

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations Act 2001
National Consumer Credit Protection Act 2009
Retirement Savings Accounts Act 1997
Superannuation Industry (Supervision) Act 1993

Treasury Laws Amendment (AFCA Cooperation) Regulations 2019

Section 1364 of the *Corporations Act 2001* (the Corporations Act), section 329 of the *National Consumer Credit Protection Act 2009* (the Credit Act), section 200 of the *Retirement Savings Accounts Act 1997* (the RSA Act) and section 353 of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) provide that the Governor-General may make regulations prescribing matters which are required or permitted by the respective Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the respective Act.

The purpose of the *Treasury Laws Amendment (AFCA Cooperation) Regulations 2019* (the Regulations) is to implement recommendation 4.11 of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (the Royal Commission) in relation to External Dispute Resolution (EDR) obligations. In making its recommendation, the Royal Commission considered the absence of a conduct-related obligation on entities required to use the AFCA scheme to be an important omission.

The Regulations prescribe clear obligations on compulsory members of the Australian Financial Complaints Authority (AFCA) to ensure that:

- members are required to take reasonable steps to cooperate with AFCA to resolve any complaint under the AFCA scheme; and
- members are required to give reasonable assistance to AFCA and to identify, locate and provide documents and information to AFCA that are reasonably required for AFCA to resolve complaints; and
- members are required to give effect to any determination made by AFCA in relation to the complaint.

Where members do not satisfy the requirements, AFCA can refer the matter to the Australian Securities and Investments Commission (ASIC) and members will be subject to the existing penalty regime, under the relevant Acts.

The Regulations amend the *Corporations Regulations 2001*, the *National Consumer Credit Protection Regulations 2010*, the *Retirement Savings Accounts Regulations 1997* and the *Superannuation Industry (Supervision) Regulations 1994*.

Under the current EDR regime, most (but not all) entities that provide financial services or credit to retail customers, and certain superannuation entities, are required

to be a member of AFCA. The new requirements in the Regulations build on the existing obligations of licensees and regulated persons and financial product issuers to make it clear that they must cooperate with AFCA to ensure the EDR scheme can operate efficiently and fairly.

Details of the Regulations are set out in [Attachment A](#).

The authorising Acts specify no conditions that need to be met before the power to make the Regulations may be exercised.

Treasury conducted targeted stakeholder consultations with AFCA, APRA, the Superannuation Complaints Tribunal and ASIC. Feedback received was considered in the development of the Regulations.

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

The Regulations commence on the day after it is registered.

A Regulatory Impact Statement was not required because the Regulations are related to the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* recommendation. The Regulations do not give rise to any relevant regulatory costs under the Regulatory Burden Measurement Framework, but may give rise to enforcement-related costs if an affected entity fails to comply with the Regulations.

A Statement of Compatibility with Human Rights is at [Attachment B](#).

Details of the *Treasury Laws Amendment (AFCA Cooperation) Regulations 2019*

Section 1 – Name of Regulations

This section provides that the title of the Regulations is the *Treasury Laws Amendment (AFCA Cooperation) Regulations 2019*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after registration.

Section 3 – Authority

This section provides that the Regulations are made under the following Acts:

- a) the *Corporations Act 2001*;
- b) the *National Consumer Credit Protection Act 2009*;
- c) the *Retirement Savings Accounts Act 1997*; and
- d) the *Superannuation Industry (Supervision) Act 1993*.

Section 4 – Schedule(s)

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

Schedule 1 – Amendments

Amendments to the Corporations Regulations 2001

Item 1 – Regulation 7.6.03C

This item inserts a new regulation 7.6.03C to include a clear obligation for Australian financial services licence (AFSL) holders who are required to be a member of the AFCA scheme to ensure they take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which it is a party.

To satisfy this obligation, ASFL holders are required to provide reasonable assistance to AFCA to resolve complaints. Reasonable assistance would exclude the provision of information or documents that would abrogate the AFSL holder's common law privilege against self-incrimination or legal professional privilege.

Further, the regulation requires the AFSL holder to identify, locate and then provide to AFCA any documents and information that AFCA reasonably requires in order to resolve the complaint and to give effect to any determination made by AFCA in relation to the complaint.

AFSL holders that do not cooperate with AFCA to resolve complaints can be referred to ASIC by AFCA and are subject to the existing penalty framework provided under paragraph 915C(1)(a) of the Corporations Act which applies to other licensee obligations.

This regulation does not apply to superannuation complaints. Superannuation complaints are excluded from this regulation because they are dealt with separately by Division 3 of Part 7.10A of the Corporations Act. Those provisions provide a statutory power to AFCA to obtain information and documents to resolve superannuation complaints and to ensure compliance with any determinations made by AFCA. The different treatment of superannuation complaints is because superannuation complaints may include third parties who are not members of the AFCA scheme but have information relevant to the resolution of the complaint.

Item 2 – Regulation 7.9.77A

This item inserts a new regulation 7.9.77A in relation to certain unlicensed product issuers and regulated persons who are required to be a member of the AFCA scheme under section 1017G(1) of the Corporations Act to ensure they take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which it is a party.

