
NATIONAL CONSUMER CREDIT PROTECTION AMENDMENT (SUPPORTING ECONOMIC
RECOVERY) BILL 2020

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of contents

Glossary 1

Chapter 1 Changes to the responsible lending obligations 3

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ADI	Authorised Deposit-taking Institution
AFCA	Australian Financial Complaints Authority
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
Bill	National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020
Credit Act	<i>National Consumer Credit Protection Act 2009</i>
Credit Regulations	<i>National Consumer Credit Protection Regulations 2010</i>
RLOs	Responsible lending obligations
SACC	Small amount credit contract

Chapter 1

Changes to the responsible lending obligations

Outline of chapter

1.1 Schedule 1 to the Bill will amend the Credit Act so that RLOs apply only to SACCs, SACC-equivalent loans by ADIs and consumer leases beginning on 1 March 2021. This forms part of the Government's Consumer Credit Reforms aimed at improving the flow of credit by reducing the time that it takes consumers and businesses to access credit so that consumers can continue to spend and business can invest and create jobs.

1.2 The Bill forms a key part of the Australian Government's economic recovery plan in response to the current economic circumstances, as the economy recovers from the COVID-19 crisis.

1.3 Schedule 1 to the Bill will also amend the Credit Act to provide the Minister a power to determine standards, by legislative instrument, specifying requirements for a credit licensee's systems, policies and processes in relation to certain non-ADI credit conduct.

1.4 These providers will be required to ensure that they have systems, policies and processes in place that comply with the standard, and not repeatedly fail to apply those systems.

1.5 All legislative references in this Chapter are to the Credit Act unless otherwise stated.

Context of amendments

1.6 In September 2020, the Government announced that it would undertake consumer credit reforms aimed at enabling the efficient flow of credit by reducing the time that it takes consumers and businesses to access credit so that consumers can continue to spend and business can invest and create jobs. This announcement included:

- removing RLOs from the Credit Act, with the exception of SACCs and consumer leases;
- removing the ambiguity regarding the application of consumer lending laws to small business lending; and

- implementing a new framework that would appropriately adopt key elements of APRA's ADI lending prudential standards to non-ADIs (other than for SACCs and consumer leases), while ensuring ADIs continue to comply with APRA's prudential standards.

1.7 The Credit Act sets out a comprehensive national licensing regime for persons who engage in credit activities (Chapter 2). This is separate to the licensing of financial services under the *Corporations Act 2001*.

Responsible lending obligations under the Credit Act

1.8 The Credit Act includes RLOs which are imposed on all holders of Australian credit licences in relation to their dealings with consumers. These are contained in Chapter 3 of the Credit Act.

1.9 RLOs are designed to prevent the provision of unsuitable credit to consumers. They apply to consumer credit and do not apply to lending for predominantly business purposes. Over time, the 'one-size-fits-all' and prescriptive nature of the RLOs has imposed burdensome and unnecessary processes on both lenders and borrowers.

1.10 Broadly, the responsible lending conduct obligations in Chapter 3 of the Credit Act impose expected standards of behaviour on licensees when they enter into consumer credit contracts or consumer leases, where they suggest a credit contract or lease to a consumer, or assist a consumer to apply for a credit contract or lease.

1.11 The key obligation on licensees is to ensure they do not provide a credit contract or lease to a consumer or suggest or assist a consumer to enter into a credit contract or lease that is unsuitable for them. This requires licensees to assess that the credit contract or lease is not unsuitable for the consumer's requirements and objectives and that the consumer has the capacity to meet the financial obligations under the credit contract or lease.

1.12 Currently, a credit licensee is required to undertake an assessment of the suitability of the consumer for the credit contract (or credit limit increase) or lease. This assessment requires that reasonable inquiries be made about the consumer's requirements, objectives and financial situation, and reasonable steps be taken to verify the consumer's financial situation.

Prudential standards for ADI lending

1.13 While both ADIs and non-ADIs are currently subject to the RLOs, ADIs must also comply with requirements under APRA's prudential framework. This has resulted in regulatory duplication for ADIs with little additional benefit to consumers.

