

ASIC CLASS ORDER [CO 13/818]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

National Consumer Credit Protection Act 2001
National Credit Code

The Australian Securities and Investments Commission (*ASIC*) makes Class Order [CO 13/818] under paragraph 163(3)(d) of the *National Consumer Credit Protection Act 2001* (the *National Credit Act*) and subsection 203A(3) of the National Credit Code (the *Code*).

ASIC may declare the provisions to which Part 3-7 of the National Credit Act applies (including Chapter 3 of the National Credit Act and definitions in the National Credit Act as they apply to references in that Chapter), apply in relation to a class of persons or credit contracts as if the provisions were omitted, modified or varied in the specified way (paragraph 163(3)(d) of the National Credit Act).

ASIC may exempt a class of persons or credit contracts from all or specified provisions of the Code, subject to specified conditions (subsections 203A(3) and (4) of the Code).

1. Background

A small amount credit contract (*SACC*) is a credit contract under which, in general terms, the amount of the loan is \$2000 or less, and the term is 16 days to one year. Only the following prescribed fees or charges can be charged on these loans:

- a) a monthly fee – 4% of the amount lent;
- b) an establishment fee – 20% of the amount lent;
- c) Government fees or charges;
- d) enforcement expenses;
- e) default fees (the lender cannot recover more than 200% of the amount lent).

SACCs are also subject to other provisions (which commenced on 1 March 2013) designed to address continued concerns regarding payday lending practices such as:

- o additional disclosure requirements,
 - o a protected earnings amount for Centrelink recipients
 - o a requirement for lenders and credit assistance providers to obtain and consider bank account statements as part of their responsible lending verifications, and
 - o a presumption that a loan will cause substantial hardship where consumers are in default under another small amount loan or have had multiple small amount loans in a short period of time
- (together, the additional SACC responsible lending provisions).

A medium amount credit contract (*MACC*) is a credit contract under which, in general terms, the loan is from \$2001 to \$5000 and the term is 16 days to 2 years. MACCs have a cap determined by an annual cost rate (interest plus fees and charges) which must not exceed 48 per cent, with the formula allowing for an additional \$400 fee to be charged. Other credit

contracts (e.g. where the loan is for more than \$5000) have a cap where the annual cost rate must not exceed 48 per cent.

These caps are contained in the *Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Enhancements Act)* and come into effect on 1 July 2013.

In preparing to implement the caps, industry stakeholders have identified the following issues:

1. It was understood that whether a contract meets the monetary limit for a SACC would be determined by the amount of credit that is received 'in hand' by the consumer under the contract (i.e. whether that amount is \$2000 or less). However, as the definition of ***small amount credit contract*** refers to the ***credit limit*** of the contract, there is some uncertainty about how to determine the monetary limit of a SACC where fees and charges are also financed under the credit contract. The practice of most lenders is to finance the upfront fees and charges associated with the credit contract. If the credit contract is not a SACC because the monetary limit for a SACC is exceeded, the affected contract will be a MACC which is then subject to a different cost cap and responsible lending requirements.
2. The provisions in relation to permitted fees and charges for SACCs will prevent a credit provider from providing for, collecting and applying an amount of credit to cover a fee charged by another person to process direct debt requests (***DDRs***) in relation to repayment of the SACC. Many credit providers use the services of agencies for collection of payments using DDRs. These agencies charge a small fee (generally between \$1-2 for each transaction) to process these transactions.

Treasury has advised industry stakeholders that regulations will be made to address these problems. However, as regulations will not be finalised by 1 July 2013, Treasury has requested ASIC to exercise its discretionary powers to give effect to the intended changes and facilitate the implementation of the Enhancement Act provisions in the way intended.

2. Purpose of the class order

The purpose of this class order is to give effect to the changes that have been proposed by Treasury (to the extent possible under ASIC's discretionary powers) to facilitate the implementation of the Enhancement Act provisions and minimise disruption to the business of credit providers and direct debit companies under these kinds of contracts.

To achieve this, this class order gives relief from requirements in the National Credit Act and the Code:

- to clarify that certain credit contracts may be treated as SACCs, rather than as MACCs, and to enable those contracts to comply with the cost caps and additional provisions for SACCs rather than the cost caps for MACCs; and
- to in effect add to the list of specified permitted fees or charges in the SACC provisions.

