

Attachment 1 to CP 279: Draft instrument



ASIC

Australian Securities & Investments Commission

ASIC Credit (Remuneration Arrangements) Instrument 2017/XX

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2017

[DRAFT ONLY – NOT FOR SIGNATURE]

<signature>

<insert name>

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Credit (Remuneration Arrangements) Instrument 2017/XX*.

2 Commencement

This instrument commences on 1 September 2018.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under paragraph 109(3)(d) of the *National Consumer Credit Protection Act 2009*.

4 Definitions

In this instrument:

Act means the *National Consumer Credit Protection Act 2009*.

Part 2—Declaration

5 Modification to prohibit the provision of flex-commissions

- (1) The provisions to which Part 2-6 of the Act applies apply in relation to a licensee as if Chapter 2 of the Act were modified or varied by, after section 53, inserting:

“53A Obligation to not provide certain benefits

- (1) This section applies to a licensee that has entered into a flex commission arrangement in relation to a credit contract or consumer lease under which the licensee is, or is proposed to be, a credit provider or lessor.

Requirement to not provide certain benefits

- (2) Subject to subsections (3) and (4), the licensee must not give the service provider under the flex commission arrangement or an associated person any benefit, whether monetary or non-monetary, if:
- (a) the amount of the benefit is determined (in whole or in part) by reference to:
 - (i) in the case of a credit contract:
 - (A) the annual percentage rate under the contract; or
 - (B) the amount of any credit fees and charges; and
 - (ii) in the case of a consumer lease:
 - (A) the amount (*rental charge*) by which the rental payable under the lease exceeds the cash price of the goods; or
 - (B) the amount of any consumer lease fees or charges not included in the rental payable under the lease; and
 - (b) the amount of the annual percentage rate, credit fees and charges, rental charge or consumer lease fees or charges (as the case may be) has been determined, proposed or influenced by the service provider or an associated person.

Civil penalty: 2,000 penalty units.

- (3) Subsection (2) does not apply to a benefit that is determined by reference to an annual percentage rate or rental charge that is determined, proposed or influenced by the service provider or an associated person if:
- (a) the amount of the annual percentage rate or rental charge is:
 - (i) an annual percentage rate that is:
 - (A) not more than the annual percentage rate (*specified rate*) specified by the licensee with respect to the credit contract before any determination, proposal or influence by the service provider or associated person; and
 - (B) not less than a rate that is [200] basis points less than the specified rate; or
 - (ii) a rental charge that is:
 - (A) not more than the amount of the rental charge (*specified rental charge*) specified by the licensee with respect to the consumer lease before any determination, proposal or influence by the service provider or associated person; and
 - (B) not less than an amount that is [4%] less than the specified rental charge; and
 - (b) the benefit is not determined by reference to the amount of any credit fees and charges or consumer lease fees or charges that have been determined, proposed or influenced by the service provider or associated person.
- (4) Subsection (2) does not apply to a benefit given by the licensee to a director or employee of the licensee.

Offence

- (5) A person commits an offence if:
- (a) the person is subject to a requirement not to give a benefit under subsection (2); and
 - (b) the person engages in conduct; and

- (c) the conduct contravenes the requirement.

Criminal penalty: 100 penalty units, or 2 years imprisonment, or both.

Definitions and interpretation

- (6) For the purposes of this section:

associated person means, in relation to a service provider, a person who is:

- (a) an associate of the service provider for the purposes of Division 2 of Part 1.2 of the *Corporations Act 2001*; or
- (b) an officer, agent or employee of the service provider, or of a person referred to in paragraph (a).

consumer lease fees or charges has the meaning given by section 204 of the National Credit Code.

credit fees and charges has the meaning given by section 204 of the National Credit Code.

flex commission arrangement means a contract, arrangement or understanding between a licensee and another person (*service provider*):

- (a) for the service provider or an associated person to engage in credit activities in relation to a credit contract or a consumer lease; and
- (b) under which the service provider or an associated person can determine, propose or influence:
- (i) in the case of a credit contract—the annual percentage rate under the contract or the amount of any credit fees and charges payable in relation to the contract; or
- (ii) in the case of a consumer lease—the amount of the rental payable under the lease or the amount of any consumer lease fees or charges not included in the rental payable under the lease.

rental charge has the meaning given by subparagraph (2)(a)(ii)(A).

- (7) For the purposes of this section, the circumstances in which a service provider or associated person determines, proposes or influences the amount of an annual percentage rate, any credit fees and charges, a rental charge or any consumer lease fees and charges in relation to a credit contract or a consumer lease do not include the service provider or associated person:
- (a) proposing or influencing:
 - (i) in the case of a credit contract that is provided for the purposes of purchasing goods—the type or identity of the goods to be purchased; or
 - (ii) in the case of a consumer lease—the type or identity of the goods to be rented under the consumer lease; or
 - (b) only providing the credit provider or lessor with information about any of the following:
 - (i) the consumer's requirements and objectives in relation to the credit contract or consumer lease;
 - (ii) the consumer's financial situation.”.

Part 3—Transitional

6 Application

This instrument does not apply in relation to a credit activity that was engaged in, or a credit contract or a consumer lease that was entered into, before this instrument commences.

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