



Australian Government

THE NATIONAL CONSUMER CREDIT PROTECTION BILL 2009



DELIVERING SINGLE, STANDARD,
NATIONAL REGULATION OF CONSUMER
CREDIT FOR ALL AUSTRALIANS



Key points

- > delivers a single, standard, nationally consistent consumer credit law
- > creates a new regulatory approach built on responsible lending and consumer protection that will require lenders to provide credit products to consumers that are **not unsuitable**; including products that consumers have been assessed as having the **capacity to repay**
- > ensures a comprehensive national licensing regime built around the Australian Credit Licence (ACL)
- > boosts the powers of the Australian Securities and Investments Commission (ASIC) as the national credit regulator
- > cuts red tape and reduces the compliance burden for business including cutting up to 2,500 pages of multiple state laws down to one national regime
- > supports a prudent, international best practice consumer lending market
- > invests \$66 million in credit reform and ASIC oversight.

Message from the Minister

It gives me great pleasure to release for public exposure the draft National Consumer Credit Protection Bill, and related legislation.

This new package of reforms delivers on our commitment to modernise Australia's consumer credit laws. The state-based Uniform Consumer Credit Code (UCCC), which operates inconsistently across the eight jurisdictions will be replaced with single, standard nationally consistent consumer credit regulation and oversight.

The package will provide for both an improved consumer protection regime and cut red tape and inconsistency for business.

This package of reforms follows the historic agreement by the Council of Australian Governments in October 2008 to implement a two-phase approach for the Australian Government takeover of responsibility for the regulation of consumer credit.

Extensive consultation with the States and Territories and with industry and consumer representatives over the past six months has contributed to the development of this historic package. I thank all of those involved for their participation in this process. They have contributed greatly to delivering a consumer credit regime that not only protects consumers, but is functional for business and supports the future of a sound consumer credit market.

The Government is providing an enhanced level of consumer protection by requiring all lenders to lend responsibly including ensuring that a product is not unsuitable to the consumer and that an

individual's capacity to repay is fully assessed. After many years of report after report calling for this, and particularly in these times of financial instability, this key initiative will help sustain the integrity of Australia's financial system.

A national licensing regime will be established for the first time, requiring lenders and providers of consumer credit broking services to obtain an Australian Credit Licence from ASIC, which will have significant new enforcement powers.

Importantly, the new consumer credit regime is sufficiently flexible so that actions required of certain participants reflect the nature of their business and the pre-existing level of regulation. So for example, bank and credit unions will be streamlined into a credit licence and will have proportionately different obligations than, for example, a currently unregulated broker known under the regime as a credit service provider.

This Government invites your comments on the draft legislative package and looks forward to delivering an internationally competitive financial services regulatory system modernised and fit for the 21st century.

Nick Sherry

Minister for Superannuation and Corporate Law

How the proposed consumer credit laws will benefit consumers

- > protect consumers from being offered loans that are clearly unsuitable for them or that they cannot afford to repay
- > enhance consumers' understanding of credit products by greater disclosure of information, including fees, charges and commissions
- > increase the maximum threshold for mortgage hardship cases from the current \$312,400 to \$500,000 and puts in place a new, flexible power to raise this further as needed
- > assist consumers to make informed choices by creating a more level playing field on access to information between the consumer and the lender or broker
- > ensure consumers receive reliable credit services from suitably qualified and competent persons
- > protect consumers in borrowing for residential investment property
- > provide a national regulator, ASIC, with enhanced powers to enforce responsible lending conduct standards
- > give universal access for consumers to low-cost external dispute resolution schemes
- > provide the option for the first time of opt-in, tribunal-like access to the Federal Magistrates Court
- > provide comprehensive regulatory coverage of the credit industry for previously unregulated sectors such as mortgage brokers
- > broaden criminal and penalty sanctions to safeguard industry standards
- > enhance consumer protection through improved access to consumer remedies

