



Min-it Software



**Joint Submission –**

**ASIC**

**Update to RG 209: Credit licensing: Responsible lending conduct**

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**Contact:**

Haydn Cooper  
President  
Financiers Association of Australia

Director  
Min-it Software  
PO Box 1367  
Sunnybank Hills  
QLD 4109

Telephone : 07 3038 3044

Fax: 07 3870 0813

Mobile: 0413 722 223

e-mail: [haydn@min-it.net](mailto:haydn@min-it.net)

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## ***Poor pro-active distribution of consultation paper***

This submission to the Australian Securities and Investments Commission (“ASIC”) consultation on updating responsible lending conduct is made on behalf of the Financiers Association of Australia (“FAA”) and Min-it Software (“Min-it”) clients.

We only heard of this consultation on Friday 11 May despite the paper having been issued in late February though a chance remark made by a solicitor.

According to a Sydney Morning Herald article<sup>1</sup> of 18 October 2017, James Shipton, chairman of ASIC said “success for him will be a nimble, proactive and inquisitive corporate regulator”. Whilst Royal Banking Commissioner Kenneth Hayne damned ASIC for its “an entrenched culture of negotiating outcomes rather than pursuing punishment for wrongdoing<sup>2</sup>”, the process for engaging in proactive consultation with the very industry groups likely to be affected by this review of responsible lending conduct must be classified as an abject failure. The FAA was never informed of this consultation and we know other industry representative bodies weren’t either.

With less than a dozen industry groups representing affected participants, we question why ASIC chose not to alert all of them personally by email. As many a teacher has advised an errant student, on this outcome, ASIC needs to do much better.

## ***Further industry consultation absolutely necessary***

Under the heading of “what will happen next”, we note there appears to be no published intention to consult industry representative groups. We are aware that ASIC has regular meetings with consumer advocates.

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<sup>1</sup> Ferguson, A, 2017. “*New ASIC boss wants to be nimble and inquisitive*”, Sydney Morning Herald, 18 October 2017. Available online <https://www.smh.com.au/business/new-asic-boss-wants-to-be-nimble-and-inquisitive-20171017-gz2o1s.html> viewed 13 May 2019.

<sup>2</sup> Prior, N, 2019. “Banking royal commission: Hayne orders ASIC to show its teeth”, The West Australian, 5 February 2019. Available online <https://thewest.com.au/business/asic/banking-royal-commission-hayne-orders-asic-to-show-its-teeth-ng-b881094524z> viewed 13 May 2019.

Just as Treasury held stakeholder meetings with both industry representatives and consumer advocates, we suggest this is such importance that ASIC must consider holding similar meetings on this matter with the same stakeholders.

This should follow the same format of open meetings where differing views can be explored and challenged. These meetings must equally be ones where all sides are properly considered rather than ones going through the motions of consultation even though the outcome has already been decided upon.

The final outcome is likely to take some time and it will be important that ASIC holds informatory meetings for Responsible Managers and how to interpret the new RG209 when finally published. It is suggested that because of the number of changes required, we consider it unlikely this may be implemented prior to July 2020.

## ***Executive Summary***

As the report notes, the Australian Financial Complaints Authority is also developing its own guidance on responsible lending. We view this as unnecessary duplication and it is imperative that we do not see AFCA arrive at a slightly different view of what constitutes responsible lending conduct to that of ASIC. There must be consistency across both entities and as the regulator, we see no reason why ASIC cannot provide industry and the EDR provider with sufficient clear guidelines that will enable the vast majority of lenders and lessors to be able to meet the legal requirements.

There will always be those consumers, however, that see their own personal situation as deserving of more accommodation in order to secure the financial products that are sought. Based on anecdotal information from both members and clients, too often, those lenders that try to assist such consumers invariably create grief for themselves down the track. What this paper highlights is the distinct possibility of incurring punitive pecuniary outcomes that could arise despite industry's willingness to take the risk in assisting consumers at the time of application. Consequently, this may not directly relate, *per se*, to unaffordability but what industry will regard as a contrived complaint lodged well after funding, formulated on the notion the consumer's contractual

requirements have not been met whereas the reality suggests it's merely an attempt to avoid further payment by the consumer.

In our opinion, the use of benchmarks has significantly increased the likelihood of irresponsible lending by some lenders. ASIC was aware of this fact from the beginning when it released its initial version of RG209. ASIC's Regional Commissioner for Tasmania advised an industry representative organisation very early after taking on the credit regulatory role that it did not believe such systems provided the lender with sufficient information on which it could rely on in order to ensure the loan was not unsuitable, although there have undoubtedly been improvements in system capability. Despite making statements to inform licencees that they must use the consumers' actual figures rather than taking enforcement action, apart from a current action against Westpac Bank in its use of the Household Expenditure Measure ("HEM"), it has done little to stem the tide since. Almost all online credit comparison websites have used this benchmark, generally at its lowest level, instead of taking the consumer's actual expenses as an indication of what the consumer could live on rather than really occurs.

