

## Australian Securities and Investments Commission

### National Consumer Credit Protection Act 2009 – Paragraphs 163(1)(a) and (d) – Exemption and declarations National Credit Code – Subsection 203A(1) – Exemptions

#### Enabling power

1. The Australian Securities and Investments Commission (ASIC) makes this instrument under:
  - (a) paragraphs 163(1)(a) and (d) of the *National Consumer Credit Protection Act 2009* (the *Act*); and
  - (b) subsection 203A(1) of the National Credit Code.

#### Title

2. This instrument is ASIC instrument [18-0327].

#### Commencement

3. This instrument commences on the date it is signed.

#### Exemptions

4. FlexiCards Australia Pty Ltd ACN 099 651 877 (*FlexiCards*) does not have to comply with:
  - (a) Division 3 (other than section 132) and Division 4 of Part 3-2 of Chapter 3 of the Act;
  - (b) section 16 of the National Credit Code; and
  - (c) Subsections 14(3), 199(2) and 199(3) of the National Credit Code.

#### Declarations

5. Subject to paragraph 4, the provisions to which Part 3-7 of Chapter 3 of the Act applies apply in relation to FlexiCards as if Division 4 of Part 3-2B of Chapter 3 of the Act was varied or modified as follows:
  - (a) after sections 133BF, insert:

“133BFA For the purpose of applying subsections 133BE(1), (2) and (3) to the making of a credit limit increase invitation, it is a defence if:

    - (1) the licensee has entered the credit card contract as the result of the novation of a previous credit card contract or offer to enter into a credit card contract (the *novated contract or offer*) with the consumer who is the debtor under the credit card contract; and

- (2) the licensee (the *first licensee*) that was the credit provider under the novated contract or offer had, in accordance with section 133BF, obtained express consent from the consumer to the first licensee making credit limit increase invitations; and
- (3) the licensee has obtained from the first licensee records of the consent and any withdrawal kept by the first licensee in accordance with section 133BG; and
- (4) the consent has not been withdrawn.

Note 1: The licensee must keep records of consents obtained by the first licensee that have been given to the licensee as a result of the assignment of rights under the credit card contracts, or novation of credit card contracts or offers, of the first licensee and withdrawals of those consents: see section 133BG.

Note 2: For the purposes of subsections 133BE(2) and (3), a defendant bears an evidential burden in relation to the matter in this section (see subsection 13.3(3) of the *Criminal Code*); and

(b) after paragraph 133BG(1)(a), insert:

“(aa) if the licensee has entered into a credit card contract as a result of the novation of a previous credit card contract or offer to enter into a credit card contract, consents that the licensee obtains under subsection 133BFA(3); and”; and

(c) after section 133BG, insert:

“133BGA In this Division, *novation* includes replacement of a credit card contract or offer to enter into a credit card contract with a new credit card contract or offer to enter into a credit card contract that has the same credit limit.”.

6. Subject to paragraph 4, the provisions to which Part 3-7 of Chapter 3 of the Act applies apply in relation to FlexiCards as if Division 5 of Part 3-2B of Chapter 3 of the Act was varied or modified as follows:

(a) omit section 133BI(1)(a), substitute:

“(a) the licensee either

- (i) has, in accordance with this section, obtained express consent from the consumer covering the imposition of the fees or charges, or the higher rate of interest; or
- (ii) has entered the credit card contract as the result of the novation of a previous credit card contract or offer to enter into a credit card contract (the *novated contract or offer*) with the consumer who is the debtor under the credit card contract, and:
  - (A) the licensee (the *first licensee*) that was the credit provider under the novated contract or offer had, in

accordance with this section, obtained express consent from the consumer covering the imposition of the fees or charges, or the higher rate of interest; and