How the proposed consumer credit laws will benefit industry

- > reduce duplication, red tape and compliance costs as eight sets of regulation are replaced with one national scheme
- > cut up to 2,500 pages of inconsistent laws down to one comprehensive national regime
- > introduce a regulatory regime that allows innovation, and promotes increased consumer and market confidence
- > create a level playing field across the credit industry by requiring all industry participants to meet required conduct obligations and standards
- > establish two clear groups of credit participants — credit providers such as banks and credit unions, and credit service providers, such as credit and mortgage brokers
- > create appropriate sets of obligations on credit providers and credit service providers matched to the current level of regulation of both groups
- > enhance industry standards through one national market subject to obligations and requirements by one national law enforced by a national regulator — ASIC
- > raise industry standards by establishing minimum requirements such as responsible lending conduct, and disclosure considerations in providing credit services
- > reduce costs to business of responding to enforcement action through the use of a broader set of consumer remedies and enhanced ASIC enforcement powers

How the proposed consumer credit laws work to protect a consumer looking to borrow money

Although the States and Territories have broadly consistent regulation of most lenders, there are some significant gaps and differences between them. However, under existing State and Territory laws, brokers are not uniformly regulated and are often completely unregulated.

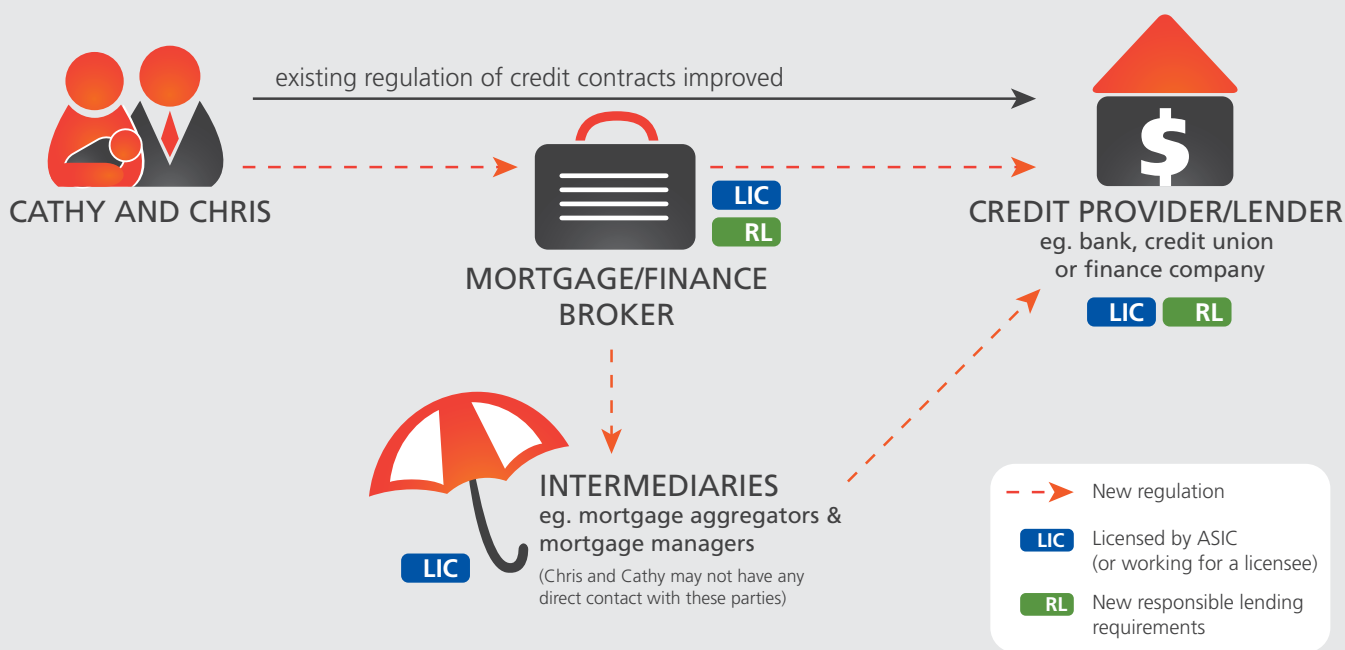
For example, Cathy and Chris go to a broker to arrange a loan to buy a house. Cathy and Chris do not know if their broker is competent to provide such assistance and/or has any possible conflicts of interest in suggesting one loan over another. Depending on what State they live in, their broker may not be licensed or have a dispute resolution process in place.