This is therefore a rear-guard action by ASIC following the scathing comments of Commissioner Hayne on both lenders and brokers, particularly in relation to home mortgage finance. We do not dispute what these credit providers did was wrong and they let many consumers down. Based on what is being contemplated, however, the guidance appears more designed for ASIC to take enforcement (and by implication, for AFCA to take similar) action in a one-size-fits-all approach that cannot but leave consumers' feeling their private lives will have been stripped bare purely to satisfy the regulator's requirements. There are very many consumers who already feel anger and doubtless threatened by the intrusiveness of information demanded of by lenders in order to meet their current responsible lending and loan suitability inquiries, never mind these new proposals.

Whilst home mortgage loans represent large value amounts in total, there are many more consumer finance contracts being entered into daily and, we suggest, on a far regular basis. In order to reduce such feelings by consumers, there is no suggestion that a lender meeting the suggested inquiries will afford any form of safe harbour because there may always be something else that might have been overlooked or ill-considered. Consequently, rather than possibly assisting lenders or encouraging lenders find creative (and safe) ways to lend to consumers in a responsible manner without delivering such feelings, it may well have the opposite effect in some

circumstances. Process rigidity may well become an unintended consequence and notwithstanding improvements in data collection and information systems, even assuming consumers give collection approval, stifle or at least slow down the economy by making finance tighter. This has already occurred for those attempting to secure home mortgage finance approval, especially by the bigger banks in reaction to the Royal Banking Commission.

We note that the consultation paper believes the New Payments Platform (“NPP”) for banking will enable competition and faster real-time payment transfers but we suggest many consumers will be left disappointed they will still be tied to their existing lender(s) or mortgagee(s). Depending on the cost and what information (if any) can be obtained via the NPP, it may enable some but not all financial service providers derive useful information that would assist in their assessment process assuming the consumer allows access or provides it. Equally, the new Consumer Data Rights (“CDR”) legislation might assist but it must be remembered the very information required is likely to only be made available to the lender by the consumer, the very ones who currently engage in fraud. These are the same consumers that copy and paste falsified data into pdf documents for bank statements and other documents to allegedly show they have the financial resources to repay the loan with ease and who enter the telephone numbers of friends or relatives instead of employer and possibly landlord references who can ‘verify’ the falsified data to the lender on enquiry.

We therefore repeat the call we have made numerous times to Government in the past and that is the borrower must be made accountable for their actions rather than all responsibility falling on any licensee, though ultimately the lender. Even the former Financial Services Minister, the Hon. Kelly O’Dwyer, said in an interview on ABC’s 7:30 programme<sup>3</sup> back on 4 April 2016 when asked:

**SALES:**

“We just heard in the first story on this program tonight that Australian households are carrying unprecedented levels of debt. Is that something that bothers the Turnbull Government? And are you prepared to lecture Australians about the need for personal responsibility?”

**MINISTER O’DWYER:**

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<sup>3</sup> ABC Television, 2016. *Interview with Leigh Sales, ABC 7:30*. Available online <https://www.kellyodwyer.com.au/interview-with-leigh-sales-abc-7-30/> viewed 18 May 2019.

“I think we have been very clear with our values. **We, of course, believe in accountability and in people taking responsibility for their actions.** But also providing them with information by which they can make positive choices. But **at the end of the day, people are responsible for their own decisions. That’s a fundamental tenet.** (my bolding)”

Despite this being described as a fundamental tenet, neither the Government nor ASIC has done anything about acting on it.

In our opinion, ASIC still doesn’t really understand the industry. For example, it fails to take account the fact that all lenders attempt to reduce their external costs but particularly in regard to credit application costs. We are firmly of the opinion the granting of credit is not a right and consequently are of the opinion financial service providers should not be compelled to complete all assessment steps if they choose not to lend or supply goods on a lease to a particular consumer. Equally, if a lender believes it is able to rely on whatever documentary evidence it has chosen to accept, it should be free to do so without fulfilling over-verification by prescriptive measures. The NCCP Act requires “reasonable inquiries” to be made by licencees, not engage in an examination approaching an inquisition. Neither the NCCP Act nor the National Credit Code defines what constitutes “reasonable” but we are of the opinion, ASIC should not usurp Parliament’s powers and take it on itself to define this. Applying prescriptiveness would remove any sense of fairness or sensibility that is implied in its definition.

To that end, we note that the suggested requirements of Appendix 2 appear to require some form of confirmation contact by the lender with the consumer to verify the information provided and to attempt to ascertain fraud. This will slow down the granting of all credit if carried out to the extreme. At this stage, without knowing what will be the final form of assessment and ASIC’s suggested requirements, we do not know how much more documented assessment work is to be required in order to meet responsible lending conduct requirements. We seriously doubt these steps will not be able to occur entirely via website interaction. Assuming we are correct, some lenders already believe they can allegedly charge consumers a non-refundable application lodgement fee in order to recoup the additional costs they will incur. Whether a Court would see this fee entirely as a prohibited assessment fee would need to be tested.

