

Australian Securities and Investments Commission
National Consumer Credit Protection Act 2009 —
Paragraphs 163(1)(a) and (d) — Exemption and Declaration

Enabling power

1. The Australian Securities and Investments Commission (*ASIC*) makes this instrument under paragraphs 163(1)(a) and (d) of the *National Consumer Credit Protection Act 2009* (the *Act*).

Title

2. This instrument is ASIC instrument 14-0395.

Commencement

3. This instrument commences on 6 May 2014.

Exemption

4. Macquarie Bank Limited ACN 008 583 542 (*Macquarie Bank*) does not have to comply with Division 3 (other than section 132) and Division 4 of Part 3-2 of Chapter 3 of the Act.

Declaration

5. Subject to paragraph 4, the provisions to which Part 3-7 of Chapter 3 of the Act applies apply in relation to Macquarie Bank as if section 132 of the Act were varied or modified as follows:
 - (a) in paragraph 132(2)(c), omit "7 business days", substitute "15 business days"; and
 - (b) in paragraph 132(2)(d) omit "21 business days", substitute "25 business days".
6. Subject to paragraph 4, the provisions to which Part 3-7 of Chapter 3 of the Act applies apply in relation to Macquarie Bank as if Divisions 4 and 5 of Part 3-2B of Chapter 3 of the Act were varied or modified as follows:
 - (a) after section 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- (4) the consent has not been withdrawn.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 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 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 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."; and

(d) omit paragraph 133BI(1)(a), substitute:

"(a) either:

- (i) the licensee 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) 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:

- (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
- (e) in subsection 133BI(3), omit "Before", substitute:
"If subparagraph (1)(a)(i) applies, before"; and
- (f) 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 subparagraph 133BI(1)(a)(ii)(B); and"; and
- (g) 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 exemption applies

7. The exemption in paragraph 4 applies in relation to a consumer where:
- (a) Macquarie Bank has entered an agreement with HSBC Bank Australia Limited ACN 006 434 162 (*HSBC*) to purchase a credit card portfolio (the *HSBC credit card portfolio*) consisting of:
 - (i) existing credit contracts (*existing credit contracts*) under which HSBC is the credit provider and credit is accessed using a credit card branded as a Woolworths Everyday Money credit card or a Woolworths Qantas credit card; and
 - (ii) offers (*in-flight offers*) to enter credit contracts:
 - (A) under which a consumer has been provided by HSBC with a credit card branded as a Woolworths Everyday Money credit card or a Woolworths Qantas credit card; and

- (B) which the consumer may accept by using the credit card to obtain credit or activating the credit card by arrangement with HSBC or Macquarie Bank; and
- (b) the consumer has either an existing credit contract or an unaccepted in-flight offer; and
- (c) as part of the purchase of the HSBC credit card portfolio, Macquarie Bank:
 - (i) makes an offer to the consumer to enter a credit contract (*new credit contract*) that is on the same terms or substantially on the same terms as the pro forma credit contract provided to ASIC on 30 April 2014 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) Macquarie Bank has entered an irrevocable deed poll for the benefit of, and enforceable by, both ASIC and consumers with whom Macquarie Bank enters a credit contract as part of the purchase of the HSBC portfolio under which Macquarie Bank 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 HSBC; and
 - (ii) has not recovered from HSBC 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 Macquarie Bank and in relation to the credit contract with Macquarie Bank; and
- (e) as at a date not more than 30 days before Macquarie Bank sends offers to consumers as part of the purchase of the HSBC credit card portfolio, the consumer has not:
 - (i) been in default under the existing credit contract for 90 days or more; or
 - (ii) entered an agreement with HSBC for changes to be made to the existing credit contract as a result of a hardship notice or hardship application under section 72 of the National Credit Code.

Where declarations apply

8. The declaration in paragraph 5 applies in relation to a consumer where:
- (a) the circumstances specified in paragraph 7 are met; and
 - (b) the consumer:
 - (i) was a debtor under an existing credit contract or had been given an in-flight offer; and
 - (ii) requests from Macquarie Bank a written copy of the assessment prepared by HSBC under paragraph 128(c) of the Act.
9. The declaration in paragraph 6 applies in relation to credit contracts entered as the result of acceptance by a consumer of an offer referred to in subparagraph 7(c).

Conditions

10. The exemption in paragraph 4 is subject to the condition that if Macquarie Bank relies on the exemption in relation to a consumer, Macquarie Bank 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 HSBC credit card portfolio:
- (a) an explanation of the circumstances in which the consumer will be considered by Macquarie Bank to have accepted the offer and entered a credit contract with Macquarie Bank; and
 - (b) a statement that Macquarie Bank, at the request of the consumer, will not treat the consumer as having entered into a contract with Macquarie Bank if the consumer disputes entry into the credit contract and the following circumstances exist:
 - (i) only direct debit transactions have occurred since the date specified as the acceptance date in the offer by Macquarie Bank to the consumer;
 - (ii) if the consumer activated a credit card to which the offer relates after receiving the offer – the consumer did not contact Macquarie Bank in relation to activating the credit card;
 - (iii) 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 Macquarie Bank; and
 - (c) the following information in relation to the deed poll referred to in subparagraph 7(d):
 - (i) that Macquarie Bank has entered into a deed poll that gives consumers rights to recover any loss or damage that has not been recovered from HSBC that arises as a result of a breach of any of the provisions in

Division 3 or Division 4 of Part 3-2 of Chapter 3 of the Act by HSBC, where the loss or damage arises on or after the entry into, and in relation to, the replacement credit contract with Macquarie Bank; and

- (ii) a statement that upon request by the consumer Macquarie Bank 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 Macquarie Bank as part of the purchase of the HSBC credit card portfolio; and
- (e) if the consumer has given a consent to HSBC 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 Macquarie Bank; and
- (f) a statement that:
 - (i) the new credit contract will operate under the terms and conditions (*Macquarie Bank terms and conditions*) that apply to Macquarie Bank credit card contracts; and
 - (ii) the Macquarie Bank terms and conditions differ from the terms and conditions of the existing credit contract, including different fees and charges; and
 - (iii) a copy of the Macquarie Bank terms and conditions is included with the offer; and
 - (iv) the consumer should carefully review the Macquarie Bank terms and conditions before making a decision whether to accept the offer made by Macquarie Bank; and
- (g) if the consumer is party to an existing credit contract and:
 - (i) as at a date (*relevant date*) not more than 30 days before Macquarie Bank sends the offer, the consumer had been in default under the existing credit contract for 60 days or more; or
 - (ii) the consumer had notified HSBC of the consumer's inability to meet the consumer's obligations under the existing credit contract within the period from 1 March 2013 to the relevant date;

an explanation of the consumer's rights under section 72 of the National Credit Code.

Interpretation

11. In this instrument, the *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 6th day of May 2014

A handwritten signature in black ink, appearing to read 'J. Knox', written in a cursive style.

Signed by Jennifer Knox
as a delegate of the Australian Securities and Investments Commission