- (B) the licensee has obtained from the first licensee records of the consent and any withdrawal kept by the first licensee in accordance with section 133BJ; and”; and
- (b) in subsection 133BI(3), omit “Before”, substitute:  
“If subparagraph (1)(a)(i) applies, before”; and
- (c) after paragraph 133BJ(1)(a), insert:  
“(aa) if the licensee has entered a credit card contract as the result of the novation of a previous credit card contract or offer to enter into a credit card contract, consents that the licensee obtains under sub-subparagraph 133BI(1)(a)(ii)(B); and”; and
- (d) after section 133BJ, insert:  
“133BK In this Division, *novation* includes replacement of a credit card contract or offer to enter into a credit card contract with a new credit card contract or offer to enter into a credit card contract that has the same credit limit.”.

#### Where exemptions apply

- 7. Subject to paragraphs 8 and 9, the exemptions in paragraph 4 apply in relation to the entry into a credit contract with a consumer where:
  - (a) FlexiCards has entered an agreement with Once Credit Pty Limited ACN 112 319 632 (*Once*) to purchase a credit contract portfolio (the *Once credit contract portfolio*) consisting of:
    - (i) all existing credit contracts (*existing credit contracts*) under which Once is the credit provider; and
    - (ii) Offers (*in-flight offers*) to enter credit contracts:
      - (A) under which a which a consumer has been provided by Once with a card; and
      - (B) which the consumer may accept by using the card to obtain credit or activating the card or otherwise in accordance with the terms of the offer; and
  - (b) the consumer has either an existing credit contract or an unaccepted in-flight offer; and
  - (c) as part of the purchase the Once credit contract portfolio, FlexiCards:
    - (i) makes an offer to the consumer to enter a credit contract (*new credit contract*) that is on the same terms as the existing credit contract and will:

- (A) if the consumer has an existing credit contract, replace the existing credit contract; and
  - (B) have the same credit limit as the existing credit contract or in-flight offer; or
  - (ii) enters a credit contract with the consumer as the result of acceptance by the consumer of an offer referred to in sub-subparagraph (i); and
  - (d) FlexiCards has entered an irrevocable deed poll for the benefit of, and enforceable by, both ASIC and consumers with whom FlexiCards enters a credit contract as part of the purchase of the Once credit contract portfolio under which FlexiCards undertakes to compensate each consumer who:
    - (i) suffers loss or damage as a result of a contravention of any of the provisions in Division 3 or Division 4 of Part 3-2 of Chapter 3 of the Act (as modified by regulation 25K of the *National Consumer Credit Protection Regulations 2010*) by Once; and
    - (ii) has not recovered from Once any loss or damage that the relevant consumer has suffered as a result of that contravention that arises on or after the entry into the credit contract with FlexiCards and in relation to the credit contract with FlexiCards.
8. Subject to paragraph 9, the exemptions in subparagraph 4(c) apply in relation to credit contracts where:
- (a) the circumstances specified in paragraph 7 are met; and
  - (b) the consumer has an existing credit contract; and
  - (c) the consumer has in place an existing direct debit, BPAY or non-cash and carry offer arrangement with a person associated with the credit provider at the time the offer referred to in subparagraph 7(c) is made; and
  - (d) subject to the commitments described in paragraph 11(b), the consumer may be considered to have entered into a contract with FlexiCards due to a transaction under the existing direct debit, BPAY or non-cash and carry offer arrangement.
9. Where a consumer, 30 days before the day on which FlexiCards sends offers to consumers as part of the purchase of the Once credit contract portfolio:
- (a) is in default under the existing credit contract for 90 days or more; or
  - (b) has an agreement with Once for changes to be made to the existing credit contract as a result of hardship notice or hardship application under section 72 of the National Credit Code,

the exemptions in paragraph 4 apply where:

- (c) the circumstances specified in paragraph 7 are met; and
- (d) under the terms of the existing credit contract, the consumer is not able to access or draw down credit to incur a further liability under the existing credit contract unless the consumer is able to meet their obligations under the contract; and

- (e) under the terms of the new credit contract, the consumer will not be able to access or draw down credit to incur a liability under the new credit contract until the consumer is able to meet their obligations under the contract.

