

**ASIC Consultation Paper 309  
– Update to RG209: Credit  
Licensing: Responsible  
Lending Conduct**  
Submission by Legal Aid Queensland



## ASIC Consultation Paper 309 – Responsible Lending Conduct

### Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to ASIC Consultation Paper 309 – Update to RG209: Credit Licensing: Responsible Lending Conduct.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Civil Justice Services Unit lawyers provide advice and representation in relation to insurance, mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications and unsolicited consumer agreements, including clients with financial issues arising from irresponsible lending.

**Proposal 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.**

**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?**

It is appropriate for ASIC to identify the inquiries and verification steps that should be taken by licensees (FSP) engaging in responsible lending conduct. Over the last decade, a number of FSP’s have lacked the ability to assess whether their customers can repay credit without undue hardship, leading to irresponsible lending and consumer detriment.

As a consequence, it is appropriate that ASIC prescribes the relevant inquiries and verification steps that would allow FSP’s to meet responsible lending requirements.

The steps prescribed by ASIC should set out the acceptable standard that all FSP’s should meet in order to lend responsibly.

It is also important for the ASIC guidance to make clear that information obtained as part of making inquiries and verification steps may trigger the need for further inquiries to be made by an FSP.

**B1Q2 If there are particular examples of industry practice that you consider should be reflected in any guidance, please provide details of those practices.**

The following conduct should be the subject of ASIC guidance:

- (a) reliance on the Household Expenditure Measure (HEM) or the Henderson Poverty Index (HPI) as the primary means of assessing a client's income should not be recommended;
- (b) obtaining 3 months' worth of bank statements and analysing that information to identify and verify income and identify other existing expenses of the consumer should be recommended;
- (c) obtaining pay slips and confirming the information contained therein should be recommended;
- (d) reliance on Centrelink benefits as income for consumers where the amount of these payments are likely to change in the near future should not be recommended; and
- (e) inquiry about "buy now, pay later" contracts or other repayment obligations that currently fall outside the existing NCCP and NCC legislation should be recommended.

**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.**

LAQ would encourage comprehensive inquiry and verification requirements for all financial products. We are of the view that the responsible lending regime should focus on the individual circumstances of each consumer. It is important that each consumer's individual circumstances are properly assessed and that ASIC's guidance reflects this requirement. Consistent and reliable lending practices should be adopted by FSP's and apply to all consumers.

**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.**

FSPs should be required to inquire and verify the following aspects of a consumer's circumstances:

- (a) income;
- (b) employment;
- (c) Centrelink or other government assistance;
- (d) ages of any children;
- (e) nature and amount of any existing credit obligations, including any repayment obligations for products outside the existing credit legislation;
- (f) household bills such as electricity, telephone and other utilities expenses;
- (g) whether the consumer is meeting all of their existing credit obligations; and
- (h) whether there has been a recent change in circumstances or likely to be a change in circumstances for the consumer.

**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.**

It is important that FSPs verify and record all the relevant information that they wish to rely on and utilise to substantiate a decision to approve credit to a consumer. The information that a FSP should access and rely upon when making this decision is easily accessed and capable of being verified and would not cause substantially increased or additional costs for the FSP.

**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?**

The positive impacts on consumers of specifying the inquiries and verification steps that are required to lend responsibly are that:

- (a) loans appropriate for a consumer's circumstances will be issued by FSPs;
- (b) consumers will not have their financial circumstances made worse by inappropriate lending; and
- (c) the original intent of responsible lending, that is, to ensure the protection of vulnerable consumers will be achieved.

**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.**

LAQ cannot make specific comments as to the likely costs FSPs will incur with the implementation of the ASIC guidance. However, as argued elsewhere in this submission, appropriate lending may reduce the default rates of loans made by FSP's and reduce their commercial risk.