We remain of the opinion every licencee should comply with the ultimate updated outcomes, and that ASIC grant no exceptions to this, such as to the not-for-profit lender Good Shepherd



Microfinance. Commercial lenders do not and cannot obtain the same benefits this organisation does and it should not enjoy any additional benefits.

On the question of fraud, we note the consultation paper appears to focus almost entirely on fraud to protect the consumer. Our members and clients are equally concerned ASIC should also be taking into account fraud committed by consumers against the lender. . A classic example of legislation where ASIC has decided not to invoke the law is the sale or disposal of secured goods under a mortgage which is a strict liability offence under subsection 51(1) of the National Credit Code. Unfortunately for industry, it requires ASIC as the regulator to take action; the lender itself is unable to do so. To date, ASIC has taken no action whatsoever on behalf of any lender. We argue ASIC must apply the law equally and not turn what is, in effect, a blind eye to those consumers who transgress as this fraud costs industry many thousands of dollars annually.

## ***Responses to questions***

### **Section B**

**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 think it is relevant for the regulator to list the types of inquiries that could be made to obtain various pieces of information but with the proviso that the lender can select which one or ones it uses. There should be no overarching requirement to use all of them. We oppose total prescriptivism as it flies in the face of “reasonableness”.

**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 do consider a mandatory requirement to review bank statements is in order but not by the method this to be achieved. For example it could be undertaken manually or via an aggregator’s bank statement report and analysis. There should be no prescriptive requirement. It should be noted a lender might call for both as a means of verifying the information produced but this should not be necessary in all situations. In any case, the consumer might not give the relevant permission under the Privacy Act.

**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.**

Yes, where recent inquiries have already been made or where the consumer is well-known to the financial service provider. For example, we are aware many non-card based continuing credit product clients have used the same lender for years and the lender knows the consumer's financial situation intimately. We can assure ASIC these clients thoroughly detest the lender's intrusiveness to supply further information even though it's a compliance requirement.

Whilst well-intended, it also highlights the issue of smaller loans or financial products that are being supplied on a more regular basis than larger, more one-off financial products. The consumers of the latter will elect to use whatever lender that offers the best deal they can get in the circumstances whereas the former tend to stick to a lender or couple of lenders they know intimately.

**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.**

In our opinion, in setting a prescriptive approach, it's as equally important what to review is spelt out as what should not be. The licensee should be free to review whatever information appears relevant at the time and free to do so in any way it sees fit. That said, without doubt, income, the likely future ability to repay and expenditure should be inquired about. It should be noted how these are arrived at will vary by individual. For example, we do not see a prescriptive need to contact an employer unless the work is possibly seasonal, casual or unless there is another 'flagged' reason. In any case, an employer might not be willing to provide any information other than possibly confirm a pay slip amount for fear of having to retain an employee long term.

**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.**

See above. This is a repeat of question B1Q4.

**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?**

Depending on the level of inquiries finally determined, as we have stated, some lenders are looking at whether they could either imposing an upfront application lodgment fee that would be payable in every circumstance rather than only if the application is successful which arguably may not be possible as a Court could find it's an assessment fee and so be precluded or increasing its application fee considerably. Either way, this would be to the financial detriment of those it chose to lend to. Rigid steps that financial service providers might have to follow could also lead to a slowing of the granting of credit. Inevitably, this will lead to a slowing of the economy as the relevant information is obtained. Compulsory and more intrusive verification requirements will alienate the industry even further with consumers as there is already considerable angst at what many see as over-intrusiveness by lenders in requesting application data.

For SACC lenders in particular, this may cause an issue because they have relied on speed of service as a product augmentation level. If the steps suggested are implemented, regulatory intervention will impact all lenders' new product designs. We suggest consumers will be thoroughly displeased with this aspect, regardless of the amount of credit being sought.

If licencees sought to require consumers provide statutory declarations as some are also considering, this will slow down the granting of credit.

**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.**

Without knowing the details of exactly what's to be required, this is a hypothetical question. Undoubtedly, there will be extra compliance costs arising out of legal advice, amending procedure and policy manuals, staff training, website redevelopment and database development where applicable. Given the shortage of time to respond, our members and clients have been unable to advise exactly what these might be but as a minimum, they may easily exceed \$10,000 and in many cases, be considerably more.

The few members and clients that have responded have all indicated they can envisage no cost savings. They believe any prescriptive requirement will not improve their rate of lending, but just add what they view as needless costs. One lender, though, did think it might improve the quality of those few, largely online, lenders that currently have massive rates of dishonoured payments. These dishonour rates merely highlight the unsuitable lending that they provided to consumers in the first place.

