

# FINANCIAL ADVISORY SERVICES

# Consumer credit reform

## Guidance for CPA Australia Public Practitioners

### February 2011

#### Introduction

On 1 July 2010 ASIC took over the regulation of consumer credit and finance broking.

Home loans, personal loans, credit cards, consumer leases, pre-arranged overdrafts and line of credit accounts, among other products and services are now regulated under the National Consumer Credit Protection Act 2009 (National Credit Act) and administered by ASIC.

You therefore cannot engage in any regulated credit activity unless you are appropriately licensed\*.

This includes for example suggesting a consumer:

- apply for a particular credit contract with a particular credit provider
- apply for an increase to the credit limit of a particular credit contract; or
- remain in their current credit contract or consumer lease

Referring a client to a particular finance company who only offer a very limited range of credit products may also be seen as a regulated credit activity and would therefore require a licence.

Consumers regularly approach accountants for advice regarding consumer credit. It is therefore imperative members understand their obligations under the National Credit Act and implement a solution to address the implications of the National Credit Act.

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

#### Guidance

We provide the following guidance for members who are not licensed under the National Credit Act:

- **Unless you are licensed you can not suggest a consumer apply for an increase to the credit limit on a particular credit contract or suggest they remain in their current credit contract or consumer lease.**
- **Credit used to purchase, renovate, improve or refinance a residential investment property is now a regulated under the National Credit Act.**
- **Leases by businesses used to hire goods such as cars or plant and equipment are not a regulated credit activity because they are for business purposes.**
- **You can suggest or advise a consumer to pay off their loan or credit card faster by making extra repayments, even if it is for a specific loan or credit card.**

# Consumer credit reform

## 1. The key requirements of the National Credit Act

On 1 July the Australian Securities and Investments Commission (ASIC) took over the regulation of consumer credit and finance broking under the National Credit Act.

This Act marks phase one of the Governments' previously announced two-phase reform to consumer credit and includes:

- a licensing regime for providers of consumer credit and services
- mandatory membership of an external disputes resolution body for providers of consumer credit and services
- responsible lending conduct requirements; and
- sanctions and enforcement powers for ASIC as the regulator of the regime.

**You must hold an Australian credit licence or be a credit representative to provide credit or credit services to a consumer.**

## 2. Credit regulated under the National Credit Act

Only credit that is covered by the National Credit Code (Code) is regulated under the National Credit Act.

The Code, which is contained in Schedule 1 of 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. If more than 50% of the credit is not for personal, domestic or household purposes, the credit will not be regulated under the National Credit Act.

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

**Some lenders may request an accountant to provide a declaration that a loan/lease for a consumer will be predominantly for business use. We recommend that Members do not provide such declarations.**

**Members are referred to Guidance Note – Accountant's letters & capacity to repay certificates**

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## 3. Credit activities regulated by the National Credit Act

'Credit activity' is also defined in the National Credit Act and includes activities relating to credit contracts, consumer leases, related mortgages and guarantees, and credit services.

You cannot engage in a regulated credit activity unless you are appropriately licensed.

The following table sets out when a person will engage in a credit activity.