The Class Order is intended to provide relief for a short interim period while the intended regulations are being finalised. ASIC expects to revoke this Class Order once the regulations have been made.

3. Operation of the class order

Relief in relation to the classification of certain contracts as SACCs

This class order gives relief from requirements in the National Credit Act and the Code to clarify that certain credit contracts may be treated as SACCs, rather than as MACCs, and to enable those contracts to comply with the cost caps and additional provisions for SACCs rather than the cost caps for MACCs.

Relief is given in the form of:

- a declaration under the National Credit Act to modify the definition of ***small amount credit contract*** for the purpose of Ch 3 of the National Credit Act (including the additional responsible lending provisions for SACCs) and
- exemptions from the provisions (***MACC provisions***) in the Code that would apply to the affected contracts as MACCs, and to credit providers and credit assistance providers in relation to those contracts. ASIC does not have a declaration power in relation to the Code provisions.

The declaration and exemptions apply in circumstances that mirror the provisions (***SACC provisions***) in the Code that set out the cap on costs and additional requirements for SACCs.

The effect of this relief is that:

- the affected contract must comply with requirements that are set out in the SACC provisions (including restrictions on the kinds of fees and charges that are permitted to be imposed, required, accepted or paid using the amount of credit, and restrictions on the amount that can be charged in the event of default in payment under the contract),
- the affected contract is treated as a SACC for the responsible lending provisions, and
- the MACC provisions (in particular the 48% cap on the annual cost rate for the contract) will not need to be complied with in relation to the affected contracts.

Relief to permit direct debit processing fees or charges

Relief is given as exemptions from the SACC provisions that restrict the kinds of fees or charges that can be imposed or provided for under a SACC, required and accepted by the credit provider or a prescribed person, and in relation to which part of the amount of credit may be applied.

The effect of this relief is to add to the existing list of permitted fees or charges a direct debit processing fee or charge.

The definition of a direct debit processing fee or charge in the class order covers a fee or charge that is imposed under, or provided for by, a relevant type of small amount credit contract for which the following apply:

- (a) the fee or charge is charged to the debtor by a person other than the credit provider under a written agreement between the debtor and the person;
- (b) the fee or charge is for processing payments of amounts due under the contract that is charged or calculated on the same basis as for persons who are not debtors under a small amount credit contract (or a contract that is treated as a SACC under the class order);

- (c) the amount of the fee or charge has been clearly disclosed to the debtor in writing.

4. Consultation

Treasury consulted with industry and consumer stakeholders when developing the provisions included in the Enhancements Act. The problems to be addressed by this Class Order have been identified by industry stakeholders during the development of systems and processes for the implementation of the Enhancement Act provisions. Those industry stakeholders requested that these problems be addressed by law reform to provide certainty, and Treasury indicated to those stakeholders that it will do so through regulations.

Industry stakeholders that have been involved in these discussions include: the National Financial Services Federation (the peak industry association for small amount credit providers,) and certain individual lenders and software providers (including Min –it software (a provider of software to small amount credit providers).

ASIC has informally consulted with the NFSF on some of the terms of this relief. Formal consultation has not taken place as the Class Order is only intended to give effect (as far as possible) to the kinds of changes that Treasury has indicated will be made by regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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This class order is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the class order

This class order gives relief from requirements in the *National Consumer Credit Protection Act 2009 (National Credit Act)* and the National Credit Code (*Code*):

- to clarify that certain credit contracts may be treated as small amount credit contracts (*SACCs*), rather than as medium amount credit contracts (*MACCs*), and to enable those contracts to comply with the cost caps and additional provisions for *SACCs* rather than the cost caps for *MACCs*; and
- to in effect add to the list of specified permitted fees or charges in the *SACC* provisions to permit the imposition, receipt and application of an amount of credit to a fee or charge for a person (other than the credit provider) for processing direct debit requests for the payment of a *SACC*.

Human rights implications

This class order does not engage any of the applicable rights or freedoms.

Conclusion

This class order is compatible with human rights as it does not raise any human rights issues.