**Where declarations apply**

- 10. The declarations in paragraphs 5 and 6 apply in relation to credit contracts entered as the result of acceptance by a consumer of an offer referred to in subparagraph 7(c).

**Conditions**

- 11. If FlexiCards relies on an exemption in paragraph 4 in relation to the entry into a credit contract with a particular consumer, FlexiCards must provide the following information to the consumer at the same time as the offer is made to the consumer as a part of the purchase of the Once credit contract portfolio:

- (a) a statement that the consumer may accept the offer and enter a credit contract with FlexiCards by:
  - (i) express consent; or
  - (ii) undertaking positive action in relation to the account, or future account in the case of in-flight offers, that demonstrates the intention to access or draw down credit at a future date together with a list of the conduct that will be taken as acceptance of the offer; and
- (b) a statement that FlexiCards, at the request of the consumer, will not treat the consumer as having entered into a contract with FlexiCards if the consumer disputes entry into the credit contract and the following circumstances exist:
  - (i) Only direct debit, BPAY or non-cash and carry offer transactions have occurred since the date specified as the acceptance date in the offer by FlexiCards to the consumer;
  - (ii) the consumer has not taken any other action that supports the view that the consumer has accepted the offer from or otherwise has entered into a new credit contract with FlexiCards; and
- (c) the following information in relation to the deed poll referred to in subparagraph 7(d):
  - (i) that FlexiCards has entered into a deed poll that gives consumers rights to recover any loss or damage that has not been recovered from Once that arises as a result of breach of any of the provisions in Division 3 or Division 4 of Part 3-2 of Chapter 3 of the Act by Once, where the loss or damage arises on or after the entry into, and in relation to, the replacement credit contract with FlexiCards; and
  - (ii) a statement that upon request by the consumer, FlexiCards will provide a copy of the deed poll to the consumer free of charge; and
- (d) details of who the consumer should contact if the consumer suffers loss or damage after a credit contract has been entered into with FlexiCards as part of the purchase of the Once credit contract portfolio; and
- (e) if the consumer has given a consent to Once under section 133BF or section 133BI of the Act in relation to an existing credit contract or a credit contract to which an in-flight offer related and that consent has not subsequently been withdrawn, a statement that:

- (i) such a consent will continue to operate in relation to the new credit contract; and
  - (ii) the consumer may withdraw such a consent by contacting FlexiCards; and
- (f) a statement that:
- (i) the new credit contract will operate under same terms and conditions that applied to the existing credit contract or a credit contract to which an in-flight offer related; and
  - (ii) upon request by the consumer, FlexiCards will provide a copy of the terms and conditions to the consumer free of charge; and
- (g) if, as at a date not more than 30 days before FlexiCards sends an offer to the consumer as part of the purchase of the Once credit contract portfolio, the consumer had:
- (i) been in default under the existing credit contract for 60 days or more; or
  - (ii) notified Once of the consumer's inability to meet the consumer's obligations under the existing credit contract within the period of 90 days up to the date of the offer,
- an explanation of the consumer's rights under section 72 of the National Credit Code.

### **Cessation**

12. Paragraph 5 ceases to apply if the defence in section 133BF of the Act (as at the date of this instrument) is repealed.

Note: On commencement, the Treasury Laws Amendment (Banking Measures No. 1) Act 2018 will repeal the defence in section 133BF of the Act.

### **Interpretation**

13. In this instrument:

*consumer* has the meaning given in section 5 of the Act.

*credit provider* has the meaning given in section 5 of the Act.

*provisions to which Part 3-7 of Chapter 3 of the Act applies* are the provisions referred to in section 162 of the Act.

Dated this 30th day of April 2018



Signed by

as a delegate of the Australian Securities and Investments Commission