**B1Q8 In your view, what would be the effect (either positive or negative) on competition between licensees? Please provide details.**

Ensuring FSP's lend responsibly will improve competition, ensure a level playing field for all FSPs, improve the reliability and reputation of the FSP industry and ensure that all FSP's provide consistent, fair and responsibly assessed credit.

**Proposal 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).**

**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?**

The types of information that should be included, in addition to the information in Appendix 1 are:

- (a) bank statements should always be obtained as the reveal a person's income, they also disclose the consumer's liabilities;
- (b) Centrepay deductions should always be examined; and
- (c) the presence of any obligations to SPER or other government departments such as child support obligations. .

**C1Q2 Do you consider that the examples included in Appendix 1 are appropriate? Why or why not?**

The examples in Appendix 1 are appropriate.

**C1Q3 Are there particular issues with using data aggregation services 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?**

LAQ recognises that what constitutes reasonable steps will change over time and that the use of data aggregation services is likely to increase as open banking is introduced.

However, we are concerned that data aggregation services do not have adequate privacy safeguards in place to protect consumer information. LAQ is particularly concerned about protecting the information of domestic and family violence victims who may have their safety put at risk if their information is not adequately secured.

Also, there is a risk of personal identifiers being disclosed. There needs to be clear rules established around who is responsible for any unauthorised transactions after a data aggregation service is used.

Given these concerns, in LAQ's view, FSP's should first seek information from the consumer before accessing data aggregation services.

**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.**

**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 useful?**

LAQ supports the proposed clarification. It highlights an FSP's responsible lending obligations which includes a responsibility to look at the individual circumstances of a consumer when assessing their ability to repay a loan. It is only by looking at all relevant information about a consumer that appropriate lending decisions can be made.

**C2Q2 Would an 'if not, why not' approach encourage improvements to current verification practices? Why or why not?**

An "if not why not approach" will only be successful if it is enforced properly by ASIC to ensure compliance. A similar type of presumption already exists about small amount loans legislation. It contains a rebuttable presumption that a third small amount loan is unsuitable. However, this presumption has not resulted in an increase in appropriate and responsible lending to consumers. For this reason, LAQ does not support an "if not why not?" approach to verifying information. Instead, ASIC should be encouraging FSPs to obtain and verify information relating to a consumer. FSP's should be encouraged to properly record their decision making processes and outcomes with clear reference to the verified information that they have obtained about a consumer. The FSP should be required to examine all reasonably available information.

**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)?**

The positive impacts on consumers of specifying the inquiries and verification steps that are required to lend responsibly are that:

- (a) loans appropriate for consumer circumstances will be issued by FSPs;
- (b) consumers will not have their financial circumstances made worse by inappropriate lending; and
- (c) the original intent of responsible lending, that is, to ensure the protection of vulnerable consumers will be achieved.

**C2Q4 What additional business costs would be involved in this approach?**

LAQ cannot make specific comments as to the likely costs FSPs will incur with the implementation of the ASIC guidance. However, appropriate lending may reduce the default rates of loans made by FSP's and reduce their commercial risk.

**C2Q5 In your view, what would be the effect (either positive or negative) on competition between licensees? Please provide details.**

Ensuring FSP's lend responsibly will improve competition, ensure a level playing field for all FSPs, improve the reliability and reputation of the FSP industry and ensure that all FSP's provide consistent, fair and responsibly assessed credit.

**Proposal 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, dependents 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.**

**C3Q1 Do you consider that the proposed clarification of guidance about use of benchmarks would be useful? Why or why not?**

LAQ supports further guidance being provided about the use of Benchmarks. In LAQ's experience the use of Benchmarks by licensees has been very poor and led to:

- (a) inappropriate loans being approved for consumers;
- (b) severe financial hardship being experienced by consumers as a result of irresponsible lending;

- (c) licensees failing to be diligent and engaging in legally non-compliant practices when assessing a consumer's income and expenses; and
- (d) inaccurate data regarding the true cost of living in Australia being used and reused by licensees.