If licencees cannot charge an upfront fee, particularly given current rates of decline, this will just lead to a further erosion of profitability and lead to more lenders exiting the market. That in turn will tighten the economy as there will be reduced amounts of funding available to borrow.

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

If the suggested regime does attract additional costs and it were arguably possible for licencees to charge an application fee, this may cause concern for home mortgage loan applications in particular as brokers often submit them to many lenders in the hope at least one will offer to lend the funds desired. For brokers submitting such applications, we believe it's likely to see an increase in their pricing as they seek to recover some of the additional upfront data verification on behalf of the lenders they deal with.

## **Section C**

**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 are of the opinion that the information currently collected by lenders and lessors is generally sufficient – i.e.

- Pay slips;
- Centrelink statements;
- 90 days or more of bank statements (and this should apply to all lenders and lessors);
- Rent or mortgage information;

- Additional expense information -e.g. childcare fees, payments of fines and other penalties by instalment, etc.;
- Employment statements (where deemed necessary);
- Business Activity Statements (for self-employed); and
- Accountant's statements (if necessary and available).

The above will generally provide sufficient and relevant information if examined properly. The problem we have seen is too many lenders rely on data aggregators' breakdowns for expenses without checking them properly and look at the most current pay slip to verify income instead of reviewing a period of say, one month..

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

**Income**

Confirmation of ongoing employment for PAYG employees may be difficult because it puts employers on the spot and so they may not be willing to provide any information. We believe there will be consumer resistance at having to produce tax returns in addition to pay slips. Asking for tax returns could also be an issue for those that are currently exempt from having to lodge one and likely to cause anxiety and concern for the consumer. No consumer should have lodged one merely to secure a loan or obtain a consumer lease.

For self-employed consumers, the tax returns are highly likely to be not up-to-date. Equally, statements from a consumer's accountant or financial advisor may not be forthcoming if the accountant follows the Tax Practitioners Board ("TPB") Code of Conduct. Essentially, the TPB affects all client information, requires specific consent and consent must be positive. It is far-more over-arching than standard privacy consents. We do not share ASIC's belief that Comprehensive Credit Reporting or CDR information will definitely improve licencees assessments. It may do so but certainly not in all cases. Credit Reporting is hamstrung because the reports fail to provide relevant and up-to-date details. Any defaults listed are at least 60 days old. In addition, those that have abused the credit provided are unable to be listed as serious credit defaulters because of earlier lobbying by consumers advocates when the Privacy Act was undergoing amendments. It

must also be remembered that credit reports do not list all loans, examples being those supplied family or friends and by Centrelink,

Credit Reports may not always be accurate, either, because of lenders' capitulating to threats of taking them to AFCA rather than incur an unnecessary expense. We understand this matter was referred to ASIC quite some time ago but nothing appears to have been done about it as yet.

Information from other credit providers is already difficult to obtain, even with a valid Privacy Consent. We suggest it's likely to become even harder despite NPP and CDR data.

### **Expenses**

We believe the examples given would be listed as transactions on bank account statements and data aggregation reports. To require consumers to produce documentary evidence of these expenses is likely to be regarded by most consumers as too inquisitive and over the top and intrusive red tape by Government.

We do have concern the Consultation Paper appears to believe data aggregators are able to provide analysis on all bank accounts. To our knowledge, they provide analysis only on transaction bank statements. ASIC may care to check this with the providers.

The NCCP Act (cf. s.117(1), s 130(1)) requires licencees to make "reasonable enquiries" and take "reasonable steps", not undertake a thorough examination and verification.

**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?**

We have seen data aggregation reports that have mis-classified some payments as loans when they are not and equally, some regular payments such as repayment of fines or

other penalties such as toll recoveries as one-off payments. This is an issue with the algorithms used, most likely caused by insufficient data.

Licencees should not rely totally on the breakdowns provided and make spot checks of transactions to ensure accuracy.

**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?**

We don't have an issue with ASIC re-stating "that it 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" but do have an issue with its "if not, why not" approach. We believe that if a form of verification is readily available to the licensee, it will generally be unreasonable for the licensee to take additional steps and have to obtain all other forms of information that may verify what they already have ascertained. If it were to be required; we would regard that as an unreasonable practice and fall outside of the NCCP Act's requirements.

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

No. We disagree with the suggested notion that if the licensees do not use all readily available forms of verifying information, it leads to the belief that the licensee has failed to take reasonable steps to verify the consumer's financial situation. If a borrower is to be declined, lenders will generally use the first available 'knock-out' piece of information. Forcing lenders to use all forms of information each time will slow down the granting of credit and increase the financier's costs.