1.14 APRA's prudential standards for ADIs ensure lenders have appropriate settings for managing risk to financial soundness throughout the life of loans. The credit risk management standards that ADIs are expected to meet include expectations of sound lending practices similar to the requirements under the RLOs. As part of these sound lending practices, APRA imposes serviceability requirements to ensure consumers can meet their obligations without substantial hardship.

Summary of new law

1.15 Schedule 1 to the Bill amends Chapter 3 of the Credit Act so that, from 1 March 2021, RLOs apply only to SACCs, SACC-equivalent loans provided by ADIs and consumer leases.

1.16 For all other credit, key changes will:

- remove RLOs for ADIs, reflecting that ADIs are subject to a prudential regulatory framework under the *Banking Act 1959*, including prudential standards which are enforced by APRA; and
- impose lending standards for non-ADIs, as part of the new risk-based regulatory framework for consumer credit, based on similar obligations to those imposed on ADIs.

1.17 To ensure appropriate consumer protections remain in place, the best interests obligations already legislated for mortgage brokers are extended to all credit assistance providers.

1.18 Related amendments will be made to the Credit Regulations to limit or repeal certain provisions that are affected or made redundant by the removal of RLOs for credit contracts other than SACCs and consumer leases.

1.19 Schedule 1 to the Bill will amend the Credit Act to allow the Minister to make standards, by way of legislative instrument, specifying requirements for a credit licensee's systems, policies and processes relating to certain non-ADI credit conduct.

1.20 These requirements will be system-level obligations rather than focusing on individual loans engaged in by licensees. This reflects the Government's decision to move away from a prescriptive framework for lenders and borrowers and will support risk-based lending that is attuned to the needs and circumstances of the borrower and credit product.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Responsible lending obligations	
Chapter 3 RLOs will only apply to SACCs, SACC-equivalent loans provided by ADIs and consumer leases beginning on 1 March 2021. This is the case for both credit providers and credit assistance providers.	Chapter 3 RLOs apply to all consumer credit contracts, consumer leases and SACCs. This is the case for both credit providers and credit assistance providers.
ADIs are not subject to Chapter 3 RLOs (other than for SACC-equivalent loans) beginning on 1 March 2021. Existing prudential standards continue to apply.	ADIs are subject to Chapter 3 RLOs and a prudential standards regime set and enforced by APRA under the <i>Banking Act 1959</i> .
Non-ADI credit conduct is not subject to Chapter 3 RLOs from 1 March 2021 (this conduct does not include SACCs and consumer leases). Non-ADI credit conduct is subject to non-ADI credit standards made by legislative instrument. These will be similar to those imposed on ADIs.	Non-ADIs are subject to Chapter 3 RLOs.
Best interests obligations	
A best interests duty and obligation to resolve conflicts of interest in the consumer’s favour apply to all credit assistance providers.	A best interests duty and obligation to resolve conflicts of interest in the consumer’s favour is legislated to apply to mortgage brokers only.
New non-ADI credit standard	
The Minister is able to make non-ADI credit standards , by way of legislative instrument, specifying requirements for a credit licensee’s systems, policies and processes relating to certain non-ADI credit conduct.	No equivalent.

Detailed explanation of new law

1.21 Schedule 1 to the Bill will amend Chapter 3 of the Credit Act (Responsible Lending Conduct) so that, beginning on 1 March 2021,

RLOs will only apply to SACCs, SACC-equivalent loans provided by ADIs and consumer leases.

Licenseses that provide credit assistance in relation to credit contracts

1.22 Beginning on 1 March 2021, the following obligations in Part 3-1 of the Credit Act apply only to licenseses that provide credit assistance in relation to SACCs and SACC-equivalent loans provided by ADIs:

- section 115: Obligations of credit assistance providers before providing credit assistance for credit contracts
- section 116: Preliminary assessment of unsuitability of the credit contract
- section 117: Reasonable inquiries etc. about the consumer
- section 118: When the credit contract must be assessed as unsuitable: entering contract or increasing the credit limit
- section 119: When the credit contract must be assessed as unsuitable: remaining in credit contract
- section 120: Providing the consumer with the preliminary assessment
- section 123: Prohibition on suggesting or assisting consumers to enter, or increase the credit limit under, unsuitable credit contracts
- section 124: Prohibition on suggesting to consumers to remain in unsuitable credit contracts.

