

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Treasurer**

*National Consumer Credit Protection Act 2009*

*National Consumer Credit Protection Amendment (Debt Management Services)  
Regulations 2021*

The *National Consumer Credit Protection Act 2009* (the Act) applies to the provision of credit for personal use and establishes a licensing regime for persons engaging in prescribed types of credit activities. This regime prohibits a person from engaging in credit activities without holding an Australian credit licence (ACL).

Section 329 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

On 25 September 2020, the Government announced that it would undertake consumer credit reforms aimed at reducing the cost and time that it takes consumers and businesses to access credit so that consumers can continue to spend, and business can invest and create jobs. As part of these reforms, the Government announced it would support consumers engaged in financial disputes with credit providers by introducing licensing obligations for debt management firms representing consumers in those disputes.

The *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021* (the Regulations) prescribe a new type of ‘credit activity’ for the purposes of section 6 of the Act, which will require providers of debt management services to hold an ACL (providers of debt management services will need to apply for an ACL or seek a variation to the conditions of their existing ACL) and meet the ongoing obligations imposed on credit licensees. These obligations include amongst other things, a requirement to meet the ‘fit and proper person’ test, and to undertake their activities ‘efficiently, honestly and fairly’. Licensees are subject to general conduct obligations and are required to be members of the Australian Financial Complaints Authority (AFCA).

The Act does not specify any conditions that need to be met before the power to make the Regulations is exercised. Details of the Regulations are set out in Attachment A.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence the day after they are registered on the Federal Register of Legislation.

**Details of the *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021***

**Section 1 – Name**

This section provides that the name of the Regulations is the *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021* (the Regulations).

**Section 2 – Commencement**

The Regulations commence on the day after they are registered on the Federal Register of Legislation.

**Section 3 – Authority**

The Regulations are made under the *National Consumer Credit Protection Act 2009* (the Act).

**Section 4 – Schedules**

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

**Schedule 1 – Amendments**

*Licensing*

Generally, a person cannot engage in a credit activity if the person does not hold an Australian credit licence (ACL) (see Chapter 2 of the Act). Specifically, section 29 of the Act prohibits a person from engaging in credit activities without holding an ACL. Criminal and civil penalties can apply for a contravention of section 29.

The table in section 6(1) of the Act sets out when a person engages in a credit activity, and includes where a person engages in an activity prescribed by the regulations in relation to credit, being the provision of which the National Credit Code applies to, or would apply to, if the credit were provided (item 6 of the table at section 6(1) of the Act).

Licensees are required to meet the general licensing obligations under the Act, including:

- do all things necessary to ensure that the credit activities covered by the credit licence are provided efficiently, honestly and fairly;
- have adequate arrangements in place to manage conflicts of interest;
- comply with their credit licence conditions;
- comply with the credit legislation;

- take reasonable steps to ensure representatives comply with the credit legislation;
- have adequate resources (including financial, human and technological);
- maintain competence to provide the credit activities authorised by the licence;
- adequately train representatives and ensure they are competent to provide the credit activities;
- be a member of the Australian Financial Complaints Authority (AFCA);
- have adequate risk management systems and internal dispute resolution procedures; and
- have compensation arrangements for losses suffered by customers (professional indemnity insurance).

Licence applicants will also be required to meet the ‘fit and proper person’ test under section 37A of the Act.

Items 1 and 2 together prescribe and define a new credit activity for the purposes of subsection 6(1) of the Act.

Item 2 inserts subregulation 4A(1), which provides that the provision of a *debt management service* is a prescribed activity.

Subregulation 4A(2), which is also inserted by item 2, provides that a person carries out a *debt management service* if the person provides ‘debt management assistance’ to a consumer or provides ‘credit reporting assistance’ to a consumer.

Item 1 inserts definitions of *debt management assistance* and *credit reporting assistance*.

Regulation 4B defines *debt management assistance* as being where a person, by dealing directly with the consumer or the consumer’s agent in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:

- suggests that the consumer apply, or, assists the consumer to apply for:
  - a change to the credit contract for which the consumer is the debtor; or
  - a deferral or waiver of an amount under a credit contract for which the consumer is the debtor; or
  - a postponement relating to a credit contract for which the consumer is the debtor; or
- suggests that the consumer, or, assists the consumer:
  - make a complaint or claim to the credit provider, AFCA, ASIC or the Information Commissioner, in relation to a credit contract for which the consumer is the debtor; or
  - give a hardship notice (within the meaning of the Code) to the credit provider under a credit contract for which the consumer is the debtor; or

- institute proceedings or take any other action in relation to a credit contract for which the consumer is the debtor.

It does not matter whether the person does so on the person's own behalf or on behalf of another person. People will not be able to avoid the obligation through the use of disclaimers noting that they are not 'suggesting' a particular course of action.

