

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2016 - 2017

Division/Agency: Australian Securities and Investments Commission

Question No: 217

Topic: Debt Management Firms

Reference: Written

Senator: Ketter, Chris

Question:

- 1) Subsequent to ASIC's review (#265, released in January this year), has ASIC provided advice to Treasury or the Minister regarding regulatory or enforcement measures in relation to debt management firms?
- 2) Following ASIC's report (#265, released in January this year), how many Debt Management Firms has ASIC taken action against? What is the nature of each action that ASIC has taken against individual debt management firms?
- 3) What action does ASIC have the power to take to protect consumers in relation to debt management or credit repair firms?
- 4) Can ASIC compel debt management firms in External Dispute Resolution Schemes (EDRS) or into promoting ASIC's own free alternatives to financial advice?
- 5) What action does ASIC take to ensure that industries (such as credit, telephone providers, water, energy providers) that are legally obliged to provide support or concessions to customers facing financial hardship are doing so?

Answer:

- 1) ASIC has not been requested to formally brief Treasury or the Minister in relation to regulatory or enforcement measures in relation to debt management firms.

However, at a Consumer Affairs Australia New Zealand (CAANZ) meeting on 30 March 2016, it was agreed that further analysis should be done of the debt management firm market. The CAANZ Policy and Research Advisory Committee was tasked with this work, and a Working Group on Debt Management Firms was formed. The Working Group is comprised of representatives from ASIC, Treasury, the ACCC, and the State and Territory Consumer Affairs agencies.

The Working Group has been asked to undertake a survey of the regulatory landscape and the extent to which there are regulatory gaps, and to report back to CAANZ by the end of this year.

ASIC is providing advice to the Working Group about the regulatory landscape for debt firms, and possible limitations in the laws that ASIC administers as they relate to debt firms.

2) Since January 2016, ASIC has not taken public action against a debt management firm. ASIC has matters that it is currently investigating, relating to false or misleading representations made by some of these firms. These matters are ongoing, and are not yet public. ASIC is continuing to focus on the conduct of debt management firms within the limits of its jurisdiction and the parameters of the applicable laws.

3) depending on the nature of the service provided by the firms. These services differ from firm to firm, and may include the promise of:

- 'cleaning', 'fixing' 'repairing', 'removing' or 'washing away' default listings on credit reports;
- developing and managing budgets;
- negotiating with creditors, including lenders, telecommunications companies , utilities companies or debt collectors; and / or
- advising and arranging formal debt agreements under Part IX of the Bankruptcy Act, 1966.

In general, these services are not captured as financial services under the Corporations Act 2001, nor as credit activities under the National Consumer Credit Protection Act 2009 ("the National Credit Act").

In the absence of direct or specific regulation of debt management firms, regulation falls under the consumer law administered by ASIC and the consumer law regulators (including the ACCC). The Australian Consumer Law (ACL) contains prohibitions, mirrored in the ASIC Act for financial services, against misleading or deceptive conduct, false or misleading representations, unconscionable conduct, unfair contract terms and harassment and coercion¹.

Where ASIC has evidence of conduct by debt management firms that involves a potential breach of the ASIC Act, it may investigate, and where appropriate, take action in Court. This can involve seeking injunctions, civil penalties, compensatory or non-punitive orders.

4) As most debt firms are not required to be licensed under the National Consumer Credit Protection Act 2009 or the Corporations Act 2001, they are not required to hold membership of an EDRS. ASIC has no power to otherwise compel EDRS membership.

There are a number of free alternatives available to debt firms. These include:

- independent financial counsellors;
- the Financial Ombudsman Service, and the Credit and Investment Ombudsman;
- community legal services; and
- hardship teams that sit within lenders, and utility and telecommunication providers.

¹ Whether the behaviour is regulated under the ASIC Act (as a financial service) by ASIC, or under the Australian Consumer Law (for non-financial services) by the ACCC and the consumer law regulators, will depend on the nature of the debt management firm service offered.

ASIC promotes the availability of these services on ASIC's MoneySmart pages² and warns consumers to be wary of the costs and limitations of the services provided by debt firms³. ASIC is unable to compel debt management firms to promote free alternatives to their own services.

- 5) ASIC does not generally have jurisdiction over telephone, water or energy providers, as their conduct does not involve the provision of credit as defined under legislation that ASIC administers.

However, lenders who do provide regulated consumer credit under the National Credit Act, have legal obligations in relation to consumers who are experiencing hardship.

Section 72 of the National Credit Code (attached as Schedule 1 to the National Credit Act) allows a debtor to give their credit provider notice, either verbally or in writing, of their inability to meet their obligations under a credit contract (a hardship notice).

Under the hardship provisions, a credit provider is obliged to consider the hardship notice, and has a specific amount of time available to them from receiving the notice to respond to the debtor about whether and how they will change the credit contract to address the debtor's inability to meet their obligations. A credit provider might agree to vary a debtor's obligations in a number of ways, for example by means of an extension of the period of the credit contract, and a reduction of the amount of periodic payment. The hardship provisions mean that a lender must respond to a hardship application before beginning proceedings to take possession of a mortgaged asset.

ASIC has undertaken significant work with stakeholders, including Treasury, consumer groups and industry to ensure that the hardship provisions are functioning as intended. ASIC also requires that prospective credit licensees confirm that they have documented procedures for receiving and assessing requests to vary credit contracts on the grounds of hardship before they are able to be granted an Australian Credit Licence.

Where ASIC has received evidence that suggests a credit provider does not have adequate hardship processes, ASIC will take action to bring about improvements.

² <https://www.moneysmart.gov.au/managing-your-money/managing-debts>

³ <https://www.moneysmart.gov.au/borrowing-and-credit/borrowing-basics/credit-repair>