Based on our current experience, we are of the opinion that any "if not, why not" requirement would lead to an increase of 'complaints' down the track as consumers seek or are encouraged by consumer advocates to extricate themselves from a loan on the

basis the loans assessor did not sufficiently document a detailed and concise form of explanation at the time of the assessment. If either ASIC or AFCA seek to impose this type of requirement, a number of current lenders will leave the industry for fear of incurring costs and 'compensation' down the track. This is not because they do not trust what their staff wrote but because the expectation of ASIC and AFCA is out of kilter with commercial workplace reality.

**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)?**

We do not see any benefit for consumers with an "if not, why not?" approach. For those lenders providing other than Small Amount Credit Contracts, it is likely to see the opposite with lenders increasing interest rates or fees, depending on the nature and value of the contract, as they attempt to maintain their margins. Access to credit may be more difficult if lenders decide to exit the industry because they cannot adequately recover the extra costs involved.

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

Not known at this stage but it's likely to be a combination of legal, compliance (amended documents and Policy and Procedure manuals), IT (website and/or database design), staff training together with additional transactional and subscription costs. Preliminary suggestions commence at \$10,000 and upwards. If benchmarking were to be made mandatory, based on current client experience, we would estimate this may cost upwards of \$10,000 or more (some clients have paid close to \$40,000 alone for this capability) and take between 12 – 18 months to start getting accurate results. For smaller lenders, this may be a significant cost burden and if so, it will drive them out of the industry.

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

There is already market competition and we don't envisage this requirement will lead to any real change long term but in the short term, if many current providers decide to exit the industry, it will provoke less competition. This will be particularly prevalent in the SACC market.



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

We support what ASIC intends stating about benchmarks in points (i) and (ii) as it reflects what our members and clients currently do. It is clear ASIC does understand the impreciseness of using benchmarks and so we remain very much of the opinion benchmarks should remain as an option rather than suggesting it be a mandatory requirement.

In regard to point (iii) that refers to “periodically reviewing the expense figures and adjusting them where necessary”, however, the Consultation Paper makes no mention of how frequently this should occur. “Periodically” is as ill-defined and nebulous a term as “responsibly” and we have an issue with either. There is also the effect on geographical location. Rents in a rural area may be substantially different from an inner city and utility charges vary drastically. Keeping up with such changes could possibly require access to current local data for many areas and the employment of a specific staff member.

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

Whilst the FAA has never made any recommendation, Min-it Software has suggested to its clients that they leave the client with an absolute minimum of \$50 - \$75 per adult or older child and \$30 per child under 12 years old as disposable income. Min-it Software has not suggested what amount should be added as an individual buffer for any individual assessment item though, merely what is the end result after all costs have been taken into account.

**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)?**

This is an attempt to ensure the consumer has sufficient disposable income during each pay period in which to live without hardship and afford at least some basic luxuries of life. We have seen too many (non-member and non-client) lenders in the industry go right down to the last \$10 of a consumer’s income and argue they have been responsible yet unwilling to acknowledge their failings when a payment fails.

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

None but it may lead to loss of business for the licensee. In addition, depending on how the assessment is done, it may incur one-off additional software costs or slight additional assessment time if performed manually.

There could also be the staff costs of reviewing the benchmark figures if a “periodic” review is required as outlined above.

**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?**

We believe this is too difficult to quantify at this stage without knowing the final end result.

In our opinion, it would certainly have more suitability for lessors than lenders as a consumer lease requires greater clarification as to the consumer’s requirements and objectives but for lenders, we argue this partly depends on the loan type. It is far more important that the lessor comply with this as they also have an equal responsibility under the Australian Consumer Law to understand and supply goods that meet the consumer’s requirements.

For SACC’s and MACC’s, the vast choice is governed by cost considerations rather than the consumer’s objectives or requirements. At the end of the day, requirements have essentially been given low priority because they want the money for a specific purpose, now. For almost all borrowers in these categories, their ideal requirement would be no fees and no interest. Unless they were offered a No Interest Loan from Good Shepherd Microfinance, anything else for these consumers would not meet their requirements. For all commercial lenders, this is an impossible situation and almost all SACC’s are priced on the maximum rates set out in the National Credit Code.

If a consumer were to argue for their suggested requirements, no one would get a loan so based on adherence to the proposed assessment criteria, it would require some, if not, considerable discussion and time to see if the consumer would be willing to accept the lender’s terms.

We therefore have considerable concern that the smaller the loan, ASIC seeks to impose even greater compliance requirements on such lenders. With few exceptions (such as those operating outside of the National Credit Code), these loans are standardised across the industry. Whilst reality suggests consumers will accept what's offered, this is a situation that would need to be very carefully recorded in every case in order for any 'complaint' to AFCA down the track to be rebutted but regardless of whether or not it could be, any complaint is likely to incur the lender in costs. Consequently, how lawyers suggest exactly how these proposed rules can be implemented and achieve compliance for these lenders will need very careful consideration.

