This mindset finds its way through to EDR schemes and consumer disputes which can lead to relatively simple disputes becoming complex and clouded by tangential arguments.<br><br>Best practice guidance will not be able to accommodate every unique approach, therefore what is asserted as 'best practice' may only be relevant to a limited number of licensees. As we have already stated, the majority of licensees are trying to comply and to do the right thing. |
| D4Q4 What additional business costs would be involved in this | As with previous answers, changes to templates, IT systems, staff training and the like will have a material financial cost however each business will estimate this differently. |

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| approach? | |

Proposal D5

D5 We propose to provide additional guidance in RG 209 on what information we think should be included in a written assessment.

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| D5Q1 Would it be useful for ASIC to provide an example of a written assessment to illustrate the level of information that we think should be included? Why or why not? | We support the example assessment given in Appendix 2. It must remain as a guide only and licensee assessments should not be assessed as non-compliant if they do not follow the example assessment. |
| D5Q2 Please provide any comments on the example set out in Appendix 2. | Overall this assessment reflects the typical considerations a licensee would have regard to. We refer to earlier in our submission where we raised the issue of there being no functional difference between a preliminary and final assessment of unsuitability. The Appendix 2 assessment example would be suitable for a final assessment of unsuitability. We contend that there is opportunity for a preliminary assessment to be an abridged version of this with fewer details about the expense assessment. Credit providers seeking to rely on the preliminary assessment as the final assessment could direct intermediaries to complete a more detailed assessment. |
| D5Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)? | The benefit of a formulaic assessment of unsuitability is that it should make it easier for consumers, regulators and advocates to understand what information was factored into the recommendation. It should also provide licensees with greater confidence that they have discharged their obligations satisfactorily.<br><br>We recognise that many licensees are wary about departing from examples provided in ASIC guidance lest the wording and layouts they choose should fall short of ASIC expectations. The risk of providing an example written assessment is that some licensees may follow it to literally.<br><br>On a related note, we would like to see a fast-track dispute resolution process that involves minimal or not cost to licensees where a responsible lending dispute involves a recommendation supported by a clear written assessment. |
| D5Q4 What additional business costs would be involved in this approach? | As with previous answers, changes to templates, IT systems, staff training and the like will have a material financial cost however each business will estimate this differently. |