Cathy and Chris' broker may submit their application to the lender through a range of intermediaries leaving them confused (or even unaware) as to who is doing what to arrange their loan.

If Cathy and Chris have a dispute with their broker or lender they might be surprised to learn that they may have to go to court to resolve the issue. In addition, their broker and lender have no legal obligation to check that they can afford the loan.

Under the Commonwealth regime, Cathy and Chris' broker, any intermediaries involved in the process and the lender will be either required to be licensed by ASIC (or working for a licensee). In addition, their broker and lender will be obliged to observe responsible lending requirements and be members of an external dispute resolution (EDR) scheme.

The diagram below sets out how the new legislation will improve the standards and conduct of the lender and broker, and intermediaries involved when Cathy and Chris are looking to borrow money.



The proposed consumer credit laws

A comprehensive and robust national credit licensing system

- > Anyone who suggests credit to consumers or provides consumers with credit will need to hold an Australian Credit Licence. The licensing requirements will be robust and provide enhanced, comprehensive and consistent protection for consumers in all elements of consumer credit transactions.

The licensing process will commence on 1 January 2010

- > Before 1 January 2010, all persons engaging in credit activities will need to be registered with ASIC and must apply for this registration between 1 November 2009 and 31 December 2009. They will then have six months to apply for an Australian Credit Licence, between 1 January 2010 and 30 June 2010.
- > **All persons who engage in credit activities for the first time on or after 1 January 2010 must apply for and receive an Australian Credit Licence before commencing business.**

2009

1 Nov -----> 31 Dec

- All persons engaging in credit activities will need to be registered with ASIC, and must apply for registration between **1 November 2009 and 31 December 2009.**

- The last date for applications to be lodged is **31 December 2009.**
- All persons engaging in credit activities must be registered to continue operating after this date.

2010

1 Jan -----> 30 June | 1 July

- All registered persons will then have six months to apply for an Australian Credit Licence, between **1 January 2010 and 30 June 2010.**
- All persons engaging in credit activity prior to 1 January 2010 who fail to register by 31 December 2009 must apply for a licence before continuing to engage in credit activities
- Persons who engage in credit activities for the first time on or after 1 January 2010 must apply for and receive an Australian Credit Licence before commencing business.

All registered persons must have applied for their Australian Credit Licence by this date.

- > Specifically, an Australian Credit Licence holder will be able to:
 - lend money and collect money due under a credit contract
 - act as a broker or intermediary, or provide assistance to a consumer about a specific credit product
- > Two categories of participants have been identified that can be streamlined to an Australian Credit Licence — Authorised Deposit-taking Institutions (such as banks and credit unions), and finance brokers who have met the requirements to hold either an 'A' or 'B' Class licence under the current Western Australian licensing regime. In these cases these participants have been subject to sufficiently rigorous levels of supervision and therefore can be streamlined to a licence without having to again demonstrate their competencies and qualifications
 - Streamlining will mean that the application procedure will be simplified. Applicants will be able to apply for a licence without having to provide detailed material to ASIC. However, once licensed they will still have to meet the same obligations as all other holders of an Australian Credit Licence

- > The key elements that must be met to qualify for an Australian Credit Licence include:
 - minimum training requirements and having adequate financial and human resources to meet their obligations. People who cannot meet these standards will not be allowed to engage in credit activities
 - enhanced standards of conduct including a requirement to act honestly, efficiently and fairly, and to properly train and supervise people who act on their behalf. Licensees must meet these obligations when engaging in credit activities, or risk losing their licence
 - mandatory membership of an External Dispute Resolution scheme. For the first time, consumers will be able to resolve consumer credit disputes outside the court system at no cost to them
- > ASIC will have a broad range of powers in relation to licensees to enforce the law:
 - ASIC will be given power to take action promptly to cancel or suspend a licence or ban people from engaging in credit activities, where it is necessary to protect consumers from the risk of financial harm and to maintain the integrity of the licensing scheme
 - A national licensing scheme means that a person who is banned or loses their licence or registration will be excluded Australia-wide. At present there is nothing to prevent a person banned in one State or Territory from continuing to operate as a broker or lender simply by moving to a different jurisdiction.

