

18 March 2016

Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via email: economics.sen@aph.gov.au

Dear Sir/Madam

Inquiry: Causes and consequences of the collapse of listed retailers in Australia

Thank you for the opportunity to provide a submission to the Senate Economics References Committee on the inquiry into the causes and consequences of the collapse of listed retailers in Australia.

The Shopping Centre Council of Australia (SCCA) represents Australia's major shopping centre owners, managers and developers. Our members, which include listed companies, collectively have around 37,000 retail tenancies, including listed retailers, in their centres. A full list of our members is provided below.

Although we understand that the catalyst for this inquiry was the recent 'collapse' of Dick Smith Electronics, we are not in a position to offer any comment on the specifics of that matter, or the more general issues of 'the conduct of private equity firms' or 'corporate takeovers'.

We have limited this submission to headings (c), (d) and (e) of the inquiry's Terms of Reference. These substantially deal with the treatment of secured and unsecured creditors and, more specifically, the treatment of gift card holders in the event a gift card-issuing business is placed into external administration.

We participated in the 2011/12 inquiry into 'Gift cards in the Australian Market' undertaken by the Commonwealth Consumer Affairs Advisory Council (CCAAC). This inquiry thoroughly considered the appropriateness of the current regulation of gift cards. As such, it made findings relevant to a number of the issues canvassed in the Terms of Reference of this current inquiry, including the premise of trust accounts and the ranking of creditors.

We reflect on the CCAAC's findings to support our general view that additional regulation of the gift card market is unnecessary. The SCCA's submission to the CCAAC inquiry is provided at **Attachment 1**.

Background

Gift cards are an important element of shopping centre operations. The fundamental purpose of shopping centre gift card schemes is to attract customer visitation and secure spending in a shopping centre. This is to the ultimate benefit of a shopping centre's retailers, to which shopping centre gift card funds are remitted upon a purchase of goods and services being made. Gift cards also provide customers with an alternative, convenient and efficient purchase and gift option.

Generally speaking, a shopping centre gift card scheme facilitates gift cards being purchased from a shopping centre which are then honoured by a number of retailers within that centre or across a portfolio of centres in common ownership or management in accord with applicable Terms and Conditions.

For the benefit of the Committee, this submission generally outlines a typical approach to the administration of a shopping centre gift card scheme, which is also depicted at **Attachment 2**.

It is the SCCA's strong view that the existing regulation of gift cards in Australia is sufficient to provide for appropriate consumer protections while maintaining the ability for businesses to run effective and efficient gift card schemes which meet consumer demand.

The proposed regulatory interventions canvassed in the Terms of Reference, including the premise of introducing a personal liability for company directors for the value of gift cards purchased, would constitute a heavy-handed regulatory 'over-correction'. In our view, the proposals are a reaction to a specific set of circumstances, rather than a systemic flaw in the current regulation and operation of gift card schemes. (In our view, the case for a systemic flaw in the regulation of gift cards has never been made.)

The potential implementation of these interventions also comes with the risk that gift cards will become an unattractive and unviable product for businesses to offer their customers, and that company directorships will become less attractive to otherwise capable and desirable individuals.

Typical approach to shopping centre gift card schemes

Attachment 2 provides an overview of a typical approach to the regulation and administration of a shopping centre gift card scheme.

Shopping centre gift card schemes are typically 'open-loop' (as opposed to 'closed loop') which means that the gift card is purchased from, and issued by, one entity, managed via a card payment scheme and then is able to be redeemed at a range of retailers that accept the cards of that scheme within a centre or across a portfolio of centres. In some cases, cards can also be accepted by retailers outside a centre or centres, where cards of a particular scheme are accepted by retailers generally.

As illustrated, the administration of a shopping centre gift card scheme involves three key elements – (1) regulation, (2) consumers and (3) operation.

Shopping centre gift cards are, typically, considered 'financial products' - specifically a product which is used to make 'non-cash payment' – which are regulated under the *Corporations Act 2001* (*Corporations Act*), as well as *Australian Securities and Investment Commission Act 2001* (*ASIC Act*) and the *Payment System (Regulation) Act 1998*.

As illustrated, the Australian Securities and Investment Commission (ASIC) have issued *Regulatory Guide - RG 185* (Regulatory Guide) which sets out its approach to the regulation of 'non-cash payments'. This includes detail as to the circumstances where it is appropriate for a business to apply for 'relief' from some specific requirements of the *Corporations Act* with regard to 'financial products', including disclosure obligations.

'Gift vouchers or cards' are specifically listed in the Regulatory Guide as a 'non-cash payment' facility where 'relief' from certain provisions of the *Corporations Act* may be available under the related *Class Order 05/738* (Class Order). The Regulatory Guide and Class Order details that 'relief' can only be granted if the gift card scheme observes a number of standards, including (in general terms):

- the prominent display of the relevant expiry date;
- that the product must be promoted and marketed as a 'gift product';
- that the card be pre-paid, and
- that the card cannot be recharged.

(For ease of reference, the Regulatory Guide and the Class Order are provided at **Attachments 3 and 4** respectively.)