[Schedule 1, items 4, 7 to 22 and 24 to 31, sections 113(2)(i), 115 (heading), 115(1)(a)-(b), 115(2), 116 (heading), 116(1)(b), 116(2)(b), 117(1)(a), 117(1A), 118 (heading), 118(1), 118(3AA), 118(3A), 119 (heading), 119(1), 119(3A), 123 (heading), 123(1)(a)-(b), 123(3AA), 123(3A), 123(3A), 124 (heading), 124(1) and 124(3A)]

Best interests obligations

1.23 The best interests obligations that will apply to mortgage brokers beginning on 1 January 2021 will be extended to other credit assistance providers. As a result, all credit assistance providers will need to comply with the obligations in relation to credit contracts.

1.24 The extension of the best interests obligations to licenseses and their credit representatives means that those licenseses and their credit representatives must:

- act in the best interests of consumers when providing credit assistance in relation to credit contracts; and

- where there is a conflict of interests, give priority to consumers in providing credit assistance in relation to credit contracts.

[Schedule 1, items 65 and 66, sections 158L(1) and 158LD]

1.25 A maximum civil penalty of 5,000 penalty units applies for a contravention.

1.26 Additionally, licensees that authorise credit representatives must take reasonable steps to ensure that those persons comply with the obligations listed above.

1.27 The extension of the best interests obligations is intended to improve outcomes for consumers by legally requiring that credit assistance providers act in the consumer's best interests and place their consumer's interests before their own. The extension of the best interests obligations does not affect the arrangements already legislated for mortgage brokers.

1.28 These obligations do not apply to credit assistance provided in relation to credit for predominantly business purposes.

1.29 The duty to act in the best interests of the consumer in relation to credit assistance is a principles-based standard of conduct that applies across a range of activities that licensees and representatives engage in. As such, what conduct satisfies the duty will depend on the individual circumstances in which credit assistance is provided to a consumer in relation to a credit contract. The duty does not prescribe conduct that will be taken to satisfy the duty in specific circumstances. It is the responsibility of credit assistance providers to ensure that their conduct meets the standard of 'acting in the best interests of consumers' in the relevant circumstances.

1.30 Examples of steps that may need to be taken in order to comply with the duty are:

- prior to recommending any credit contract to a consumer based on consideration of that consumer's particular circumstances, the licensee or representative may need to consider a range of products (including the features of those products), form a view about which products are in the consumer's best interests and then inform the consumer of the range and the options it contains;
- any recommendations made would be expected to be based on consumer benefits, rather than benefits that may be realised by the broker; that is, a broker should not recommend a loan by prioritising factors that cannot be substantiated as delivering benefits to that particular consumer (such as the broker's relationship with the lender), over factors and features which affect the cost of the product or are more relevant to the consumer; and

- in cases where critical information is not obtained when inquiring about a consumer's circumstances, the broker could be expected to refrain from making a recommendation about a loan where there is a consequent risk that the loan will not be in the consumer's best interests.

1.31 In some situations the consumer will not properly understand the implications of different choices and so the broker may have to assist them to understand why a particular loan is or is not in their best interests. In some cases this assistance may inform any recommendations provided by the broker.

1.32 A credit contract (e.g. a loan) may be packaged with one or more other credit contracts (e.g. a credit card) as a single product offering. In recommending a package the credit assistance provider would be expected to ensure that the package, rather than the standalone loan (if available) or an alternative standalone loan or packaged product in the range of options considered by the credit assistance provider, is in the consumer's best interests. In making this assessment, the credit assistance provider would be expected to weigh up the relative benefits and risks for the consumer, which may depend on a range of factors including what the consumer is attempting to achieve and the relative value and importance of the different components of the package.

1.33 However, in a package consisting of a primary credit contract (e.g. a car loan) and other credit contracts (e.g. a credit card), the primary credit contract is relatively more important for determining whether the package is in the consumer's best interests.

