Introduction

‘Accountant letters’ and ‘capacity to repay certificates’ are being used by some lenders as a means of assessing a borrower’s ability to service a loan before actually approving the loan. Such letters in effect are involving the accountant in the risk assessment of a potential borrower.

Some lenders are also seeking declarations from accountants that the purpose of a loan or lease will be predominately for business use. Such declarations help a lender form a view that loan is outside the requirements of the National Consumer Credit Protection Act 2009 (the National Credit Act).

Research conducted by the Australian Securities and Investments Commission (ASIC) in 2008 found that mortgage brokers were regularly approaching accountants to provide capacity to repay certificates on behalf of borrowers, especially in circumstances where finance is trying to be arranged for a borrower in mortgage stress. ASIC warned at that time that an accountant’s certificate essentially shifts the risk of credit assessment from the lender to the accountant.

The provision of an ‘accountants’ letter’ and ‘capacity to repay certificates’ is now restricted to holders of an Australian Credit Licence under the National Credit Act. Under this Act, the signing of a capacity to repay certificate or providing other similar declarations may in fact be a breach of the National Credit Act unless you are appropriately licensed*.

The provision of a declaration by an accountant that a loan or lease is predominately for business purposes, is as far as we can determine, not restricted by the National Credit Act. However, an incorrect declaration may be deemed to be a false declaration and may have legal ramifications which in turn may affect whether your professional indemnity insurance policy will cover you for such service. We therefore recommend that you do not provide such a service, however if you do, you must make detailed and rigorous enquiries before considering whether to give such a declaration.

* Licensed in this guidance note refers to holding an Australian Credit Licence (ACL) or being a credit representation of an ACL.

Guidance

We provide the following guidance to members:

- Accountants can not provide a certificate or assessment relating to whether a client will be able to meet financial obligations under a credit contract (accountants letter or capacity to repay certificate) unless they have an Australian Credit Licence
- We recommend members do not provide a declaration for a client that a loan or lease will be predominately for business use
- You can assist your client in the lending process by providing them upon request, a statement on their financial position or other factual information about your client’s finances which you can verify.
1. What is the National Credit Act?

The national credit reform package marks phase one of the reform of credit in Australia and includes:

- a licensing regime for all providers of consumer credit and services
- responsible lending conduct requirements; and
- sanctions and enforcement powers for the Australian Securities and Investments Commission (ASIC) as the regulator of the regime

If you engage in consumer credit activities, you will be affected by the national credit regime.

Products that will be regulated include home loans, personal loans, credit cards, client leases, overdrafts and line of credit accounts, among other products and services.

Importantly it also expands the National Credit Code to include the provision of credit to purchase, renovate, improve or refinance a residential investment property.

2. What activities are exempt

There are specific categories or organisations which are exempt from the licensing requirements in certain circumstances. However, there is no exemption for recognised accountants from the obligations of the National Credit Act.

Registered Tax Agents

Credit activities engaged in as a registered tax agent may be exempt under the National Credit Act and the National Consumer Credit Protection Regulations 2009.

Regulation 24 (5) states that:

A credit activity is exempted if:

(a) it is engaged in by a tax agent in the following circumstances:

   (i) the tax agent is registered under Part 2 of the Tax Agent Services Act 2009;
   (ii) the tax agent engages in the credit activity in the ordinary course of activities as a tax agent; and

(b) it is a credit activity mentioned in item 2 of the table in subsection 6 (1) of the Act; and

(c) it does not involve providing a certificate or assessment (however described) relating to whether a client will be able to meet financial obligations under a credit contract or client lease

Importantly the exemption specifically excludes a tax agent from being able to provide a certificate or assessment relating to a consumer’s capacity to repay a proposed loan or consumer lease.

Even if you are a recognised accountant or a registered tax agent, you cannot provide a certificate or an assessment to a client relating to their capacity to repay a proposed loan unless you are licensed, as this may constitute a breach of the National Credit Act.
Referrals

Rather than choosing to become licensed, you may choose to refer your clients to a credit provider or credit service provider. Care must be taken as some referrals may be caught as a regulated credit activity which would still require you to be licensed.