This means that a 'non-cash payment facility' can only be granted 'relief' if it demonstrates that it meets specified standards of performance.

The Explanatory Statement which accompanies the Class Order makes pertinent observations about the context of gift card schemes in Australia and related regulatory requirements. For ease, these are transcribed below (emphasis added):

2. Purpose of the class order

The purpose of Class Order [CO 05/738] is to ensure that persons providing financial services in relation to gift facilities constituting NCP facilities are not subject to unnecessary and inappropriate regulation under the financial services regulatory regime. These facilities are simple, easy-to-use and well understood by retail consumers. Generally, their provision does not constitute a significant part of the business of the person providing financial services in relation to the gift facility. Further, the risk posed by gift facilities is sufficiently low as to render conditions on the relief unnecessary. [CO 05/738] therefore recognises that the costs of compliance with the financial services regulatory regime are disproportionate to the risks to clients created through their use of the facility.¹

Importantly, the 'relief' offered via the Class Order does not affect specific consumer protections under the Australian Consumer Law (ACL), which are mirrored in the ASIC Act, and include, for example, unfair contract term protections and protection from misleading and deceptive conduct.

This existing regulatory and consumer protection framework was considered in detail by the CCAAC and no recommendation was forthcoming to the effect of pressing for the reform of this existing framework. The CCACC only went as far as to suggest that a review of the Class Order may be appropriate to "ensure that it continues to meet its objectives"².

In addition to the specific protections and 'relief' built into the existing regulatory framework, self-regulation is an important part of the administration of shopping centre gift card schemes. For example, company websites provide intuitive, easy to find links to gift card Terms of Conditions, lists of participating retailers and, in some cases, also provide responses to Frequent Asked Questions. Operators of shopping centre gift card schemes are also willing to consider offering a 'grace period' following the expiry of a gift card on the basis of special circumstances.

As illustrated, a typical approach to operating a shopping centre gift card scheme involves the funds from gift card sales being held in a dedicated account for the purpose of remittance to retailers upon a purchase occurring.

The role of a gift card 'platform operator(s)' is also a typical component of a shopping centre gift card scheme. These operators support the issue of cards and, subsequently, the reconciliation and settlement of funds to retailers. Funds move through a payment system and, therefore, through a number of accounts, on a daily basis. At any given time, only a portion of shopping centre gift card funds are moving through the payment system and through bank accounts managed by platform operators, with the balance being held in bank accounts operated by our members.

Response to Terms of Reference

1. Headings (c) and (d)

c. the effect of the appointment of external administrators on secured and unsecured creditors, including employees and consumers of retail businesses;

and

d. the effect of external administration on gift card holders and those who have made deposits on goods not delivered;

Taken together, headings (c) and (d) of the Terms of Reference, from our interpretation, infer that consideration could be given to changing the treatment of gift card holders with regard to the 'ranking' of creditors in the event of external administration. As noted in the CCAAC Final Report, "gift card holders are likely to rank as unsecured creditors in the event of insolvency"³.

The CCAAC considered this scenario in detail in its 2012 inquiry and conclusively found that:

"Granting priority status to gift card holders where they are considered to be creditors would merely transfer welfare from one group to another"⁴.

¹ ASIC Class Order (05/738) - Explanatory Statement, <https://www.legislation.gov.au/Details/F2005L03618/Explanatory%20Statement/Text>

² CCAAC Final Report: Gift cards in the Australian Market, July 2012, pg. 16.

³ CCAAC Final Report: Gift cards in the Australian Market, July 2012, pg. 14.

⁴ CCAAC Final Report: Gift cards in the Australian Market, July 2012, pg. 15.

In justifying their finding, the CCAAC noted that:

"Such an approach would have significant impacts on businesses, lenders, investors and employees, and place gift card holders above all other unsecured creditors, such as contractors or trade creditors that had supplied goods or services to a company without payment. There does not appear to be a compelling case for why gift card holders should receive a higher priority than other unsecured creditors of the gift card issuer"⁵.

The SCCA agrees with the CCAAC's findings.

The CCAAC did note the importance of ensuring that consumers had the ability to understand how gift card holders would be treated in the event the relevant business was placed into external administration. In this regard, it is noted that detail on this scenario, and the options available to gift card holders, is already available on both the ASIC *MoneySmart* website and Australian Competition and Consumer Commission (ACCC) website⁶.

A relevant excerpt from the ASIC *MoneySmart* website is provided below:

What if your gift card retailer goes out of business?

When a retailer goes out of business they usually publically announce it so you will see stories about their insolvency in the media. You can also check if they are insolvent by searching [ASIC's insolvency notices](#)

Here are the things you can do when you hold a gift card from a retailer who becomes insolvent.

Make a chargeback claim

If you have purchased a gift card using a credit card you may have chargeback rights. This means you can sometimes get your money back from your credit card issuer. You should contact the issuing bank, building society or credit union straight away as there are conditions and time limits on making a chargeback claim.

Register as an unsecured creditor

If you have a gift card and don't want to ask the person who gave it to you to request a chargeback, you can register with an external administrator or liquidator as an unsecured creditor. The insolvency process will determine if you get a full refund, a partial refund or no refund at all.