To satisfy this obligation, certain unlicensed product issuers and regulated persons are required to provide reasonable assistance to AFCA to resolve complaints. Reasonable assistance would exclude the provision of information or documents that would abrogate the provider's common law privilege against self-incrimination or legal professional privilege.

Further, the regulation requires that certain unlicensed product issuers and regulated persons to identify, locate and then provide to AFCA any documents and information that AFCA reasonably requires in order to resolve the complaint and to give effect to any determination made by AFCA in relation to the complaint.

Those unlicensed product issuers and regulated persons that do not cooperate with AFCA to resolve complaints can be referred to ASIC by AFCA and are subject to the existing penalty framework provided under subsection 1311(1) of the Corporations Act.

This regulation does not apply to superannuation complaints. Superannuation complaints are excluded from this regulation because they are dealt with separately by Division 3 of Part 7.10A of the Corporations Act. Those provisions provide a statutory power to AFCA to obtain information and documents to resolve superannuation complaints and to ensure compliance with any determinations made by AFCA. The different treatment of superannuation complaints is because superannuation complaints may include third parties who are not members of the AFCA scheme but have information relevant to the resolution of the complaint.

Item 3 – Application

This item provides that the obligation to cooperate applies to complaints made before, on and after commencement of the regulation.

This regulation is prospective and does not have retrospective effect in relation to past failures by members to cooperate with AFCA.

Amendments to the National Consumer Credit Protection Regulations 2010

Item 4 – Definition

This item provides that AFCA has the same meaning as in Chapter 7 of the Corporations Act.

Item 5 – Regulation 11A

This item inserts a new regulation 11A to include a new obligation for Australian credit licence (ACL) holders who are required to be a member of the AFCA scheme to ensure they take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which it is a party.

To satisfy this obligation, ACL holders are required to provide reasonable assistance to AFCA to resolve complaints. Reasonable assistance would exclude the provision of information or documents that would abrogate the provider's common law privilege against self-incrimination or legal professional privilege.

Further, the regulation requires the ACL holder to identify, locate and then provide to AFCA any documents and information that AFCA reasonably requires in order to resolve the complaint and to give effect to any determination made by AFCA in relation to the complaint.

ACL holders that do not cooperate with AFCA to resolve complaints can be referred to ASIC by AFCA and are subject to the existing penalty framework provided under paragraph 55(1)(a) of the Credit Act which applies to other licensee obligations.

This regulation does not apply to superannuation complaints. Superannuation complaints are excluded from this regulation because they are dealt with separately by Division 3 of Part 7.10A of the Corporations Act. Those provisions provide a statutory power to AFCA to obtain information and documents to resolve superannuation complaints and to ensure compliance with any determinations made by AFCA. The different treatment of superannuation complaints is because superannuation complaints may include third parties who are not members of the AFCA scheme but have information relevant to the resolution of the complaint.

Item 6 – Amendment to Regulation 23B

This item amends regulation 23B. Regulation 23B provides an exemption for a fund raising special purpose entity from holding an ACL where they (amongst other things) are a member of the AFCA scheme.

This amendment provides that where the entity does not take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which it is a party, the exemption under regulation 23B will cease to apply (provided that the other requirements relating to cessation are satisfied).

To satisfy this obligation, the entity is required to provide reasonable assistance to AFCA to resolve complaints. Reasonable assistance would exclude the provision of information or documents that would abrogate the provider's common law privilege against self-incrimination or legal professional privilege.

Further, the amendment requires the entities to identify, locate and then provide to AFCA any documents and information that AFCA reasonably requires in order to resolve the complaint and to give effect to any determination made by AFCA in relation to the complaint.

Where ASIC is satisfied that the entity has failed to cooperate with AFCA to resolve the complaint and gives the entity written notice, the exemption from having a credit licence will cease to apply after 28 days have passed since the notice was given. An application may be made to the Administrative Appeals Tribunal for review of that ASIC decision.

This amendment does not apply to superannuation complaints. Superannuation complaints are excluded from this amendment because they are dealt with separately by Division 3 of Part 7.10A of the Corporations Act. Those provisions provide a statutory power to AFCA to obtain information and documents to resolve superannuation complaints and to ensure compliance with any determinations made by AFCA. The different treatment of superannuation complaints is because superannuation complaints may include third parties who are not members of the AFCA scheme but have information relevant to the resolution of the complaint.

Item 7 – Amendments to Regulation 23C

This item amends regulation 23C. Regulation 23C provides an exemption for a securitisation entity from holding an ACL where they (amongst other things) are a member of the AFCA scheme.

This amendment provides that where the entity does not take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which it is a party, the exemption under regulation 23C will cease to apply (provided that the other requirements relating to cessation are satisfied).

To satisfy this obligation, the entity is required to provide reasonable assistance to AFCA to resolve complaints. Reasonable assistance would exclude the provision of information or documents that would abrogate the provider's common law privilege against self-incrimination or legal professional privilege.