Specific responsible lending requirements

- > New to consumer credit laws in Australia is the introduction of responsible lending requirements for lenders and other advisers whom consumers deal with, such as finance brokers
- > Responsible lending has two core elements:
 - if a loan is considered to be **unsuitable** for a consumer; and
 - if they do not have the **capacity to repay** the loan, they will not be provided with the loan
- > In order for lenders to lend responsibly and advisers to suggest responsible loans they will be required to:
 - let consumers know who they are, including their licence number and provider of their dispute resolution membership (in the event of a dispute)
 - let consumers know that they have to assess whether the loan is not unsuitable for the consumer's needs and the consumer's capacity to repay the loan
 - let consumers know they can get a copy of this assessment if they ask for it
 - not suggest or provide a loan to a consumer that they think is unsuitable for the consumer's needs and that the consumer could not reasonably foreseeably repay
 - let consumers know what fees and charges they will have to pay upfront before the loan is suggested or entered into
 - let consumers know what commissions the lender or adviser will receive for selling the consumer that loan.

A. An example of how responsible lending protects a consumer when they borrow money straight from a lender

Cathy and Chris make an appointment with a lender to ask about getting a loan to buy a house. Cathy and Chris meet with the loans officer at their home one evening, and talk about their interest in buying a house. They are just starting out and want a simple loan because that is what they are most comfortable with. They also want the lowest interest rate and costs available.

The loans officer considers this and from the loans her organisation offers lets Cathy and Chris know she has a couple of loans that meet these requirements. The loans officer then makes some initial inquiries about Cathy and Chris' financial capacity. She also asks Cathy and Chris to follow up on some items that they don't know the answers to on the spot and provides them with a list of documents to collect and give to her.

The loans officer gives Cathy and Chris a preliminary assessment of how much they might be able to borrow under the loans that meet their requirements, based on their conversation. The loans officer lets them know that after they have provided the requested range of documents, and submitted the application to the application centre for final assessment, she will be able to tell them a firm amount they can borrow and give them the lender's approval for the loan application.

The diagram below sets out how the new legislation will protect Cathy and Chris when they are borrowing money.

Step 1

Cathy and Chris go to a lender to enquire about a home loan



Loans officer must

RL

1. Provide Cathy and Chris with a Credit Guide.

The Credit Guide lets them know important information about the lender, their licence number and EDR scheme membership, and what sorts of costs Cathy and Chris might pay if they obtain a loan from the lender.

RL

2. Discuss with Cathy and Chris their requirements and objectives.

RL

3. Enquire into Cathy and Chris's financial situation to assess their financial capacity and ask them for certain documents to verify their financial situation.

RL

4. Let Cathy and Chris know which loans would **not be unsuitable** for their requirements and on a preliminary basis they have the **capacity to repay**.

RL

5. Let Cathy and Chris know the commissions received for selling the loan to them.

Step 2

Cathy and Chris complete a loan application and submit it to the lender



RL

6. The lender's loan application centre does a final credit assessment of Cathy and Chris's application and makes a determination that the loan is **not unsuitable** and also that the lender wishes to lend to Cathy and Chris based on their commercial criteria.

Step 3

Entering the contract



7. Advise Cathy and Chris that the loan is approved and provide them with important information about the contract being offered to them.

8. Cathy and Chris decide they are happy with the contract being offered to them and sign the contract.

Step 4

Loan is approved and extended



9. The lender then lends Cathy and Chris the money to buy their new home.

RL

New responsible lending requirements

B. An example of how responsible lending protects a consumer when they go to a broker to borrow money

Cathy and Chris visit a broker to get an investment property loan. They talk to the broker about their interest in buying an investment property. They want an interest only loan and an offset account. They are also thinking of renovating the house and only keeping it for two years, so they want to be able to borrow for the renovations and exit the loan in two years without large exit fees.

The broker considers this and from the range of loans she offers (from her panel of lenders) lets Cathy and Chris know she has a couple of loans that meet these requirements.

The broker then makes some initial inquiries about Cathy and Chris' financial capacity. She asks Cathy and Chris to follow up on some items that they do not know the answers to on the spot and provides them with a list of documents to collect and give to her.