Consider an offer to redeem the gift card

Sometimes a retailer will continue trading under the control of an administrator and the gift cards the retailer sold will be honoured. The administrator may place new conditions on the use of gift cards, like requiring you to spend an additional dollar for every dollar you redeem. If this is the case, you will need to work out if it is worth taking up the offer.

Whether you're giving or receiving a gift card, it's good to know what to look out for and what options are available to you if your gift card retailer goes out of business.

<https://www.moneysmart.gov.au/managing-your-money/banking/different-ways-to-pay/gift-cards>

⁵ CCAAC Final Report: Gift cards in the Australian Market, July 2012, pg. 49.

⁶ <https://www.moneysmart.gov.au/managing-your-money/banking/different-ways-to-pay/gift-cards>
<https://www.accc.gov.au/consumers/consumer-protection/when-a-business-goes-bust>

2. Heading (e)

e. the desirability of the following proposals in the event that gift card holders are unable to redeem their gift cards following the appointment of external administrators:

- i. placing an obligation on external administrators to honour gift cards;
- ii. a requirement that funds used to purchase gift cards be kept in a separate trust account by businesses;
- iii. directors to be personally liable for the value of gift cards purchased;

The SCCA does not consider any of the proposals canvassed under heading (e) are desirable or necessary with regard to the administration of shopping centre gift card schemes.

Much like the comments above, the suggestion at (i) that external administrators be required to honour gift cards could, potentially, just displace the rights of 'higher ranking' creditors, including secured creditors and employees.

With regard to (ii), we are of the strong view that requiring the establishment of trust accounts would add to the complexity of administering a gift card scheme as a result of the high number and continual change of beneficiaries, and the high frequency of gift card transactions. Requiring trust accounts may also make gift cards issued through 'open loop' schemes unworkable. By way of example, it may impact efficient payment processing and the role of platform operators.

We note that the CCAAC made the following finding regarding trust accounts:

"...holding gift cards on trust is likely to be more expensive than alternative policy measures. As such, CCAAC does not consider that gift card issuers should be compelled to maintain a trust account for gift card balances"⁷.

Further, we would be troubled that requiring trust accounts would potentially allow for the administration process guided by the *Corporations Act* to be 'circumvented'. As per our understanding, a requirement to establish trust accounts would 'raise' gift card holders above other creditors in the event of external administration as the monies in trust would be earmarked for a specific purpose. This calls into question the issue of welfare displacement already canvassed by the CCAAC. The CCAAC commented on this issue in their Final Report, noting that requiring funds to be held in trust would *"...reduce the amount available to meet the claims of all other creditors in the event of insolvency..."⁸.*

We also draw reference to the **Attachment 2** which details that a typical approach to administering a shopping centre gift card scheme includes the establishment of a dedicated account for the deposit of gift card monies. Typically, gift card monies are not used for any purpose other than honouring gift card sales and remittance to retailers.

If trust accounts for gift card schemes were to be mandated, considerable work and consultation would be required to ensure that any legislative amendment is practical in an operational sense and appropriately framed to ensure that it does not conflict with existing relevant regulation, including the process of business wind-up under the *Corporations Act*. Any legislative amendment would also have to consider the functionality of trust accounting in the context of the broader payment system structure and payment system participants which allow shopping centre gift card schemes to operate efficiently and effectively for consumers and participating retailers.

In the event the Committee makes a recommendation along these lines - and is then adopted by the Government - the SCCA respectfully request to be consulted on the detail of the proposed legislative drafting.

⁷ CCAAC Final Report: Gift cards in the Australian Market, July 2012, pg. 15.

⁸ CCAAC Final Report: Gift cards in the Australian Market, July 2012, pg. 49.

Of the proposed interventions under heading (e), the proposal at (iii) to introduce a director liability for the value of gift cards purchased is, in our view, the most blatant example of a heavy-handed regulatory 'over-correction'. Currently, personal director liabilities are only present in limited circumstances which are, generally speaking, related to the fundamental responsibility of a director to act lawfully.

The introduction of a personal liability for the value of gift cards would be a 'wild card' precedent that the Committee and the Government would find difficult to defend. Change in this regard could be met with subsequent calls from disaffected consumers, employees and other relevant parties for similar liabilities to be introduced to protect against risks they perceived they are exposed to in the management of a business. As such, this intervention should not be entertained by the Committee.

Further, we are concerned that introducing a personal liability for the value of gift cards would potentially prevent qualified and desirable individuals from seeking directorships in the future. This is not a desirable or practical outcome. It is also unclear how a potential future personal liability would interact with existing liabilities and with relevant 'Director and Officer' and personal insurances.

Members

The SCCA represents AMP Capital Investors, Blackstone Group, Brookfield, Charter Hall Retail REIT, DEXUS Property Group, Eureka Funds Management, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, JLL, Lancini Group, Lendlease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, SCA Property Group, Scentre Group, Stockland and Vicinity Centres.