Further, the amendment requires the entity to identify, locate and then provide to AFCA any documents and information that AFCA reasonably requires in order to resolve the complaint and to give effect to any determination made by AFCA in relation to the complaint.

Where ASIC is satisfied that the entity has failed to cooperate with AFCA to resolve the complaint and gives the entity written notice, the exemption from having a credit licence will cease to apply after 28 days have passed since the notice was given. An application may be made to the Administrative Appeals Tribunal for review of that ASIC decision.

This amendment does not apply to superannuation complaints. Superannuation complaints are excluded from this amendment because they are dealt with separately by Division 3 of Part 7.10A of the Corporations Act. Those provisions provide a statutory power to AFCA to obtain information and documents to resolve superannuation complaints and to ensure compliance with any determinations made by AFCA. The different treatment of superannuation complaints is because superannuation complaints may include third parties who are not members of the AFCA scheme but have information relevant to the resolution of the complaint.

Item 8 – Application

This item provides that the obligations to cooperate apply to complaints made before, on and after commencement of the regulation.

The regulations are prospective and do not have retrospective effect in relation to past failures by members to cooperate with AFCA.

Amendments to the Retirement Savings Accounts Regulations 1997

Item 9 – Definitions

This item provides that ‘AFCA’ has the same meaning as in Chapter 7 of the Corporations Act and ‘AFCA scheme’ has the same meaning as in Chapter 7 of the Corporations Act.

Item 10 – Regulation 6.10A

This item inserts a new regulation 6.10A to include a new operating standard for Retirement Savings Account (RSA) providers who are required to be a member of the AFCA scheme to ensure they take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which it is a party.

To satisfy this obligation, RSA providers are required to provide reasonable assistance to AFCA to resolve complaints. Reasonable assistance would exclude the provision of information or documents that would abrogate the RSA provider’s common law privilege against self-incrimination or legal professional privilege.

Further, the regulation requires the RSA provider to identify, locate and then provide to AFCA any documents and information that AFCA reasonably requires in order to resolve the complaint and to give effect to any determination made by AFCA in relation to the complaint.

RSA providers that do not cooperate with AFCA to resolve complaints can be referred to ASIC by AFCA and are subject to the existing penalty framework provided under subsection 39(2) of the RSA Act which applies to other operating standards.

This regulation does not apply to superannuation complaints. Superannuation complaints are excluded from this regulation because they are dealt with separately by Division 3 of Part 7.10A of the Corporations Act. Those provisions provide a statutory power to AFCA to obtain information and documents to resolve superannuation complaints and to ensure compliance with any determinations made

by AFCA. The different treatment of superannuation complaints is because superannuation complaints may include third parties who are not members of the AFCA scheme but have information relevant to the resolution of the complaint.

Item 11 – Application

This item provides the obligation to cooperate applies to complaints made before, on and after commencement of the regulation.

This regulation is prospective and does not have retrospective effect in relation to past failures by members to cooperate with AFCA.

Amendments to the Superannuation Industry (Supervision) Regulations 1994

Item 12 – Definition

This item provides that AFCA has the same meaning as in Chapter 7 of the Corporations Act.

Item 13 – Regulation 13.17D

This item inserts a new regulation to include a new standard applicable to the operation of regulated superannuation funds (other than self-managed superannuation funds) and approved deposit funds who are required to be a member of the AFCA scheme to ensure they take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which it is a party.

To satisfy this standard, funds are required to provide reasonable assistance to AFCA to resolve complaints. Reasonable assistance would exclude the provision of information or documents that would abrogate the fund's common law privilege against self-incrimination or legal professional privilege.

Further, the regulation requires the funds to identify, locate and then provide to AFCA any documents and information that AFCA reasonably requires in order to resolve the complaint and to give effect to any determination made by AFCA in relation to the complaint.

Funds that do not cooperate with AFCA to resolve complaints can be referred to ASIC by AFCA and are subject to the existing penalty framework provided under section 34(2) of the SIS Act which applies to other standards.

This regulation does not apply to superannuation complaints. Superannuation complaints are excluded from this regulation because they are dealt with separately by Division 3 of Part 7.10A of the Corporations Act. Those provisions provide a statutory power to AFCA to resolve superannuation complaints. Those provisions provide statutory power to AFCA to obtain information and documents to resolve superannuation complaints and to ensure compliance with any determinations made by AFCA. The different treatment of superannuation complaints is because superannuation complaints may include third parties who are not members of the AFCA scheme but have information relevant to the resolution of the complaint.

Item 14 – Application

This item provides that the obligation to cooperate applies to complaints made before, on and after commencement of the regulation.

This regulation is prospective and does not have retrospective effect in relation to past failures by members to cooperate with AFCA.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (AFCA Cooperation) Regulations 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The purpose of the regulations is to impose a requirement on members of AFCA to provide AFCA with the necessary assistance and documents it requires to promptly and fairly resolve complaints and where this does not occur, ASIC can provide sanctions against the member under the existing penalty regimes for similar offences.

This Legislative Instrument does not engage any of the applicable rights or freedoms.

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.