LAQ supports the guidance and submits that a Benchmark figure does not reliably provide positive confirmation of a particular consumer's income and expenses.

We also supports the steps set out in Part B. These steps reinforce the importance of ensuring that any benchmark that is used to test whether the information provided by a consumer is accurate has the following characteristics:

- (a) is not static;
- (b) are drawn/supported from reliable and accurate sources;
- (c) is regularly reviewed and updated to ensure it reflects Australia's current expenses and living standards;
- (d) contain a buffer of retained and sufficient income to ensures a consumer will not be living in poverty if the loan is approved;
- (e) is only used to reality test the information provided by the consumer; and
- (f) is adjusted for the consumer's individual variables and geographical location.

### **C3Q2 Please provide information on what buffer amounts you currently apply, or would otherwise consider to be reasonable.**

A buffer amount of 25% on top of a low budget spending measure is realistic. Many expenses are left out of low income benchmark figures that are relied on by FSPs to assess a consumer's ability to repay a loan. Any benchmarking should be adjusted for these missing expenses which are set out on page 19 of the Consultation Paper.

### **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 positive benefits to consumers of this approach are:

- (a) a reduction in access to inappropriate and unaffordable credit and ensure consumers who cannot afford the credit they are seeking will not be able to access credit they cannot repay;
- (b) responsible lending obligations will be more likely to be complied with by licensees. This improved compliance will ensure protections are provided to all consumers with the FSP industry; and
- (c) there would be no justification for the cost of credit to increase. Responsible lending obligations are obligations that licensees are already legislatively required to comply with.

### **C3Q4 What additional business costs would be involved in this approach?**

LAQ is unaware of any additional business costs that would apply to licensees complying with their existing legal obligations. Ensuring FSP's lend responsibly will improve competition, ensure a level playing field for all FSPs, improve the reliability and reputation of the FSP industry and ensure that all FSP's provide consistent, fair and responsibly assessed credit. Appropriate lending may also reduce the default rates of loans made by FSP's and reduce their commercial risk.



**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).**

**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?**

LAQ supports the proposed clarifications set out in Paragraphs 66-68 of the Consultation Paper. The clarification is useful because:

- (a) it encourages licensees to know, understand and correctly assess the consumer's financial circumstances and capacity to repay the requested credit;
- (b) it will result in consumers accessing financial products suitable to their individual circumstances; and
- (c) it will encourage consumers to make commercially sound choices regarding the credit they are seeking as they will have to provide information to support the credit requests they are making.

**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)?**

In LAQ's submission, the benefits to consumers are:

- (a) loans appropriate for consumer circumstances will be issued by FSPs;
- (b) consumers' will not have their financial circumstances made worse by inappropriate lending;
- (c) there will be a corresponding improvement in the mental health and well-being of consumers;
- (d) the original intent of responsible lending, that is, to ensure the protection of vulnerable consumers will be achieved; and
- (e) consumers' who cannot afford the credit they are seeking will not be able to access credit they cannot repay.

**C4Q3 What additional business costs would be involved in this approach?**

LAQ cannot make specific comments as to the likely costs FSPs will incur with the implementation of the ASIC guidance. However, this is another instance where appropriate lending may reduce the default rates of loans made by FSP's and reduce their commercial risk.

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

**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.**

**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.**

The problem in this area is not with licensees applying responsible lending obligations to small business lending but rather, non-licensees attempting to disguise consumer lending arrangements governed by the



National Consumer Credit lending, as small business lending. Wider enforcement is required about this type of avoidance of the National Credit legislation.

**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.**

**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?**

Many licensees already have very sophisticated fraud detection practices in place. LAQ questions whether additional guidance is necessary unless it is focused on reinforcing for licensees that incorrect information being provided as part of a loan application is not necessarily indicative of fraud and the importance of reality checking information provided by consumer against other information sources such as the consumer's bank statements and employment records.