The SCCA would be pleased to meet the Committee to discuss this submission or participate in a public hearing process.

Yours sincerely,

 Angus Nardi
Executive Director

ATTACHMENT 1

**SCCA submission to the Commonwealth Consumer Affairs Advisory Council,
7 March 2012**

SHOPPING CENTRE COUNCIL OF AUSTRALIA

7 March 2012

CCAAC Gift Card Review
Care of Manager
Consumer Policy Framework Unit
Infrastructure, Competition and Consumer Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam,

Gift cards in the Australian market – Issues Paper

Overview

The Shopping Centre Council of Australia (SCCA) would like to make the following submission in response to the Issues Paper released in December 2011 "*Gift cards in the Australian market.*" Our comments relate mainly to shopping centre gift cards (i.e. gift cards accepted or honoured by affiliated retailers in a shopping centre or within a shopping centre company).

The terms of reference of the Commonwealth Consumer Affairs Advisory Council (CCAAC) for this inquiry have been summarised as "to explore and develop options to better protect consumers who use gift card products" (*Foreword* p. iii).

In October 2007, the Council of Australian Governments (COAG) adopted a *Guide for Ministerial Councils and National Standard Setting Bodies on Best Practice Regulation*. It is important that the CCAAC adheres to this COAG Guide when exploring and developing options to "better protect consumers who use gift cards". The COAG Guide requires regulatory bodies to, firstly, establish whether there is a problem which needs to be addressed (Principle 1) and, secondly, if it is found that there is a problem, (i.e. if a case has been established for (further) government intervention), to consider a range of policy options (including non-regulatory and self-regulatory approaches) but always working from an initial presumption against new or increased regulation (Principle 2).

We strongly urge the CCAAC, in its investigations, to adhere to these principles. It is our firm view that the Issues Paper has failed to identify a problem. There is no evidence in the Issues Paper of an issue which requires additional regulation. While the Issues Paper cites a sample of typical complaints, there is no evidence of the *number or volume of complaints* each year. Nor is there any attempt to put consumer complaints in a proper perspective by citing the number of complaints as a proportion of the volume of gift cards sold in a year (estimated by Wright Express Australia to be around 34 million cards last year, both closed-loop and open-loop cards) or as a proportion of the estimated dollar amount of gift card sales (i.e. \$1.8 billion to \$2 billion a year, again according to estimates by Wright Express Australia).¹

¹ Estimates supplied by Wright Express Australia to QIC, a member of the SCCA.

Leaders in Shopping Centre Advocacy

We seriously doubt, for example, if the number of complaints received by the consumer affairs or fair trading departments around Australia last year would have numbered anywhere near 3,400 (which is only 0.01% of the number of cards sold last year.) If this assumption is correct – and it would have been useful if the Issues Paper had revealed the number of complaints – then the fact that fewer than one in ten thousand gift cards sold resulted in a complaint is evidence that there is no problem which requires additional government regulation. (This, of course, also assumes that every complaint is a valid complaint.)

We have used the phrase “additional government regulation” since the issue and use of gift cards is already regulated by the provisions of the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010*) and the *Corporations Act 2001*, as the Issues Paper makes clear. The provisions of the ACL – such as those addressing misleading and deceptive conduct; false and misleading representations; unfair contract terms; unconscionable conduct etc. – apply across the board to all consumer products, including the sale of gift cards. There is no evidence, from the Issues Paper, of a need for better protection, or additional protection, for consumers of gift cards than is already provided under the ACL to the consumers of other products.

We firmly believe that all of the “issues facing consumers” discussed in the Issues Paper can be addressed by full and proper disclosure at the time of issuance of the gift card. All gift card issuers provide to customers the terms and conditions of use of the gift card at the point of sale or, if purchased online, these are also available on the web. Provided there is transparency on the part of the organisation which issues the gift card – which clearly addresses key matters such as expiry date; restrictions on low value use; fees and charges; and limitations on use – then there is no need for additional regulation by governments.

In our view, if the CCAAC considers there is a need for further regulation of gift cards, this should be in the form of published guidelines to card issuers and consumers by the appropriate regulatory authority, following detailed consultation with stakeholders. With the advent of the Australian Consumer Law, and in the interests of national consistency, we recommend that the Australian Competition and Consumer Commission (ACCC) would be the appropriate regulatory authority to issue such guidelines, if indeed such guidelines are considered necessary. We strongly recommend the preparation of any such guidelines should be done in consultation with relevant card issuers, retailers, gift card system providers and industry bodies.

Key Issues Affecting Consumers

We now address each of the “key issues affecting consumers” raised in the Issues Paper (page 7).

1. Expiry dates.

It is important that gift cards have an expiry date. In the case of shopping centre gift cards this date is usually twelve months after the date of purchase. The onus should be on the gift card holder to fully redeem the gift card before the expiry date. Companies cannot be expected to carry a significant and growing unknown liability in their financial accounts which would be the result if cards did not have an expiry date. Expiry dates are very much a case of ‘buyer beware’ and there is widespread community awareness (among purchasers and recipients) that gift cards have expiry dates. Gift card providers should not be made liable for inaction on the part of customers.

