ASIC CREDIT (REPEAL) INSTRUMENT 2016/1087

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

National Consumer Credit Protection Act 2009
National Credit Code

The Australian Securities and Investments Commission (***ASIC***) makes the ASIC Credit (Repeal) Instrument 16/1087 (the ***Instrument***) under paragraph 163(3)(d) of the *National Consumer Credit Protection Act 2009* (the ***National Credit Act***) and subsection 203A(3) of the National Credit Code (the ***Code***).

Paragraph 163(3)(d) of the National Credit Act provides that 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.

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

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

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. Since 1 July 2013, 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).

In preparing to implement these fee restrictions, industry stakeholders identified that they would be prevented 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.

Treasury advised industry stakeholders at that time that regulations would be made to address this issue. However, as regulations would not be finalised by 1 July 2013, Treasury requested ASIC to exercise its discretionary powers to give effect to the intended changes. In response, ASIC made [CO 13/818] on 28 June 2013. That instrument adds to the list of permitted fees and charges allowable under the SACC cap to include direct debit fees charged to the consumer by a third party.

In August 2015 the Government established an Independent Review to examine and report on the effectiveness of the law relating to SACCs. The review's Final Report was released in March 2015 and made 24 recommendations, one of which was that "*Direct Debit fees should be incorporated into the existing SACC fee cap*" (Recommendation 4).

The Government response to Recommendation 4 was that "*the Government is supportive of ASIC acting on this recommendation as and when it considers it appropriate to do so*". The Government is now of the view that the original scope of the cost cap should be maintained (with the effect that SACC providers be required to absorb the costs of processing repayments though direct debit agencies).

2. Purpose of the Instrument

The purpose of this instrument is to give effect to recommendation 4 from the Independent Review into the SACC laws. To achieve this, this credit (repeal) instrument:

- Repeals [CO 13/818];
- Provides that contracts entered into before the repeal of [CO 13/818] continue to operate on the same terms to ensure existing arrangements are not disrupted; and
- Provides a delayed repeal date of 1 February 2017 to enable an orderly reorganisation of repayment arrangements.

By removing the ability for consumers to be charged a direct debit fee by a third party, the Instrument is intended to ensure the integrity of the SACC cap by ensuring all amounts chargeable to consumers under a SACC arrangement are included within the one cap.

3. Operation of the Instrument

<u>Repeal of [CO 13/818]</u>

This instrument repeals the whole of ASIC Class Order [CO 13/818].

The effect of this is that the only fees a consumer may be charged are those outlined in section 31A of the National Credit Code. As the list of permitted fees and charges does not include direct debit processing fees, credit providers and direct debit agencies that the consumer is introduced to by the credit provider, will no longer be able to charge these amounts to the consumer.

<u>Transitional period</u>

The Instrument commences on 1 February 2017. This ensures that SACCs entered into before this date will continue to operate as if [CO 13/818] continued to exist so long as the amount of any direct debit fee or charge is the amount that applied prior to 1 February 2017.

The effect of this transition period is to ensure that the repeal of [CO 13/818] does not trigger sudden changes to repayment arrangements under existing contracts which could cause problems for consumers, such as the risk of repayments being missed and permitted default fees being incurred.

4. Consultation

Two phases of consultation with industry and consumer stakeholders were undertaken during the course of the Independent Review with the panel considering written submissions together with holding roundtables and bilateral meetings.

ASIC has informally consulted with key stakeholders including direct debit service providers and industry associations on the period of time needed to make the necessary contractual and system changes in an orderly way. Formal consultation has not taken place as that was undertaken during the Independent Review of the SACC laws.

Statement of Compatibility with Human Rights

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

ASIC Credit (Repeal) Instrument 16/1087

The ASIC Credit (Repeal) Instrument 16/1087 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 ASIC Credit (Repeal) Instrument 16/1087

This instrument repeals Class Order [CO 13/818] to ensure all amounts chargeable to consumers are included under the one small amount credit contract cap. This means direct debit fees can no longer be charged to consumers and must be absorbed by the credit provider.

Human rights implications

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

Conclusion

The ASIC Credit (Repeal) Instrument 16/1087 is compatible with human rights as it does not raise any human rights issues.