**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)?**

Whilst there might be no costs for the consumer, for lenders of SACC's and MACC's, the consumer may possibly be denied or unable to access finance or the goods sought under a consumer lease.

For lenders offering MACC's and Other contracts (i.e., those having a credit limit in excess of \$5,000) it will complicate many consumers' understanding of what's required when applying for finance. If lenders have to start offering a choice of varying interest rates and fees, it's arguable many estimated repayment calculators could become misleading and deceptive. In other words, instead of making it easier for consumers, ASIC's suggested approach would considerably complicate every finance application.

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

At this stage, until we saw the end guidance from ASIC, we would not be prepared to comment.

## **Section D**

**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.**

Whilst responsible lending conduct requirements technically do not apply under the NCCP Act, the reality is there some equivalent provisions that apply under the ASIC Act. We believe any guidance ASIC issues should make this clear.

That said, we encourage our members and clients to adhere to the NCCP Act requirements for small and medium business loans and comply with the requirements of the current RG209. It's easier for lenders to apply consistency when they offer both consumer and business loans than introduce specific rules covering the latter.

**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 author is aware of a number of lenders that do not understand whether, when a loan required by the holder of an Australian Business Number as a sole trader, if it is a business loan or a personal loan or, that investment loans for consumers may, in some circumstances, be covered by the National Credit Code.

In general, the best word that could describe these lenders is 'confused'. They invariably do not belong to any industry representative organisation and are reluctant to consult lawyers. It would suggest these lenders probably will also be non-compliant with their consumer loans.

**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?**

This appears to be guidance on fraud to protect the consumer rather than fraud applying to the licensee. Unless it covers both scenarios, we see it of little value. The Royal Banking Commission revealed some consumers had been defrauded through mal-administration action by brokers increasing income in order to qualify the loan. To avoid this situation recurring, ASIC should consider requiring brokers to provide a copy of the application data

(not necessarily the assessment) they intend supplying to lenders and get some form of acceptance and educating consumers to obtain this.

We are aware of some lenders suggesting there should be a national blacklist database that would protect licencees from providing credit to those that have been dishonest. We are not in agreement with this proposal and would prefer that such individuals should be able to be recorded on Credit Reporting Body's databases and be able to be accessed by all. Such a database immediately begs the questions of who would administer it, what would it cost, who pays, how are costs recovered and what protections does it contain? We would prefer to encourage ASIC to assist the industry seek the necessary changes to the Privacy Act to permit this.

One problem that would need to be overcome is the vast number of lenders that do not subscribe to any Credit Reporting Body ("CRB"). As we have stated, all lenders would need access to allow viewing of such individuals without having to mandatorily be a subscriber to the CRB. ASIC should not be seen as an enforcer to assist the financial position of these businesses.

**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 are aware of a small number of individuals that "play the system" and attempt to walk away from their financial responsibilities and where the contract was secured by a motor vehicle, at either little or no cost. Some AFCA staff are keen to offer these consumers such 'compensation'. Interestingly, most are staff of those with financial legislation knowledge, particularly bigger banks. One client informed us of a financial counsellor that had also engaged in such practices but due to personal commitments, the author has not been able to verify this and meet the submission deadline. For this reason, our view is the ability to identify such individuals via credit reports would be the ideal solution.

Of the fraud committed by consumers on lenders, it's the need to look very closely at documents manually supplied. Much of the fraud we have witnessed to date has been predominantly by consumers of Asian and Eastern European ethnicity. We are not saying

consumers of any ethnicity should have to lodge documents electronically but where they aren't, then documents, particularly bank statements, should be extremely carefully viewed and tests undertaken to see if the debits, credits and balances are correct and are consistent. In such cases, it's also useful to seek accompanying verification from other sources. This might be by requesting electronic submission of bank statements and comparing balances by selected dates.

**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)?**

As we have stated earlier, unless the guidance covers both consumer and lender fraud, we see no or little benefit for consumers from the approach suggested.

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

For lenders to review documents manually, extra staff costs. This will vary by complexity of the contract and so we are unable to estimate what the cost would be. It's more likely to impose additional costs on financiers of home mortgage financiers and expensive motor vehicles. We suggest that many lenders in these sectors already undertake such checks.

**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?**

Obtaining credit is not a right and if a licensee makes the decision not to lend, that should be the end of the matter. There should be no right to even complain to AFCA or anyone about this. The licensee will have made a decision based on its appetite for risk, its policies and procedures and most probably, its 'gut feeling'. It may well use negative repayment history or hardship indicators now to arrive at that decision and there may well be some individuals that are rejected for credit right now that might obtain credit from another lender who is willing to take the risk.

From our experience, those lenders that specialise in loan consolidation are mainly the ones that would probably consider such applications but if the lender declines, as we have argued, that should be the end of the matter. It's no different to going into licensed premises and being refused a drink. For this reason, we don't believe negative repayment reporting will have much effect on granting credit to those the licensee chooses not to finance.