Provided the purchaser of the gift card is fully informed at the time of purchase about the expiry date of the card, and the expiry date is readily obtained by the recipient of the gift card, it is our view that no further regulatory action is required. This is a matter which should be addressed in the guidelines we have suggested above. Many companies operate an unofficial period of grace in which they accept expired cards and, even after such grace periods have expired, some companies are still willing to consider applications on the basis of special circumstances.

We see no justification for standardising expiry dates since this is a matter which can vary from company to company for sound commercial reasons. A major shopping centre company, for example, may be able to afford to operate a period of 12 months in which a card can be redeemed but such a long period may cause difficulties for a retail company which issues its own gift card. Expiry dates can also be a competitive issue: one company may deliberately impose a longer expiry date because it believes this may give a competitive advantage over a rival. Such decisions are commercial decisions and, provided appropriate disclosures are made, should not be regulated.

2. Restrictions on low value use.

The terms and conditions of some shopping centre gift cards specify that individual retailers may not accept gift cards for purchases below a certain (low) value. It is not common, however, for retailers to impose such restrictions since the primary purpose of gift cards is to drive retail sales. Nevertheless, provided this is clearly noted in the terms and conditions of use of the card available to the purchaser at the time of purchase, this is not a restriction that should be prohibited.

3. Terms and conditions in the event of insolvency.

The insolvency of the gift card issuer is always a risk for a consumer but this is a general consumer risk and is not a risk that can be mitigated by regulation. There is no argument why gift card users should receive priority in the creditors' queue in the event of insolvency. This is a risk that could be exacerbated by wrong-headed regulation. For example, regulation which compulsorily required a long expiry date for gift cards would increase the risk that a card could not be redeemed in the event of insolvency since it may reduce the incentive for the purchaser or recipient of the card to redeem the card as soon as possible after purchase.

The issue of the terms and conditions of use being changed by receivers when the issuer of the gift card is in administration would seem to be a matter for the Australian Securities and Investments Corporation (ASIC).

4. Fees and charges.

Shopping centre companies which issue gift cards are in a different position to single retailers which do the same. Since the shopping centre company operates as an aggregator of tenants, its costs of administering and maintaining the gift card system are much higher than a single retailer issuer of cards. A retail company can often absorb many of these costs through the direct sale of its inventory. The advantage of a shopping centre gift card is that it enables retailers, particularly small retailers, to participate in a gift card scheme when they normally might not have the critical mass or facilities to operate such a scheme themselves.

If fees are charged on the issue of the card, these fees are usually nominal and are obviously known to the purchaser upfront. There are usually no additional fees and charges for shopping centre gift cards and, if there are such fees, these should be stipulated upfront at the time of purchase. The use of periodic fees may become more common if, for example, there was to be regulated long expiry periods.

We understand that it is unusual in the case of shopping centre gift cards for periodic fees or charges to apply to outstanding balances. Nevertheless we see no reason why periodic fees and charges which might apply to the outstanding balance of a gift card should be outlawed, provided these are clearly conveyed to the purchaser of the gift card in the terms and conditions of use.

5. Limitations on use with respect to retailers that accept the gift card.

Shopping centre owners would like to be in a position where they could enforce all retailers within the shopping centre to accept their own gift card. Unfortunately, particularly in the case of major retailers (who often have their own gift card system), this is not possible. Retailers accept gift cards at their own discretion and in some circumstances block gift card BIN numbers from working via their EFTPOS terminals. It is often the case that retailers without EFTPOS facilities are also unable to redeem the card. Once again this is a matter that is addressed in the terms and conditions of use of the gift card, ensuring appropriate disclosure is made.

6. Receiving change.

There is no reason why gift cards should offer the customer the balance difference in cash if the card is used and the remaining funds are under a certain amount. One of the purposes of the gift card is to drive retail sales within the store or within the shopping centre. It is therefore not unreasonable to expect the purchaser or recipient of the gift card to use the balance towards another purchase. Requiring the issuer of a gift card to offer the customer a cash balance changes the nature of the transaction from being one of a gift card to being one of financial product, which is fundamentally different to the commercial intention of the gift card product.

Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents Australia's major shopping centre owners and managers. Our owners own and manage more than 11 million square metres of retail space around Australia. A number of our members operate shopping centre gift card programs and the terms and conditions of the gift card are available on their websites.

Our members are AMP Capital Investors, Brookfield Office Properties, Centro Retail Australia, Charter Hall Retail REIT, Colonial First State Global Asset Management, DEXUS Property Group, Eureka Funds Management, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland, Westfield Group and Westfield Retail Trust.