The broker assesses the information. She makes any further enquiries and verification necessary to make a preliminary assessment about which loans she considers are not unsuitable for Chris and Cathy. She also determines the amount she considers they have the capacity to repay. The broker then suggests these loans to Cathy and Chris. Cathy and Chris choose and make an application to the lender.

The broker submits the application to the lender for final assessment with supporting documentation. The lender advises the broker that they have approved the loan and the amount that they have approved. The broker provides the documents to Cathy and Chris to enter the loan.

The diagram below sets out how the new legislation will protect Cathy and Chris when they are borrowing money through a broker.

Step 1

Cathy and Chris visit a broker to enquire about borrowing money to buy an investment property



Broker must

1. Give Cathy and Chris a Credit Guide.
The Credit Guide lets Cathy and Chris know some important information about the broker, the licence number and EDR scheme membership, what sorts of costs Cathy and Chris may pay if they use the broker's services and who the broker lends from.
2. Discuss with Cathy and Chris their requirements and objectives so that she can suggest a loan that meets their requirements.
3. Give Cathy and Chris a quote for their services, telling them how much she is going to charge for helping them get their loan.
4. Ask Cathy and Chris to provide certain documents to verify their financial circumstances.
5. Once the broker has these documents she suggests a loan that she has assessed is **not unsuitable** for Cathy and Chris' requirements and that they have the **capacity to repay**.
6. Provide Cathy and Chris with a credit proposal disclosure.
The credit proposal disclosure tells them how much commission the broker will get for securing the loan. The broker also lets Cathy and Chris know all the costs they will have to pay to her, the bank and others, and how much money will be left over after those payments are made.

Step 2

Cathy and Chris decide to proceed with the loan suggested by the broker



Broker

7. Assists Cathy and Chris to complete their loan application and sends it to the chosen lender along with the documents supporting the application.

Step 3

Lender assesses the application



Lender must

8. Do a credit assessment of Cathy and Chris' application and make a final determination that the loan is **not unsuitable**, and also decide that it wishes to lend to Cathy and Chris based on their commercial criteria.

Step 4

Loan is approved and extended



Broker

9. Provides Cathy and Chris with the lender's pre-contractual disclosure document.
10. The lender then lends Cathy and Chris the money to buy their investment property

RL New responsible lending requirements

Improved protection for consumers and enhanced powers for ASIC to enforce the laws

- > The new package will considerably enhance the protections available to consumers by ensuring that:
 - ASIC has substantial powers to enforce consumer credit law
 - there are significant sanctions for licensee misconduct
 - consumers have the ability to access legal remedies in the event of a dispute
- > The new package allows for consumers to be protected in a range of ways, which can take the form of:
 - criminal penalties for licensee misconduct which can include possible imprisonment for up to five years for those who lend contrary to the responsible lending requirements
 - civil penalties for licensee misconduct which enable ASIC to seek heavy fines of up to \$220,000 for an individual and \$1.1 million for a corporation
 - infringement notices (fines) so that ASIC can act quickly to penalise certain breaches of the law
 - consumer remedies, such as compensation, which allow consumers to seek redress for their loss and damage from a licensee
- > There will be a three-tiered dispute resolution system for consumer credit issues, making it easier and less costly for consumers to resolve disputes. The system consists of access to:
 - the licensee’s internal dispute resolution process
 - an ASIC-approved EDR scheme
 - the Federal Court, Federal Magistrates Court and the courts of the States and Territories (including the Magistrates or local Courts)
- > Consumers will also have access to streamlined court procedures for ‘small claim’ actions they have started in a magistrate’s court, local court or the Federal Magistrates Court. Its features include:
 - being available for claims of awards up to \$20,000 or such higher amount as is prescribed in regulations
 - a presumption that consumers will not have legal representation. This provides that the state tribunal practices of self-representation will be retained and legal costs for consumers minimised
 - informal legal procedures where the court will not be bound by formal rules of evidence and may act without regard to legal forms and technicalities, easing the difficulty for consumers in using the legal system
- > Also, the consumer will normally not incur costs for applications for hardship variation or seeking to postpone an enforcement proceeding. This will prevent cost being a disincentive to consumers seeking court remedies.

