

ACCOUNTANT'S LETTERS AND CAPACITY TO REPAY CERTIFICATES

GUIDANCE FOR CPA AUSTRALIA PUBLIC PRACTITIONERS
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INTRODUCTION

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

The National Credit Act requires Australian Credit Licensees, such as Authorised Deposit-Taking Institutions (ADIs), other lenders and intermediaries, to comply with the responsible lending obligations. This includes making reasonable inquiries and verifications and assessing whether a credit product is 'not unsuitable' for a consumer. ADIs also have additional obligations under the APRA prudential requirements.

Despite this, many ADIs and lenders request an 'accountant's letter' or a 'capacity to repay certificate' is signed by a borrower's accountant as a means of assessing a borrower's ability to service a loan before actually approving the loan. These documents essentially shift the risk of credit assessment from the lender to the accountant.

The National Credit Act does not apply where the finance is predominantly for businesses purposes. Some lenders are requesting accountants to provide a declaration or letter that a loan / lease for a consumer will be predominantly for business use. Such declarations assist the lender to form a view that loan is outside the requirements of the National Credit Act

Given the potential risks and obligations of the National Credit Act, it is imperative that you understand what support and documentation you can provide your client seeking finance.

This guidance note focuses on three key areas:

1. The National Credit Act and the role of the accountant
2. A declaration a loan or lease will be predominantly for business purposes, and
3. Exempt activities under the National Credit Act.

1. The National Credit Act and the role of the accountant

The National Credit Act 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 must be appropriately licensed by either holding an Australian Credit Licence (ACL) or be a credit representative of an ACL.

Products that are regulated include home loans, personal loans, credit cards, client leases, overdrafts and line of credit accounts, among other products and services. Importantly it also captures credit to purchase, renovate, improve or refinance a residential investment property.

If the finance is regulated under the National Credit Act, the provision of an accountant's letter, capacity to repay certificate' or a similar document is restricted to appropriately licensed individuals. This is because signing a capacity to repay certificate or providing other similar declarations may be considered providing credit assistance, which is a licensed activity. It is also common for personal lending to be used to support business purposes, especially for small businesses, so it may not always be clear if the National Credit Act will apply. This activity is also unlikely to be covered by your Professional Indemnity Insurance (PII) unless you are appropriately licensed under an ACL.

Accountants cannot provide a certificate or assessment relating to whether a client will be able to meet their financial obligations under a credit contract (accountant's letter or capacity to repay certificate) unless they are appropriately licensed under an ACL.

With the ongoing impact and uncertainty of COVID-19, many lenders are requesting additional confirmations from the accountant such as:

- confirmation whether the income being paid to the spouse is consistent and ongoing
- actual level of income expected for this financial year for the spouse from a trust
- whether the income is consistent and ongoing for future years, the basis upon which the assessment is made and the basis upon which the accountant can confirm the documents are authentic, and
- whether a client's income has been or will be affected by COVID-19.

It is impossible to comply with many of these requests and attempting to do so also gives rise to potential risks, liability and may not be an activity covered by your PII.

CPA Australia strongly recommends that you assist your client by providing them upon request, a statement on their financial position or other factual information about your client's finances which you can factually verify.

2. Declaration a loan or lease will be predominantly for business purposes

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.

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

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 logbooks or other forms of evidence to confirm that the credit will 'predominantly' be used for business purposes.

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.

CPA Australia recommends you do not provide a declaration for a client that a loan or lease will be predominately for business use.

Should you 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 be a breach of APES 110 Code of Ethics for Professional Accountants, may also have legal ramifications and PII may not cover you.

3. Exempt Activities under the National Credit Act

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

Registered Tax Agents

If you are a registered tax agent, you are exempt from the licensing provisions where you engage as a registered tax agent in the ordinary course of your activities as a registered tax agent under reg 24(5) of the National Credit Regulations. For example, providing your client with a statement of financial position to support their application for finance providing you do not express a view whether your client can meet the repayments.

This exemption does not allow you to provide a certificate or assessment about whether a consumer will be able to meet their financial obligations under a credit contract or consumer lease.

Referrals

The National Consumer Credit Protection Regulations 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.

You can:	You need a client licence to:
Refer a client to a range of specific lenders, all carrying a wide range of credit products	Suggest a client approach a particular finance company or bank about a specific product
Refer a client to a licensed mortgage broker	Suggest the client approach a particular credit provider who offers a very limited range of credit products

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