1.34 In addition to the best interests duty, the law will also require credit assistance providers to resolve conflicts of interests in the consumer's favour. In particular, if a credit assistance provider knows or reasonably ought to know, that there is a conflict between the interests of the consumer and the interests of the credit assistance provider or a related party, the provider must give priority to the consumer's interests.

1.35 The obligation to give priority to the consumer's interests is not limited to conflicts of interests that the credit assistance provider currently knows about. Credit assistance providers are expected to take active steps to identify conflicts of interests to minimise the risk of a contravention, including obligations that can arise because of its commercial relationships with third parties. For example, if a broker has referral arrangements with a provider of goods or services such that they are an associate, then the broker would need to consider the conflicts that could arise, and ensure that they give priority to the interests of the consumer over their own interests or those of the associate.

1.36 The obligations apply to credit assistance providers that are licensees, or their representatives. For credit representatives:

- the obligations only apply when the credit representative is acting within the scope of the credit representative’s actual or apparent authority from the licensee; and
- the licensee is required take reasonable steps to ensure that the representative complies with the obligations.

1.37 What constitutes reasonable steps will vary from case to case according to the content of the obligation. Failure to take reasonable steps would include a failure to respond to or address identified problems that create a risk of a contravention; that is, licensees will need to act to prevent contraventions of the law, and not simply respond to contraventions once they have happened.

Licensees that are credit providers under credit contracts

1.38 Beginning on 1 March 2021, the following obligations in Part 3-2 of the Credit Act apply only to licensees that are credit providers under SACCs and SACC-equivalent loans provided by ADIs:

- section 128: Obligation to assess unsuitability
- section 129: Assessment of unsuitability of the credit contract
- section 130: Reasonable inquiries etc. about the consumer
- section 131: When credit contract must be assessed as unsuitable
- section 132: Giving the consumer the assessment
- section 133: Prohibition on entering, or increasing the credit limit of, unsuitable credit contracts.

[Schedule 1, items 36, 38 to 50 and 52 to 55, sections 126(2)(f), 128 (heading), 128(a)-(ba), 129 (heading), 129(b), 130(1)(a), 131 (heading), 131(1), 131(3AA), 131(3A), 132(1), 132(2)(a), 133 (heading), 133(1)(a)-(b), 133(3AA) and 133(3A)]

SACC-equivalent loans by ADIs

1.39 The RLOs are retained for credit contracts provided by ADIs which would be a SACC if the credit provider was not an ADI. The Bill uses the term ‘low limit credit contract’ to encompass both types of contract. *[Schedule 1, item 1, definition of ‘low limit credit contract’ in section 5(1)]*

1.40 That is, if an ADI provides an unsecured loan of under \$2000 that is not a continuing credit contract, and with a term of between 16 days and one year, the ADI continues to be subject to the RLOs that have previously applied to credit contracts generally. However, the obligations that have previously applied specifically to SACCs (such as the requirement to give consumer warnings) do not apply to ADIs in this scenario.

1.41 The effect is that ADIs' RLOs are unchanged for this category of contract. This maintains a comparable level of consumer protection whether a small loan is obtained as a SACC or from an ADI.

1.42 As indicated above, the RLOs are also retained for credit assistance in relation to a SACC-equivalent loan by an ADI.

Licenses and reverse mortgages

1.43 The requirement to give equity projections remains in place, but from 1 March 2021 the obligation is to do so before the licensee provides credit assistance or enters the credit contract. *[Schedule 1, items 58 and 61, sections 133DB(1) and (1A)]*

1.44 In addition to giving equity projections, the licensee must also:

- ask the consumer about their expected future aged care accommodation costs; and
- present the consumer's expected future aged care accommodation costs alongside the equity projection, in a manner allowing the consumer to appreciate how the equity expected to be left in the home may impact their ability to afford aged care.

[Schedule 1, items 59 and 60, sections 133DB(1)(aa) and (ba)]

1.45 The licensee need only ask the consumer for their estimate of the future costs. The licensee does not need to form its own view.