Topic	A person engages in a credit activity if:
Credit Contracts	<ul style="list-style-type: none"><li>(a) the person is a credit provider under a credit contract; or</li><li>(b) the person carries on a business of providing credit, being credit the provision of which the National Credit Code applies to; or</li><li>(c) the person performs the obligations, or exercises the rights, of a credit provider in relation to a credit contract or proposed credit contract (whether the person does so as the credit provider or on behalf of the credit provider); E.g. Banks, credit unions, building societies, finance companies and vendors offering sales contracts by instalment (i.e. hire purchase agreement). An individual may be a lender.</li></ul>
Credit Service	<p>the person provides a credit service; (see following section for more information )</p> <ul style="list-style-type: none"><li>(a) the person is a lessor under a consumer lease; or</li><li>(b) the person carries on a business of providing consumer leases; or</li><li>(c) the person performs the obligations, or exercises the rights, of a lessor in relation to a consumer lease or proposed consumer lease (whether the person does so as the lessor or on behalf of the lessor);</li></ul>
Consumer Leases	<p><b>It does not include leases by businesses used to hire goods such as cars or plant and equipment because they are for business purposes.</b></p> <p><b>Short-term, indefinite and employment leases are also excluded.</b></p> <p><b>Examples include leases novated to an employer or leases paid by salary sacrifice.</b></p>
Mortgages	<ul style="list-style-type: none"><li>(a) the person is a mortgagee under a mortgage; or</li><li>(b) the person performs the obligations, or exercises the rights, of a mortgagee in relation to a mortgage or proposed mortgage (whether the person does so as the mortgagee or on behalf of the mortgagee);</li></ul>
Guarantees	<ul style="list-style-type: none"><li>(a) the person is the beneficiary of a guarantee; or</li><li>(b) the person performs the obligations, or exercises the rights, of another person who is a beneficiary of a guarantee or proposed guarantee, in relation to the guarantee or proposed guarantee (whether the person does so on the person's own behalf or on behalf of the other person);</li></ul>
Prescribed Activities	the person engages in an activity prescribed by the regulations in relation to credit, being credit the provision of which the National Credit Code applies to, or would apply to if the credit were provided.

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## Credit Service

A credit service is where you either provide a credit assistance or act as an intermediary.

### Credit assistance

You will provide credit assistance to a consumer where you:

Suggest:

- the consumer apply for provision of credit under a particular credit contract with a particular credit provider / particular lease with a particular lessor;
- the consumer apply for an increase to the credit limit on a particular credit contract;
- they remain in their current credit contract / consumer lease; or

Assist:

- the consumer apply for a particular credit contract with a particular lender / particular consumer lease with a particular lessor; or
- the consumer to apply for an increase to their credit limit on a particular credit contract.

### Act as an intermediary

You will act as an intermediary if you act as a connection between a lender / lessor and a consumer with the aim of securing the provision credit or a consumer lease for the consumer. For example, finance brokers and mortgage managers.

The critical element is that your role, wholly or partially, is to secure a credit contract or consumer lease for the consumer with a credit provider or lessor.

## Items not regulated by the National Credit Act

Some types of credit are excluded, examples include:

- insurance premiums payable by instalment
- employee loans
- credit for which only an account charge is payable
- joint credit and debit facilities
- credit provided by a trustee of a deceased person's estate.

There are also special provisions for contracts or other instruments that are made and in force, and to which an old Credit Code applied, immediately before 1 July 2010. These are known as a 'carried over instrument'. Generally, the requirement to hold a credit licence doesn't apply to people who engage in credit activities (other than credit services) relating to carried over instruments.

Margin lending is excluded as such facilities are now regulated as a financial product and therefore requires issuers and advisers of margin lending facilities to hold an Australian Financial Services (AFS) Licence.

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## 4. Activities that can be provided without holding a licence

The following tables provides a snapshot of the activities that you can and cannot provide to a consumer without holding an Australian credit licence or being licensed as a credit representative.

### Financing residential property

You can:	You need a credit licence to:
<ul style="list-style-type: none"><li>✓ suggest to a consumer that they consider borrowing in order to finance residential property</li></ul>	<ul style="list-style-type: none"><li>✗ suggest to the consumer approach a particular finance company or bank about a specific product – even if you do not arrange or help with setting up the credit contract</li></ul>
<ul style="list-style-type: none"><li>✓ suggest the consumer approach a range of lenders, all carrying a wide range of credit products provided you do not suggest a specific credit product offered by those lenders</li></ul>	<ul style="list-style-type: none"><li>✗ the person provides a credit service; (see following section for more information)</li></ul>

### Debt Management

You can:	You need a credit licence to:
<ul style="list-style-type: none"><li>✓ suggest the consumer pay off their loan with the highest interest rate first, even if it is for a specific loan</li></ul>	<ul style="list-style-type: none"><li>✗ suggest a consumer consolidate their credit cards to a specific credit card</li></ul>
<ul style="list-style-type: none"><li>✓ suggest a consumer approach their lender to discuss renegotiating a loan on the basis of hardship</li></ul>	
<ul style="list-style-type: none"><li>✓ suggest or advise the consumer to pay off their loan or credit card faster by making extra repayments, even if it is for a specific loan or credit card</li></ul>	
<ul style="list-style-type: none"><li>✓ suggest the consumer review their multiple credit cards and consider cancelling them all and then finding the cheapest card suitable to meet the consumer's needs</li></ul>	