We are very happy to elaborate on any aspect of this submission. Please feel free to contact either:

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SYDNEY NSW 2000
Phone: 02 9033 1912

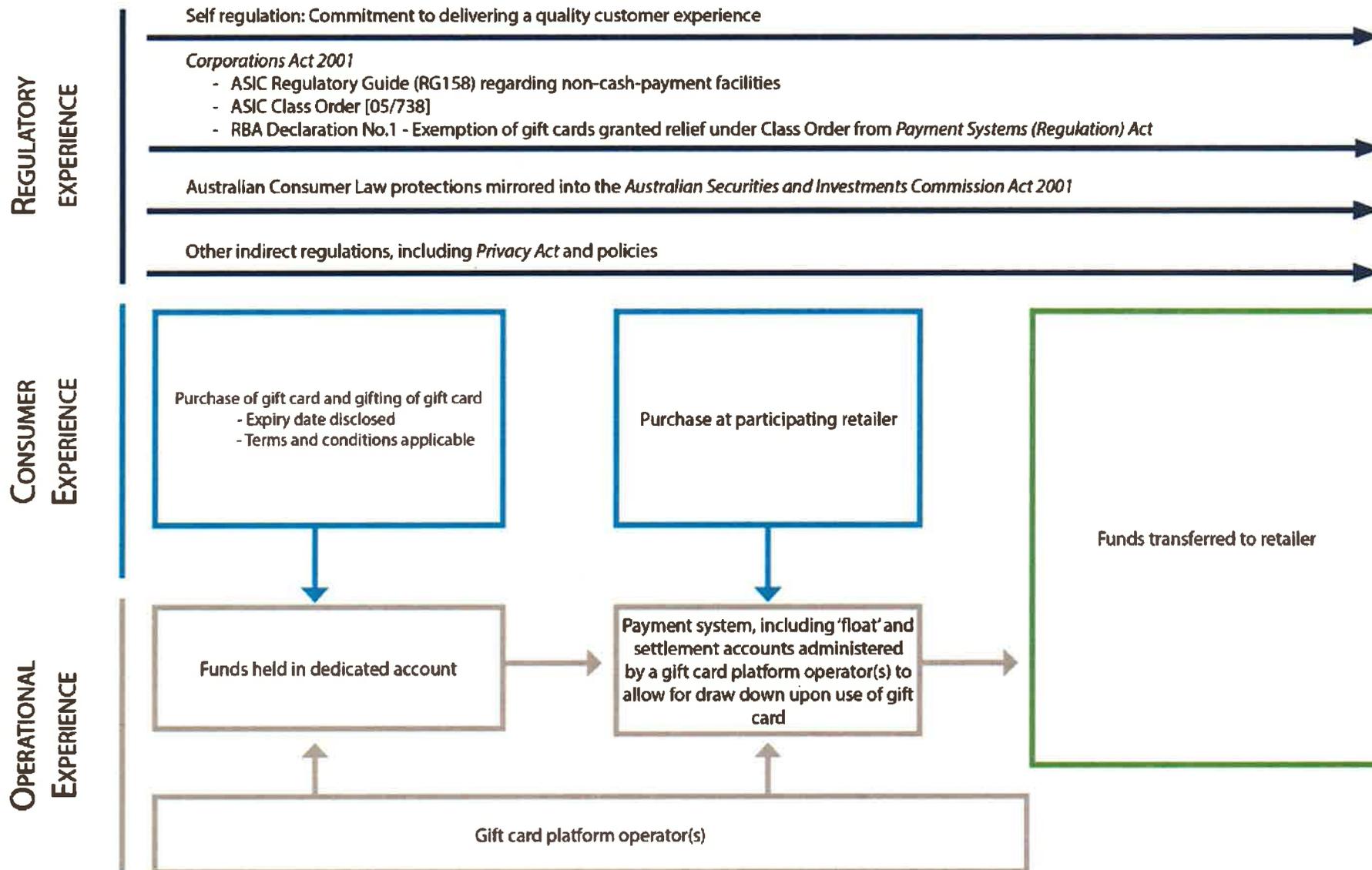
Angus Nardi
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Yours sincerely,

 Milton Cockburn
Executive Director

ATTACHMENT 2

TYPICAL APPROACH TO SHOPPING CENTRE GIFT CARD SCHEME



ATTACHMENT 3

**Australian Securities and Investments Commission Regulatory Guide 185 –
Non-cash payment facilities, 15 November 2005**



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 185

Non-cash payment facilities

Related instruments [CO 05/736], [CO 05/737], [CO 05/738],
[CO 05/739], [CO 05/740]

Chapter 7—Financial services and markets

Issued 15/11/2005

From 5 July 2007, this document may be referred to as Regulatory Guide 185 (RG 185) or Policy Statement 185 (PS 185). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 185.1) or their policy statement number (e.g. PS 185.1).

What this guide is about

RG 185.1 This guide sets out our approach to regulating non-cash payment (NCP) facilities under the *Corporations Act 2001* (Corporations Act).

Note: For a definition of 'NCP facility', see 'Key terms' and the Schedule.

RG 185.2 It discusses:

- A our general approach to regulating NCP facilities, including our policy on granting relief from provisions of the Corporations Act
see RG 185.5–RG 185.21
- B our approach to low value NCP facilities
see RG 185.22–RG 185.31
- C our approach to the following specific products that constitute NCP facilities:
 - (a) gift vouchers or cards;

- (b) prepaid mobile phone accounts;
- (c) loyalty schemes; and
- (d) electronic road toll devices

see RG 185.32–RG 185.55

RG 185.3 The guidance in this guide should be read in the context of the overall framework of provisions governing the regulation of NCP facilities: see the Schedule.