1.46 As with the existing equity projections requirement, a maximum civil penalty of 5,000 penalty units applies for a failure to comply. Failure to comply is also an offence punishable by a maximum penalty of 50 penalty units.

Example

Bob enters a reverse mortgage at 60. His broker asks him how much he expects his future aged care accommodation costs will be. Bob estimates these will amount to approximately \$30,000.

The broker provides an equity projection which indicates at the time the reverse mortgage is discharged Bob can expect \$50,000 in equity left in his home.

Bob's broker provides the information to Bob regarding (i) the estimated equity remaining after the reverse mortgage has been discharged and (ii) Bob's estimated cost of aged care in a manner that allows Bob to appreciate how the equity expected to be left in his home may impact his ability to afford aged care.

Miscellaneous rules

1.47 Division 5 of Part 3-6A, about the periods for determining unsuitability in respect of credit card, is repealed. This Division is redundant because unsuitability assessments no longer apply for credit card contracts. *[Schedule 1, item 69, Division 5 of Part 3-6A]*

Non-ADI credit standards

1.48 The Minister is able to make **non-ADI credit standards**, by way of legislative instrument, specifying requirements for a credit licensee's systems, policies and processes which relate to certain non-ADI credit conduct. *[Schedule 1, items 1 and 62, definition of 'non-ADI credit standard' in sections 5(1), and 133EA(1)]*

1.49 These standards will require licensees to implement adequate systems, policies and processes relating to non-ADI credit conduct rather than impose individual conduct-level obligations. This enables credit assessment to move away from a prescriptive framework for lenders and borrowers and will support risk-based lending that is attuned to the needs and circumstances of the borrower and credit product. These standards are appropriately adopted from the APRA standards to maximise alignment between the ADI and non-ADI regimes.

1.50 Additionally, these standards may require a licensee to give a document to a consumer. This will enable a standard to require a licensee to give a copy of an assessment prescribed by the standard to a consumer.

1.51 Non-ADI credit conduct relates to credit contracts where the contract is not a SACC and the credit provider is not an ADI. In relation to these contracts, **non-ADI credit conduct** is:

- a licensee entering a credit contract with a consumer where the consumer will be the debtor under the contract;
- a licensee unconditionally representing to a consumer that they believe the consumer is eligible enter into a credit contract with the licensee;
- where a consumer is a debtor under the credit contract, a licensee increases the credit limit of that contract; or
- a licensee unconditionally representing to a consumer under a credit contract that the credit limit can be increased. *[Schedule 1, item 62, definition of 'non-ADI credit conduct' in sections 5(1) and 133EA(5) and (6)]*

1.52 The non-ADI credit standards can specify that a licensee is required to provide a consumer a copy of documents at a particular time and in a particular manner. *[Schedule 1, item 62, section 133EA(2)]*

Obligations to establish, maintain and implement the systems, policies and processes required by the non-ADI credit standards

1.53 A licensee is prohibited from engaging in non-ADI credit conduct unless the systems, policies and processes applicable to the conduct, as required by a non-ADI credit standard, are both:

- established and maintained to comply with the requirements in the standard; and
- documented in a written plan.

1.54 A licensee failing to have met either of these requirements before engaging in an instance of non-ADI credit conduct will contravene a civil penalty provision with a maximum penalty of 5,000 penalty units. *[Schedule 1, item 62, section 133EB]*

1.55 This obligation is intended to ensure that prior to a licensee engaging in any non-ADI credit conduct covered by a standard, the licensee has established, maintained and documented the systems, policies and processes required by the relevant standard.

1.56 A licensee may fail to maintain systems, policies and processes in accordance with the standard if the licensee fails to make changes to those systems when the licensee has identified that those systems, policies and processes are not ensuring the outcomes required by the standard.

1.57 Where the licensee fails to implement established and maintained systems, policies and processes on a repeated basis, the licensee will contravene a civil penalty provision with a maximum penalty of 5,000 penalty units. *[Schedule 1, item 62, section 133EC]*

1.58 Each time a licensee does not implement their systems, policies and processes in relation to non-ADI credit conduct is considered a failure. Therefore, repeated failures can take place over a short period of time, including a single day, or over a longer period of time.

