



ASIC

Australian Securities & Investments Commission

ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780

About this compilation

Compilation No. 1

This is a compilation of *ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780* as in force on 3 October 2018. It includes any commenced amendment affecting the legislative instrument to that date.

This compilation was prepared by the Australian Securities and Investments Commission.

The notes at the end of this compilation (the *endnotes*) include information about amending instruments and the amendment history of each amended provision.

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780*.

2 Commencement

This instrument commences on 1 November 2018.

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*.

exempt special purpose funding entity has the same meaning as in regulation 3 of the *National Consumer Credit Protection Regulations 2010*.

Part 2—Declaration

5 Modification to prohibit the provision of flex-commissions

The provisions to which Part 2-6 of the Act applies apply in relation to a licensee and an exempt special purpose funding entity as if:

- (a) subsection 5(1) of the Act were modified or varied by inserting the following definitions in the appropriate alphabetical position:

“**annual percentage rate** has the meaning given by section 204 of the National Credit Code.”;

“**associated person** means, in relation to a person (**primary person**), a person who is:

- (a) an associate of the primary person for the purposes of Division 2 of Part 1.2 of the *Corporations Act 2001*; or
- (b) an officer, agent or employee of the primary person, 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.”;

“**determines, proposes or influences**, when used in relation to a person determining, proposing or influencing the amount of an annual percentage rate or a rental charge in relation to a credit contract or a consumer lease does not include the person:

- (a) merely 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) merely providing the credit provider or lessor with information about any of the following:
- (i) the requirements and objectives of the debtor or lessee in relation to the credit contract or consumer lease;
- (ii) the financial situation of the debtor or lessee; or

- (c) merely providing the credit provider or lessor with other factual information provided by, or about, the debtor or lessee; or
- (d) determining, proposing or influencing the amount of the annual percentage rate or rental charge (as the case may be) before the first to occur of:
 - (i) any contact between the debtor or lessee and the person or an associated person in relation to the credit contract or consumer lease;
 - (ii) any information in relation to the debtor or lessee being provided to the person or an associated person in relation to the credit contract or consumer lease.

Note: For example, paragraph (d) would apply to a person who merely influenced the annual percentage rate proposed to apply under a class of potential future credit contracts before any contact with, or the provision of information in relation to, the debtor.”;

“**exempt special purpose funding entity** has the meaning given by regulation 3 of the *National Consumer Credit Protection Regulations 2010*.”;

“**flexible credit cost arrangement** in relation to a credit contract or consumer lease means a contract, arrangement or understanding (other than a servicing agreement or a management agreement) between a licensee or an exempt special purpose funding entity and another person (**introducer**):

- (a) for the introducer or an associated person to provide credit services in relation to the credit contract or consumer lease; and
- (b) under which the introducer 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
 - (ii) in the case of a consumer lease—the rental charge for the lease.

Note 1: See the definition of **determines, proposes or influences** for various circumstances that do not amount to determining, proposing or influencing the amount of the annual percentage rate or rental charge.

Note 2: The definition of **servicing agreement** is notionally inserted into this subsection by subregulation 25G (1) and item 3.4 of Schedule 3 of the *National Consumer Credit Protection Regulations 2010*.”;

“**home loan** means a credit contract under which a licensee or an exempt special purpose funding entity provides credit wholly or predominantly:

- (a) to purchase, renovate or improve residential property; or
- (b) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property.”;

“**introducer** in relation to a flexible credit cost arrangement entered into by a licensee or an exempt special purpose funding entity means the person who has entered into the arrangement with the licensee or funding entity.”;

“**linked supplier**:

- (a) of a credit provider, means a supplier of goods or services in relation to whom the credit provider is a linked credit provider (within the meaning of subsection 127(1) of the National Credit Code); and
- (b) of a lessor, means a supplier of goods in relation to whom the lessor is a linked lessor (within the meaning of subsection 179S(1) of the National Credit Code).”;

“**management agreement** means a written agreement that is:

- (a) entered into by a mortgage manager (as defined in in regulation 26 of the *National Consumer Credit Protection Regulations 2010*) and by a credit provider or lessor; and
- (b) an agreement of the type specified in the definition of **mortgage manager** in regulation 26 of the *National Consumer Credit Protection Regulations 2010*.”.

“**regulated person**: see subsection 53A(1).”;

“**rental charge** has the meaning given by subparagraph 53A(2)(c)(ii).”;

- (b) Chapter 2 of the Act were modified or varied by, after section 53 of the Act, inserting:

“**53A Obligation not to provide certain benefits**

- (1) This section and section 53B apply to each of the following:
 - (a) a licensee (**regulated person**) if the licensee:

- (i) has entered into a flexible credit cost arrangement in relation to a credit contract (other than a home loan) or a consumer lease; and
 - (ii) is, or is proposed to be, a credit provider or lessor under the credit contract or consumer lease;
- (b) a licensee (***regulated person***) and an exempt special purpose funding entity (***regulated person***) if all of the following apply:
- (i) the licensee is party to a servicing agreement with the exempt special purpose funding entity in relation to a credit contract (other than a home loan) or a consumer lease;
 - (ii) the licensee or the exempt special purpose funding entity has entered into a flexible credit cost arrangement in relation to the credit contract or the consumer lease;
 - (iii) the exempt special purpose funding entity is, or is proposed to be, a credit provider or lessor under the credit contract or consumer lease.