The National Consumer Credit Protection Regulations do exempt a referral activity from the licensing requirements, provided:

- the activity only consists of you informing the client that a credit licensee or representative of the credit licensee is able to provide particular credit activities, such as lending, suggesting or assisting, and how to contact them, and
- at the same time that you provide the referral you also fully disclose any benefit or commission you or your associates may receive.

Whether the referral arrangement is exempt will also depend on whether the referral relates to a particular loan contract from a particular provider.

Importantly, referring a client to a particular credit provider about a specific product or to a particular credit provider who only offers a very limited range of credit products may be seen as a credit assistance and would therefore require you to be licensed.

At the time of the referral you must fully disclose any benefit including commission you may receive in connection with the referral, in order to comply with the requirements of the referral exemption under the National Consumer Credit Protection Regulations 2010.

<table>
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<tr>
<th>You can:</th>
<th>You need a credit licence to:</th>
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<td>✔ Refer a client to a range of specific lenders, all carrying a wide range of credit products</td>
<td>✗ Suggest a client approach a particular finance company or bank about a specific product</td>
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<tr>
<td>✔ Refer a client to a licensed mortgage broker</td>
<td>✗ Suggest the client approach a particular credit provider who offers a very limited range of credit products</td>
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Declarations from an accountant that a loan or lease is predominately for business use

The National Credit Act only applies to credit that is:

(a) provided to a natural person or strata corporation; and

(b) is provided or intended to be provided wholly or predominantly:

(i) for personal, domestic or household purposes; or

(ii) to purchase, renovate or improve residential property for investment purposes; or

(iii) refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and

c) a charge is or may be made for providing the credit; and

d) the credit is provided in the course of a carrying on a business of providing credit in Australia or as part of, or incidentally to, any other business carried on in Australia.

‘Predominantly’ in this context requires the purpose for which more than half the credit is intended to be used. Therefore, if the credit is predominantly for business purposes it will not be regulated under the National Credit Act.

To circumvent the obligations of the National Credit Act, it appears that some lenders are requesting accountants to provide a declaration or letter that a loan / lease for a consumer will be predominantly for business use.

It is imperative that before such a declaration is provided, detailed and rigorous enquiries are undertaken to ensure you have a reasonable basis for providing such certification in each and every instance. This may involve verifying log books or other forms of evidence to confirm that the credit will ‘predominantly’ be used for business purposes.
We recommend that members not provide a declaration for a client that a loan or lease will be predominately for business use.

If you do decide to offer such a service, you must undertake detailed and rigorous enquiries to ensure you have a reasonable basis before you can provide a declaration confirming the purpose of a loan / lease will be predominantly for business use.

Failure to do so means you risk making a false declaration which will not only be a breach of APES 110 Code of Ethics for Professional Accountants, it may also have legal ramifications and your professional indemnity insurance policy may not cover you.

3. The responsible lending obligations and the role of accountant

Accountants can play an important role for their clients in the credit process.

Under the National Credit Act, a credit licensee must comply with the responsible lending conduct obligations. The key element of the responsible lending obligations is that a credit licensee must not enter into a credit contract with a consumer, suggest a credit to a consumer or assist a consumer to apply for a credit contract if the credit contract is unsuitable for the consumer.

The credit licensee must undertake a series of steps to ensure they comply with their lending obligations, including taking reasonable steps to verify a consumer’s financial situation.

You can assist your client in the lending process by providing them, upon request, a statement of their financial position or other factual information about their finances which, importantly, you can verify.
References

ASIC
As the regulator, ASIC have a dedicated credit website and have released a number of documents including the regulatory guides.
www.asic.gov.au/credit

CPA Australia
CPA Australia also have a dedicated website credit section to help members understand the National Credit Act.

Australian Government consumer credit
This site provides details on consultations, provides links and updates to legislation.
www.treasury.gov.au/consumercredit

Commonwealth of Australian Law
This site provides access to the credit legislation, regulations and explanatory memoranda.
www.commlaw.gov.au

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