1.59 The expression ‘systems, policies and processes’, in this context, is intended to be a composite concept. Therefore, a licensee will contravene an obligation under this framework if those things, when considered together, do not meet the requirements set out in the standard.

1.60 In cases where a failure to implement the systems, policies and processes does not contravene the civil penalty provision, consumers will retain access to redress through other mechanisms, such as through the AFCA scheme.

1.61 Further, a licensee is required to retain a record of a written plan for seven years after the time that the written plan ceases to set out the current systems, policies and processes the licensee utilises. A licensee will contravene a civil penalty provision with a maximum penalty of 5,000 penalty units where the licensee does not keep the records for the

written plan for seven years after the end of the period the plan applies to. *[Schedule 1, item 62, section 133EB(2)]*

1.62 Maintaining records of these written plans will ensure that AFCA are able to access the relevant written plan documenting the systems, policies and processes implemented by a licensee when considering a consumer's complaint about the licensee or non-ADI credit conduct.

Obligation to provide consumers documents

1.63 A licensee is required to give a consumer a copy of a document at a specified time, if required by a non-ADI credit standard.

1.64 A civil penalty provision with a maximum penalty of 5,000 penalty units will apply if a standard requires the licensee to provide a copy of a document to a consumer at a particular time and the licensee does not give the consumer the document within the specified timeframe. *[Schedule 1, item 62, section 133ED(1)]*

1.65 If a standard requires a copy of a document to be given in a certain manner, the licensee must adhere to those requirements. *[Schedule 1, item 62, section 133ED(2)]*

1.66 When a licensee is required to provide a consumer a copy of a document, they are prohibited to request or demand payment from the consumer for the document. A civil penalty provision with a maximum penalty of 5,000 penalty units will apply if a payment is requested or demanded from a consumer. *[Schedule 1, item 62, section 133ED(3)]*

1.67 A strict liability offence will be committed by a person if they are under a requirement to provide a consumer a copy of a document or to not request payment in providing the document and they engage in conduct which contravenes those requirements. This strict liability offence has a maximum penalty of 50 penalty units. *[Schedule 1, item 62, section 133ED(4)]*

Consequential amendments

1.68 Schedule 1 makes amendments that include and update notes and other guidance materials to reflect the substantive changes made by the amendments. *[Schedule 1, items 2 to 4, 6, 23, 32 to 35, 37, 51, 57, 63, 64, 67 and 68, section 111, Division 4 of Part 3-1(heading), Division 6 of Part 3-1(heading), Part 3-2(heading), section 125, Division 3 of Part 3-2(heading), Division 4 of Part 3-2(heading), section 133C, Part 3-5A(heading), section 158K, Division 4 of Part 3-5A(heading) and section 160A]*

Application and transitional provisions

1.69 The amendments to Part 3-1 of the Credit Act apply to credit assistance provided on or after 1 March 2021, whether the credit contract in relation to which the assistance is provided is entered before, on or after 1 March 2021. *[Schedule 1, item 70, Schedule 19 of the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009, item 2, application of amendments of Part 3-1]*

1.70 The amendments of Parts 3-2, 3-2C and 3-2D of the Credit Act apply:

- so far as the amendments relate to entering a credit contract – to credit contracts entered on or after 1 March 2021; and
- so far as the amendments relate to remaining in a credit contract, or increasing the credit limit of a credit contract – to credit contracts entered before, on or after 1 March 2021.

1.71 To avoid doubt, section 132 of the Credit Act, as in force immediately before 1 March 2021, continues to apply in relation to assessments made before 1 March 2021. *[Schedule 1, item 70, Schedule 19 of the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009, item 3, application of amendments of Parts 3-2, 3-2C and 3-2D]*

1.72 The amendments to introduce best interests obligations for credit assistance providers apply in relation to the provision of credit assistance to a consumer on or after 1 March 2021 (whether or not the assistance was sought, or commenced being provided, before that day). *[Schedule 1, item 70, Schedule 19 of the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009, item 4, application of amendments of Parts 3-5A]*

1.73 The framework for non-ADI credit standards will be inserted into the Act commencing on 1 March 2021.