**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 only possible benefit a consumer may achieve is being financed into another contract. Whether this is a one-off or ongoing will depend on the consumer. From our experience, in almost every instance where a lender has attempted to assist a consumer, it has subsequently caused an issue with the consumer quickly getting into an arrears scenario. This is of no benefit to either party.

Lenders don't want the arrears, just their money and we are sure consumers will not want any debt collection and/or enforcement action taken against them.

Consumers may, however, have to pay higher costs for getting credit and there may be less competition if credit providers feel they cannot achieve a sustainable business model because of the additional costs they may face. For some consumers who have had a less than satisfactory outcome previously from a particular licensee, if there are fewer lenders and lessors offering credit and that licensee is one of those still operating, the consumer may decide not to apply for further credit. This scenario may possibly lead to a reduction in sales of goods overall and affect the economy.

ASIC should not assume Good Shepherd Microfinance will be able to assist these consumers. They may fall outside of its credit policies and so unable to assist. Even if it were able, some consumers feel it is like applying for charity in approaching this lender and would not do so unless they were absolutely desperate.

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

We are unaware of which members or clients currently use repayment history reporting but for those that aren't, if made mandatory, there will undoubtedly be additional costs for subscriptions and data reports.

In addition, there will be increased staff costs as assessors and loan writers review the history with the data they have collected, either manually or via data aggregators.

If the licensee were to review this history as part of its ongoing debt collection programme, this would add further cost though it would highlight if the consumer was adhering to, say, an agreement to reduce certain expenses in order to afford the finance that was initially offered. In all probability, this may lead to a hardening of attitude if the consumer were then to apply for hardship. As we have said earlier, consumers must be accountable and responsible for their own actions and if they have taken on extra expense(s) or additional finance after the lender has granted the credit, the lender should not be penalised for their subsequent failures.

**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 are concerned any "best practice" guidance issued by ASIC will essentially be a checklist that covers many possible eventualities, some of which may not be required but do agree anything that creates certainty will be welcomed by industry. We are aware of the comment made in the Consultation Paper that in such cases, if all the verification possibilities have not been explored, ASIC may form the opinion that sufficient enquiry was not made. As we have stated, we disagree with this view and the licensee should be able to accept which documents they choose in the belief they have made reasonable enquiries. If this isn't going to be possible, some licensees may request statutory declarations from the consumer to state the information provided is the truth as these can be subsequently used against consumers who make vexatious EDR complaints. Whilst we accept the ideology of any guidance recording answers provided by the consumer, we do not believe such responses should be included in any written assessment where requested.



Any guidance that ASIC may provide should be simple to follow and allow for commercial reality.

**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 have concern over the use of a “concise narrative summary” and the need to record all the points raised by the consumer. A seemingly unimportant comment may lead to documentary failure if the assessor or loan writer didn’t regard it as important based on his or her judgment and experience and record it at the time of assessment. If the conversation or discussion was not audibly recorded, AFCA or ASIC may take the view that despite notes being written at the time, anything omitted from the notes may be used against the licensee. Unlike ASIC, commercial licensees do not train their staff in the art of interrogation and recording of ‘witness’ statements but this may become necessary if they are to protect themselves from adverse findings or complaints lodged after funding. The only way we see around this is the recording of all conversations with consumers so that the licensee can refer to it later if required.

**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)?**

If the licensee already undertakes a comprehensive assessment, we can envisage no real benefit for the consumer. For those that don’t, then consumers may derive extra benefit from having a more comprehensive assessment than occurs currently. It would be a fallacy for ASIC to assume that all non-bank, third-tier lenders charge a 48% interest rate across the board. The industry is highly competitive now and this will not change.

Our members and clients already charge much lower interest rates where the client is deemed to be a good risk. There should be no additional cost to consumers.

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

As we have already stated above on D4Q1, it may be necessary to audibly record all consumer conversations. This will impact the licensee's telephone systems and also incur some data storage costs as these conversations will have to be retained for at least 7 years.

It will also increase licensee's' staff costs to cover the time taken to discuss and record any matters or points raised. We are unable to advise what these costs might be.

**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 believe an example may provide licencees with some degree of certainty but many will likely question if it reflects commercial reality. From comments made by both members and clients, there is no such thing as a standard application if all the points in Appendix 2 are followed.

One law firm, Dentons, has already publicly raised the question of the guidance allowing for reduced expenditure in order to afford the loan because based on current data, the consumer does not qualify. We suggest any example ASIC provides licencees should cover this scenario.

Typically, we see this scenario applying for large value contracts such as home mortgages and car purchases but in reality, it can apply to any finance application. From our experience though, few consumers will adhere to any such agreement. It's a bit like dieting or fitness training; very few will achieve the desired results. The vast majority of consumers, whilst having initial good intentions, will fail and revert to their old ways.