Enhanced regulation of consumer credit contracts

The National Consumer Credit Protection Bill largely incorporates the existing uniform State-based law, but in addition, the Bill enhances those laws by:

- > extending the scope of the laws to cover residential investment properties to provide important protections to mum-and-dad property investors
- > increasing the monetary thresholds under which consumers can request a change to certain terms of their credit contract on the grounds of hardship and for postponements to enforcement proceedings to \$500,000, and requiring credit providers to respond to such applications within 21 days
- > prohibiting credit providers from using essential household goods as security
- > requiring credit providers to give consumers information when a consumer defaults on their contract or a direct debit is dishonoured
- > reducing the potential for unscrupulous lenders to avoid the law’s application to consumers

Glossary of key terms

Australian Credit Licence

A person who engages in credit activities (primarily credit providers or lenders and credit service providers or brokers or intermediaries) will be required to hold an Australian Credit Licence to legally engage in those activities.

Capacity to repay

A consumer will have the capacity to repay a credit contract if they can meet the regular payments and other known and likely costs of the credit (such as administrative charges or fees charged by the broker or the lender) without substantial financial hardship.

Credit provider

A person who provides credit or consumer leases who is required to be registered or licensed under the proposed law.

Credit service provider

A person who provides credit services generally fall into two main categories:

- > broker or other intermediary where they have a role in securing credit for a consumer, and
- > person who assists a consumer in relation to a particular credit contract (for example, by recommending the consumer take out a particular loan with a lender).

Credit representative

A credit representative is a person who is appointed by the holder of an Australian Credit Licence (commonly referred to as the licensee or ACL holder) to engage in credit activities on their behalf. The credit representative must be appointed in writing by the holder of the Australian Credit Licence and the appointment must specify which acts the credit representative is authorised to engage in, and any limits on their authority.

External Dispute Resolution (or EDR) schemes

All registered persons and ACL holders are required to be a member of an EDR scheme. Consumers who have a dispute with a lender or broker can seek redress through an EDR scheme. The EDR scheme can hear and decide disputes for consumers without the need for a face to face hearing, and without the formality or cost of court proceedings.

Licensing

- > A person must satisfy ASIC that they have met all the licensing requirements in order to qualify for an Australian Credit Licence.
- > A person who has registered with ASIC between 1 November 2009 and 31 December 2009 must then apply for an Australian Credit Licence by 30 June 2010.
- > A person who commences business on or after 1 January 2010 must apply for an Australian Credit Licence before they can engage in credit activities.

Registration

Registration is the transitional phase for persons who currently engage in credit activities before they can apply for an Australian Credit Licence. Applications for registration can only be made between 1 November 2009 and 31 December 2009.

Responsible lending

Responsible lending is providing credit or providing services that lead to the provision of credit where the lender or broker is under an obligation to ensure the credit reasonably meets the consumer's requirements, including by meeting the regular payments and other known and likely costs of the credit without substantial financial hardship. Responsible lending is coupled with a responsibility on borrowers to ensure they borrow responsibly.

Unsuitable

A credit contract is unsuitable if it does not meet the requirements and objectives of the consumer for borrowing the money and which they do not have the capacity to repay without financial hardship

Public exposure

To make the transition to the new regulatory system as smooth and as seamless as possible, the Government is releasing for public comment the draft package of consumer credit protection reform laws, the National Consumer Credit Protection Bill 2009. The development of the draft package has benefited from extensive consultation and testing with key industry bodies, consumer representatives and State and Territory governments.

The purpose of this exposure is to seek the views of the community on the draft package and to refine the details in the package before it is introduced into Parliament to be debated and passed into law. The period for community consultation closes on 22 May 2009. The Bills are proposed to be introduced into Parliament before the middle of 2009.

Where the proposed consumer credit laws can be found

A dedicated website has been established. The package of consumer credit reforms can be found and downloaded from www.treasury.gov.au/consumercredit.

Any comments about the draft legislation can be provided by email to consumercredit@treasury.gov.au. The period for providing comments closes on 22 May 2009.



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