If the guidance is directed at providing support to address this situation then LAQ supports guidance, similar to that which is set out in Paragraph 76-77 of the Consultation Paper being provided.

**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.**

LAQ supports the additional verifying steps set out in Paragraph 77(b) of the Consultation Paper.

**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)?**

The risk to consumers if this issue is not addressed through the provision of guidance by ASIC is that licensees will reject applications that have incorrect information and this will reduce access to credit for consumers who otherwise would have been able to afford to repay the credit they are seeking.

**D2Q4 What additional business costs would be involved in this approach?**

LAQ cannot make specific comments as to the likely costs FSPs will incur with the implementation of the ASIC guidance. Appropriate lending may reduce the default rates of loans made by FSP's and reduce their commercial risk.

**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.**

**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?**

LAQ supports the proposed guidance that negative repayment history should not trigger a credit application being automatically refused. Instead LAQ encourages licensees to make further inquiries as set out in paragraphs 80 and 81 of the Consultation Paper. These inquiries are likely to see licensees in a position where they are better able to understand and correctly assess the consumer's financial circumstances and capacity to repay the requested credit.

**D3Q2 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 this approach are clients who can otherwise afford to repay a loan will not be denied access to credit on the basis of one missed payment and licensees will be encouraged to make further enquiries about their clients, and to be in a position to then correctly assess the consumer's financial circumstances and capacity to repay the requested credit.

**D3Q3 What additional business costs would be involved in this approach?**

LAQ cannot make specific comments as to the likely costs FSPs will incur with the implementation of the ASIC guidance. However, appropriate lending may reduce the default rates of loans made by FSP's and reduce their commercial risk.

**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.**

**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?**

The records of assessment and decision making outcomes kept by licensees of the inquiries and verification steps about their customer's circumstances are very poor. LAQ supports guidance on this issue that is based on the recommendations set out in ASIC REP 493.

**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.**

LAQ supports the best practice recording practices identified by ASIC and the comments ASIC has set out in Paragraph 85 of the Consultation Paper.

**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 main benefits of this approach are:

- (a) it will encourage compliance with legislative responsible lending obligations,
- (b) ensure appropriate records are maintained by licensees;
- (c) ensure the licensee has records that verify and substantiate responsible lending practices and decision making which can then be relied on by the licensee; and
- (d) it will result in improved decision making that ensure a licensee has correctly assessed the consumer's financial circumstances and ensure the consumer's capacity to repay the requested credits.

**D4Q4 What additional business costs would be involved in this approach?**

LAQ cannot make specific comments as to the likely costs FSPs will incur with the implementation of the ASIC guidance. However, appropriate lending may reduce the default rates of loans made by FSP's and reduce their commercial risk.

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

The ability for consumers to request a written assessment of the licensee's lending decision has the potential to be a very powerful tool for consumers to assist them to understand their current circumstances as set out in Paragraph 89 of the Consultation Paper. There are significant variances in the quality of written information provided by licensees in their written assessment. LAQ supports ASIC providing an example of a written assessment to illustrate the level of information required in a written assessment because:

- (a) it will improve the consistency of written assessments among licensees;
- (b) it will provide consumers with more accurate and in-depth information about the licensee's assessment of their financial circumstances; and
- (c) it will lead to better lending decisions as it will ensure that licensees correctly assessed the consumer's financial circumstances and capacity to repay the requested credit.

**D5Q2 Please provide any comments on the example set out in Appendix 2.**

LAQ supports the example assessment set out in Appendix 2. It sets out a level of detail that all licensees should obtain and understand about their customer as part of responsible lending decision making.

**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)?**

This guidance will benefit consumers for the reasons set out in LAQ's answer to D5Q1.

**D5Q4 What additional business costs would be involved in this approach?**

LAQ cannot make specific comments as to the likely costs FSPs will incur with the implementation of the ASIC guidance. However, appropriate lending may reduce the default rates of loans made by FSP's and reduce their commercial risk.