RG 185.4 We note that regulation of NCP facilities as financial products under the Corporations Act is recent and products constituting NCP facilities continue to develop and evolve. Therefore, we may need to review our policy at some point in the future to take into account our experience in regulating NCP facilities and the nature and extent of industry developments.

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Important note: The content of this guide is based on the law as at 15 November 2005. Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements. This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act applies to you. It is your responsibility to determine your obligations under the Corporations Act.

A Our general approach

Our policy

How will we regulate NCP facilities?

RG 185.5 We will adopt a flexible approach to administering the financial services licensing, conduct and disclosure obligations for NCP facilities under the Corporations Act. We will take into account the fact that the provision of NCP facilities is a developing area and that the concept of an 'NCP facility' covers a broad spectrum of facilities.

RG 185.6 As a starting point, our policies on licensing, conduct and disclosure will generally apply to the provision of NCP facilities.

What relief is available?

RG 185.7 We will consider applications for individual or class order relief for products or arrangements that constitute NCP facilities on a case-by-case basis under:

- (a) our general exemption and modification powers in Ch 7 of the Corporations Act; and
- (b) our general policy on granting relief:
 - (i) from the licensing provisions (see Regulatory Guide 167 *Licensing: Discretionary powers* (RG 167)); and
 - (ii) from the product disclosure requirements (see Regulatory Guide 169 *Disclosure: Discretionary powers* (RG 169)).

RG 185.8 When considering applications for relief, we will take into account:

- (a) whether we think Parliament intended the NCP facility to be regulated as a financial product under the Corporations Act;
- (b) whether most non-cash payments can only be made to the issuer of the NCP facility or related bodies corporate of the issuer;
- (c) whether financial services provided by means of the NCP facility are a significant part of the applicant's business;
- (d) the nature, scale and complexity of the NCP facility (especially whether it is simple, easy-to-use and well understood by retail consumers);
- (e) the potential for consumer problems to arise from the use of the NCP facility;

REGULATORY GUIDE 185: Non-cash payment facilities

- (f) whether the NCP facility and related financial services are subject to adequate alternative regulation, such as regulation by an industry-specific regulator; and
- (g) the likelihood of significant developments in the nature and/or use of the NCP facility.

RG 185.9 We will have regard to the factors in RG 185.8 in tailoring any relief that we grant. For example, we might:

- (a) grant conditional relief when we think a facility is intended to be regulated as an NCP facility under the Corporations Act, but we consider an adapted form of the licensing, conduct and disclosure requirements is needed to take into account the particular circumstances of the NCP facility;
- (b) grant unconditional relief when we think an NCP facility as currently operated is highly unlikely to create problems for consumers, but we think that potential developments in the operation of the NCP facility may require us to change our approach in the future; or
- (c) declare that an NCP facility is not a financial product where we think it is unintentionally caught by the broad definition of ‘NCP facility’ in the Corporations Act.

RG 185.10 Taking into account the considerations in RG 185.7–RG 185.9, we have granted class order relief from the Corporations Act for the following NCP facilities.

Table 1: Summary of class order relief

| NCP facility | Description | Summary of relief |
|--|--|--|
| Low value NCP facilities: see [CO 05/736] and Section B | NCP facility conducted on a small scale | Conditional licensing, conduct and disclosure relief (including from the ongoing disclosure obligations and advertising provisions) and hawking prohibition relief |
| Gift vouchers or cards: see [CO 05/738] and Section C | NCP facility that stores value in a device (such as a voucher or card) that is marketed solely as a ‘gift’, is not redeemable for cash and is not reloadable | Unconditional licensing, conduct and disclosure relief (including from the ongoing disclosure obligations and advertising provisions) and hawking prohibition relief |
| Prepaid mobile phone accounts: see [CO 05/740] and Section C | NCP facility enabling use of public mobile telecommunication services, which has been paid for in advance | Unconditional licensing, conduct and disclosure relief (including from the ongoing disclosure obligations and advertising provisions) and hawking prohibition relief |

| NCP facility | Description | Summary of relief |
|---|--|---|
| Loyalty schemes: see [CO 05/737] and Section C | A scheme operated by or on behalf of its issuer to encourage the purchase of goods or use of services that the issuer or third parties participating in the scheme provide | Declared not to be a financial product under the Corporations Act |
| Electronic road toll devices: see [CO 05/739] and Section C | NCP facility used solely for the payment of road tolls | Declared not to be a financial product under the Corporations Act |

RG 185.11 If we grant relief from the licensing, conduct or disclosure provisions, both the consumer protection provisions in Div 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the misconduct provisions in Part 7.10 of the Corporations Act continue to apply. Even if we declare an NCP facility not to be a financial product, the ASIC Act consumer protection provisions continue to apply.

Note: Where we use our powers to grant unconditional relief or declare that certain NCP facilities are not financial products, we think that persons providing financial services in relation to those NCP facilities should have regard to some key good consumer protection practices. For details of what we think are good consumer protection practices, see RG 185.19–RG 185.21.