Requirement not to provide certain benefits

- (2) Subject to subsections (3) and (4), a regulated person must not:
- (a) in any case—give; or
 - (b) if paragraph (1)(b) applies—engage in conduct that results in another regulated person giving;
the introducer under the flexible credit cost arrangement or an associated person any benefit, whether monetary or non-monetary, if:
 - (c) the amount of the benefit is determined by, or varies by reference to, (in whole or in part):
 - (i) in the case of a credit contract—the annual percentage rate under the contract; and
 - (ii) in the case of a consumer lease—the amount (***rental charge***) by which the rental payable

under the lease exceeds the cash price of the goods; and

- (d) the introducer or an associated person has determined, proposed or influenced the amount of the annual percentage rate or rental charge (as the case may be).

Note: See the definition of *determines, proposes or influences* for various circumstances that do not amount to determining, proposing or influencing the amount of the annual percentage rate or rental charge.

Civil penalty: 2,000 penalty units.

- (3) Subsection (2) does not apply to a benefit that is determined by, or varies by reference to, an annual percentage rate or rental charge if:
- (a) in the case of an annual percentage rate—both the following are satisfied:
- (i) the annual percentage rate is not more than the annual percentage rate (*specified rate*) specified by a regulated person:
- (A) before any determination, proposal or influence referred to in paragraph (2)(d); and
- (B) as the maximum annual percentage rate that may apply with respect to the credit contract; and
- (ii) either:
- (A) the annual percentage rate is not less than the rate (*base rate*) that is 200 basis points less than the specified rate;
- (B) otherwise—the amount of the benefit is equal to the amount that would be payable if the annual percentage rate were the base rate; or
- (b) in the case of a rental charge—both the following are satisfied:
- (i) the rental charge is not more than the amount of the rental charge (*specified rental charge*) specified by a regulated person:

- (A) before any determination, proposal or influence referred to in paragraph (2)(d); and
 - (B) as the maximum rental charge that may apply with respect to the consumer lease; and
- (ii) either:
- (A) the rental charge is not less than the amount (**base amount**) that is 4% less than the specified rental charge;
 - (B) otherwise—the amount of the benefit is equal to the amount that would be payable if the rental charge were the base amount.
- (4) Subsection (2) does not apply to a benefit given by a regulated person to any of the following:
- (a) a director or employee of the regulated person;
 - (b) a related body corporate of the regulated person;
 - (c) a director or employee of a related body corporate of the regulated person.

Offence

- (5) A person commits an offence if:
- (a) the person is subject to a requirement 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.

53B Obligation in relation to certain fees and charges

- (1) Subject to subsection (5), a regulated person must not:
- (a) in any case—give; or
 - (b) if paragraph 53A(1)(b) applies—engage in conduct that results in another regulated person giving;

the introducer under the flexible credit cost arrangement or an associated person any benefit, whether monetary or non-monetary, in relation to a credit contract or consumer lease if the following fees and charges exceed the specified fees and charges:

- (c) in the case of a credit contract—credit fees and charges that are payable to the introducer, or an associated person, where the introducer or associated person is providing credit services in relation to the credit contract and is:
 - (i) providing the credit services as a representative of the credit provider for the credit contract; or
 - (ii) a linked supplier of the credit provider;
- (d) in the case of a consumer lease—consumer lease fees and charges that are payable to the introducer, or an associated person, where the introducer or associated person is providing credit services in relation to the consumer lease and is:
 - (i) providing the credit services as a representative of the lessor under the lease; or
 - (ii) a linked supplier of the lessor.

Note: This would cover fees commonly described as “dealer origination fees” or “dealer administration fees” that enable the person providing credit services to recoup costs associated with providing those services.

Civil penalty: 2,000 penalty units.

- (2) In this section, *specified fees and charges* means, in relation to a credit contract or consumer lease, the greater of \$0 and the amount (if any) specified by a regulated person:
 - (a) before any determination, proposal or influence referred to in paragraph 53A(2)(d); and
 - (b) as the maximum amount of credit fees and charges or consumer lease fees and charges in respect of the credit contract or consumer lease that are of the type referred to in paragraph (1)(c) or (d).
- (3) Subject to subsection (5), the regulated person must not determine the amount of the specified fees and charges by reference to the loss or potential loss of revenue to

the introducer, or an associated person, resulting from section 53A affecting the manner in which a benefit is able to be determined.

Civil penalty: 2,000 penalty units.

- (4) Subject to subsection (5), a regulated person must keep written records of the basis for determining any specified fees and charges specified by the regulated person for a period of 7 years.

Civil penalty: 2,000 penalty units.

- (5) Subsections (1), (3) and (4) do not apply in relation to a benefit given by a regulated person to any of the following:
- (a) a director or employee of the regulated person;
 - (b) a related body corporate of the regulated person;
 - (c) a director or employee of a related body corporate of the regulated person.

Offence

- (6) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (1), (3) or (4); 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.”.

Part 3—Transitional

6 Application

This instrument does not apply in relation to:

- (a) a credit activity that was engaged in before this instrument commences; or
- (b) a credit contract or a consumer lease that was entered into:
 - (i) before this instrument commences; or
 - (ii) before 1 February 2019 as a result of:
 - (A) an offer that was made by the credit provider or lessor before this instrument commences; or
 - (B) an acceptance by the credit provider or lessor before 1 February 2019 of an offer made by the consumer before this instrument commences.

Endnotes

Endnote 1—Instrument history

Instrument number	Date of FRL registration	Date of commencement	Application, saving or transitional provisions
2017/780	6/9/2017 (<i>see</i> F2017L01141)	1/11/2018	
2018/706	2/10/2018 (<i>see</i> F2018L01391)	3/10/2018	-

Endnote 2—Amendment history

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Paragraph 5(a)	am. 2018/706
Section 6	am. 2018/706