Subregulation 4B(2) provides that a person does not provide 'debt management assistance' unless a fee, charge or other amount is paid or payable by or on behalf of the consumer in relation to the assistance. For the purposes of subregulation 4B(2), it is immaterial if the fee, charge or other amount is paid or payable to the provider of the assistance or to any other person (subregulation 4B(3)).

Section 4C defines *credit reporting assistance* as where dealing directly with the consumer or the consumer's agent in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:

- suggests that the consumer apply, or, assists the consumer to apply, for a change to information collected or held by a credit reporting body (within the meaning of the *Privacy Act 1988*) in relation to a credit contract for which the consumer is the debtor; or
- suggests that the consumer, or, assists the consumer to:
  - make a complaint or claim to the credit provider, AFCA or ASIC, regarding information collected or held by a credit reporting body in relation to a credit contract for which the consumer is the debtor; or
  - institute proceedings or take any other action regarding information collected or held by a credit reporting body in relation to a credit contract for which the consumer is the debtor.

It does not matter whether the person does so on the person's own behalf or on behalf of another person. People will not be able to avoid the obligation through the use of disclaimers noting that they are not 'suggesting' a particular course of action.

Subregulation 4C(2) provides that a person does not provide *credit reporting assistance* unless a fee, charge or other amount is paid or payable by or on behalf of the consumer in relation to the assistance. For the purposes of subregulation 4C(2), it is immaterial if the fee, charge or other amount is paid or payable to the provider of the assistance or to any other person (subregulation 4C(3)).

#### *Exemption for lawyers*

Items 5 and 6 amend regulation 24, which prescribes activities exempt from being credit activities under the Act, to clarify that the exemption available to lawyers in subregulation 24(4) from holding an ACL for the provision of a credit activity, also applies to provision of a debt management service, where lawyers meet the conditions in subregulation 24(4).

Item 7 inserts new subregulation 24(4A) to limit when a lawyer can rely on the exemption in subregulation 24(4) when providing a 'debt management service'. The exemption cannot be relied on where a third party holds out or advertises to consumers that the lawyer is able to provide a 'debt management service'; and there is

an arrangement between the third party and the lawyer by which the third party regularly refers persons for the purpose of being provided a ‘debt management service’. This is intended to mitigate the risk that a third party referral structure could be utilised to circumvent the operation of subregulation 24(4).

### *Application*

Item 8 inserts new regulation 49J to provide an application and transitional provision for the amendments made by the Regulations.

Subregulation 49J(1) provides that the amendments made by the Regulations apply to debt management services provided on or after 1 July 2021. People will need to have applied for an ACL and become a member of AFCA by 1 July 2021, in order to provide debt management services from that date.

This provision removes the disincentive for people engaged in the provision of debt management services to not apply for an ACL before 1 July 2021 to avoid being subject to the obligations imposed on an ACL holder.

From 1 July 2021, anyone who has not applied for an ACL to provide debt management services, will be subject to the new the obligations imposed by these Regulations.

Subregulation 49J(2) provides that the debt management service amendments apply from the commencement of Schedule 1 to the Regulations for the purposes of licensing of persons who engage in credit activities and in relation to credit representatives. This will allow ASIC to license people from the time that the Regulations commence.

Subregulation 49J(5) provides that for the purpose of regulation 49J ***debt management service amendments*** means the amendments made by items 1, 2, 5, 6 and 7 of Schedule 1 to the Regulations.

### *Transitional arrangements*

Regulation 49J(3) provides that from 1 July 2021, an AFCA member will get an exception from the obligations imposed by the Regulations and will be able to provide debt management services until such time as ASIC deals with the application (for example, ASIC grants or refuses to grant the ACL). The exception will apply where:

- a person has, on or before 1 July 2021, lodged an application for an ACL to provide a ‘debt management service’, or for ASIC to vary the conditions on the person’s licence by authorising the person to provide a ‘debt management service’; and
- at the start of 1 July 2021, the application has not been withdrawn by the applicant, or dealt with by ASIC; and
- the person is a member of the AFCA scheme at all times in the period (the ***transition period***).

The ***transition period*** starts on 1 July 2021, and ends when the application is withdrawn by the applicant, or dealt with by ASIC, whichever happens first.

Therefore, subregulation 49J(3) provides that where a person has applied for an ACL by 1 July 2021, but ASIC has refused a licence application, including where that decision is being appealed, this transitional arrangement ceases to be satisfied. That is, where a licence has been refused, even if that is being disputed, the person will no longer be permitted to provide debt management services.

*Other amendments*

Items 3 and 4 is a minor amendment to paragraphs 20(5)(b), (c), (d) and 20(12)(c) to correct an error by omitting references to ‘indirection’ and to substitute ‘indirect’.