For this reason, reasons to decline such applications are best left with those who ultimately carry the risk.

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

Based on what we have come to expect from ASIC, AFCA, financial counsellors and consumer advocates to date, we expected more detail.

The details listed are of practical use but we must question a few matters. For example,

- Under the heading “Requirements and Objectives”, it mentions under point (a) “purchase an asset (e.g. residential property, car, whitegoods) of a specified value (or value range) or quality”. We believe it is unnecessary to specify a value or quality for most loans but we accept it would be useful to record for lessors.
- Under the heading “Requirements: Amount and term of credit requested”, we are of the opinion few consumers would apply for a maximum amount. They generally know how much they want and the reality is the very opposite; many consumers will apply for more than what they need.

Most borrowers do not know how long it will take to repay a loan because they don't understand interest calculations, so we argue few consumers would request a timeframe for completing repayments. The clients of most FAA members and Min-it clients are more concerned about affordability of loan repayments than length of term. The consumer will know how long it takes to repay the contract when they get a contract offer.

- Under the heading “Requirements: Particular features requested or not necessary”, we are of the opinion this is an area open to constructive complaint. The clients of most FAA members and Min-it clients do not request nor summarise any contract features. To date, we have yet to be advised of a single consumer describing any features he or she considered a priority or essential.

This then leads to a suggested requirement to summarise those contract features the consumer has indicated are not wanted (particularly if additional charges will be incurred as a result) being unrequired.

We can see this area having benefit for home mortgages, car and large personal loans but not for SACC's, MACC's and consumer leases. The one-size-fits-all

approach consists of too much red tape, and we note Australian Governments are committed to reducing it, not increasing it.

- Under the heading “Financial position”, we are of the opinion that the section on recurring costs be increased so as to cover childcare expenses, payment of fines or other penalties, buy-now, pay-later repayments, Centrelink loans, together with all current loans and lease repayments due (whether being repaid or otherwise).
- Under the sub-heading “Variable living expenses (non-discretionary) “, surely any expense which the consumer is not able or willing to reduce to afford the credit contract or consumer lease must be considered ‘essential’ rather than ‘non-discretionary’?
- Under the sub-heading “Foreseeable changes to financial position”, it mentions “consumer is approaching retirement”. This may well be true but as there is nothing that mentions an exit plan, it may prompt some licencees to be more age discriminatory in their approach. This has already occurred previously and will no doubt prompt further outrage from those near or in retirement. For this reason, this section must include making the assessor or loan writer aware of the need to enquire further about such changes.

Equally, where consumers reside or work in geographical locations known for natural disasters (e.g., Far North Queensland) or industries facing a downturn in employment, this must be equally addressed. An example of this from some time ago would be the closure of the motor industry in South Australia.

- Under the sub-heading “Assumptions dependent on consumer behaviour”, we have already commented on these being rarely adhered to. We do not believe it is wise to accept anything the consumer advises on this at face value as almost all consumers will tell licencees what they think they want to hear in order to get the funds or product wanted.

Our clear experience is consumers lie. This has proven to be the case in the ASIC v. Westpac case where the Court was advised approximately 80% of the applications contained essentially fraudulent information.

- Under the sub- heading “Foreseeable changes to financial position”, we note the statement “[i]f the purpose of credit is to purchase an asset that involves additional expenses (e.g. additional costs for operating a car and maintaining insurance) especially if required as a term of the contract—outline the nature of expenses taken into account and an estimated amount for those anticipated expenses.” We have some concern with this as it requires knowledge rather than an assumption of what those costs may be in relation to the particular consumer. We believe an assessor or loan writer would have no knowledge of what an insurance premium might be for someone in 3 or more years’ time. Equally, and especially if the vehicle is a sports car, should the lender take into account possible speeding tickets over the term of the loan? If not, why not? This is a suggestion that has good intent but we believe is lacking in commercial reality and credibility.

Our concern with this stems from the fact this goes completely against the advice Senior ASIC officers gave to the industry at the time the NCCP Act was introduced, which was responsible lending requirements were to be based on what is presented and required currently, not throughout the term of the contract.

- Under the sub- heading “Financial support from a third party”, if the third party is not a co-borrower or guarantor but a parent, guardian or relative, responsible lending conduct would surely an assessment on that’s party’s capacity to assist. There may also be a privacy issue. For online licencees, this poses serious issues and any guidance ASIC provides needs to be both practical and realistic.

**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)?**

For consumers, the most obvious benefit should be never being granted an unsuitable contract but this must be tempered against the possible risk being denied any credit. There should be no additional costs for the consumer associated with this approach.

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

We are aware some licencees already use an assessment form that exceeds ASIC's suggestion in Appendix 2 and for them, there will be no additional cost. For others, there will be legal and other costs, including document modification and charges to policy and procedure manuals.

These costs will depend largely on the extent of the changes and so we are unable to advise at this stage.