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## Mortgage advice

You can:	You need a credit licence to:
<ul style="list-style-type: none"><li>✓ suggest to the consumer that their home loan may not be the best product available for them at that time and suggest they look at other mortgage products and if necessary, contact a mortgage broker</li></ul>	<ul style="list-style-type: none"><li>✗ suggest the consumer that their home loan may not be the best product available and suggest they approach a particular credit provider who offers a very limited range of credit products, as this may be deemed to be credit assistance given the limited choice of products available with that provider</li></ul>
<ul style="list-style-type: none"><li>✓ provide information about market interest rates and desirable features of a home loan provided it does not relate to specific products in the market</li></ul>	
<ul style="list-style-type: none"><li>✓ advise the consumer that their home loan seems reasonable or unreasonable compared to other products on the market</li></ul>	
<ul style="list-style-type: none"><li>✓ advise a client that some mortgage providers offer loans with a free redraw facility and explain how this facility works without recommending a particular provider or product</li></ul>	

## Financial planning advice

You can:	You need a credit licence to:
<ul style="list-style-type: none"><li>✓ prepare a financial plan assuming the continuation of the existing home loan</li></ul>	<ul style="list-style-type: none"><li>✗ explain and draw comparisons between a default arrangement that an employer has with a particular credit provider and another arrangement to a consumer who is seeking salary packaging advice</li></ul>
<ul style="list-style-type: none"><li>✓ provide information explaining that different arrangements can carry different features to a consumer who wants advice about salary packaging, where their employer has a default arrangement with a particular credit provider and wants to know if they should use this or another arrangement – you must then refer the consumer to a licensed broker for further advice</li></ul>	

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## 5. Your options to address your obligations of the National Credit Act

To ensure that you comply with the new legislation you must gain both a clear understanding of what ‘credit’ is regulated under the National Credit Act and decide how you will address the implications of this regulation.

There are four options that you can consider. Which option is right for you will depend on your past experiences, current situation and the future goals for your business.

### **Option 1 – Apply for your own Australian credit licence**

A credit licence authorises you and your representatives to engage in the credit activities that are specified on your licence. To hold your own licence, ASIC requires the specific criteria to be met including the ‘responsible managers’ of the business to meet both education and experience requirements.

If you do not meet these requirements, it is unlikely that applying for your own licence will be something that you could consider in the first instance, however this may be something that you wish to pursue in the future.

### **Option 2 – Become an authorised credit representative**

You or one of the existing members of the practice could become a credit representative. ASIC have set minimum training requirements for representatives working as mortgage brokers, however it is up to the credit licensee to determine the appropriate initial and ongoing training for all other credit representatives.

Selecting, agreeing terms and maintaining your relationship with the credit licensee is pivotal to this option and has ramifications across your business model, succession planning and the value of your business. However, this option could also be considered an intermediary step to obtaining your own ACL.

### **Option 3 – Recruit an authorised credit representative**

You may wish to consider recruiting a credit representative into your business. This option requires a strong commitment, however it will provide a more comprehensive offer for your clients.

If you wish to consider this option, it is important that you employ someone who will suit your practice and will work well as part of your team. It should also be remembered that the credit representative will be responsible to the credit licensee.

### **Option 4 – Refer your consumer credit business**

Another option is to refer all consumer credit queries to a licensed credit representative.

It is still imperative that you know and understand what advice and services you can continue to offer to clients without being licensed.

Members should refer to *Guidance note – Accountant’s letters & lending* for information for further information on when a referral will be exempt from the National Credit Act.

## 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](http://www.asic.gov.au/credit)

### CPA Australia

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

[www.cpaustralia.com.au/credit](http://www.cpaustralia.com.au/credit)

### Australian Government consumer credit

This site provides details on consultations, provides links and updates to legislation.

[www.treasury.gov.au/consumercredit](http://www.treasury.gov.au/consumercredit)

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