Underlying principles

RG 185.12 We will regulate NCP facilities in a way that is consistent with the Parliamentary intention to include NCP facilities as financial products under the Corporations Act. This means:

- (a) we generally expect persons providing any financial services in relation to NCP facilities to hold an Australian financial services (AFS) licence and comply with the conduct and disclosure obligations of the Corporations Act; and
- (b) we will consider any applications for relief under our general policy in RG 167 and RG 169, but also take into account the specific factors in RG 185.8.

Explanations

How will we regulate NCP facilities?

RG 185.13 NCP facilities were expressly included as financial products in the *Financial Services Reform Act 2001* (FSR Act) because they were clearly intended to be regulated as part of the financial services regulatory regime. For example, we consider that the financial services regulatory regime was clearly intended to regulate most debit cards and online

payment arrangements. Such facilities generally allow for transfer of a client's money to a third party and raise both consumer protection and market integrity issues: see RG 185.14–RG 185.15.

Note 1: See the Schedule for a detailed definition of NCP facility and further discussion of the regulatory framework for NCP facilities, including the licensing, conduct and disclosure requirements under the Corporations Act.

Note 2: For more information about our general policies on financial services licensing, conduct and disclosure, see:

- (a) Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146);
- (b) Regulatory Guide 164 *Licensing: Organisational capacities* (RG 164);
- (c) Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165);
- (d) Regulatory Guide 166 *Licensing: Financial requirements* (RG 166);
- (e) Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* (RG 168);
- (f) Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175); and
- (g) Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181).

Consumer protection

RG 185.14 NCP facilities raise a number of consumer protection issues. The licensing, conduct and disclosure requirements in the Corporations Act address some of the key risks to consumers, including the risk that:

- (a) persons providing financial services in relation to NCP facilities will not be able to carry out their obligations in delivering financial services;

Note: The licensing assessment process, in particular, helps address this risk by requiring applicants to demonstrate adequate competence and resource levels (e.g. by meeting minimum standards for education and training).

- (b) the consumer will lose value because of fraudulent or negligent conduct by persons providing financial services in relation to NCP facilities; and
- (c) consumers will choose inappropriate financial products because they are inadequately informed about key features of an NCP facility, such as:
 - (i) an issuer's right to unilaterally change the terms and conditions of the product without notice;
 - (ii) their lack of or restricted access to refunds for unused value; and
 - (iii) their limited ability to promptly replace a card or other item required for the NCP facility without detriment if it is lost or stolen.

Market integrity

RG 185.15 NCP facilities also raise market integrity issues similar to those raised by other financial products regulated by ASIC. NCP facilities normally involve a mechanism allowing for the transfer of value. Those who provide financial products of this kind must do so competently and with integrity to minimise the risk of substantial loss of value and damage to the reputation of the market for NCP facilities.

What relief is available?

RG 185.16 We accept that the definition of NCP facility in the Corporations Act is broad and may inadvertently catch arrangements not intended to be regulated as NCP facilities.

RG 185.17 We recognise that, for some types of NCP facilities, relief is appropriate because:

- (a) compliance with the financial services regulatory regime may be disproportionately burdensome; and
- (b) the likelihood and extent of potential consumer detriment may be minimal.

RG 185.18 Further, depending on the circumstances:

- (a) a reasonable person may think that the predominant purpose in providing the NCP facility is not a financial product purpose; or
- (b) the fact that the overwhelming volume of payments made using an NCP facility fall within the exemptions in s763D(2)(a) and reg 7.6.01(1)(lb) may indicate that Parliament did not intend such facilities be regulated as NCP facilities under the Corporations Act: see the Schedule at RG 185.64–RG 185.65.

Good consumer protection practices

RG 185.19 Even where we use our powers to declare that certain NCP facilities are not financial products or grant unconditional relief, we think that, as a matter of good practice, persons providing services in relation to these facilities should have regard to some good consumer protection practices. These practices will:

- (a) help consumers make informed decisions before they acquire the NCP facility; and
- (b) provide ongoing protection of consumer interests.

RG 185.20 A key component of good practice in this context is good disclosure. Good disclosure means ensuring that consumers receive adequate information about the product before they make a decision to buy it. We think consumers should receive information about the key terms and conditions of the product in a document worded and presented

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in a clear, concise and effective manner. We also think that issuers of these arrangements should consider disclosure about the following key features of the facilities:

- (a) whether any of the terms and conditions may be unilaterally varied by the issuer and how the client can find information about any new terms and conditions;
- (b) whether the whole or any part of the benefits from the facility is subject to an expiry date and if so, how the client can find out details of the expiry date;

Note: In the case of a facility subject to an expiry date, it may be appropriate to make arrangements ensuring prominent disclosure of the expiry date.

- (c) fees or charges for acquiring or using the facility and, where they are subject to change during the life of the facility, how the client can find information about new fees or charges;
- (d) how unauthorised or mistaken transactions, or the loss or theft of the physical device (if there is one) for or means of using the facility, are dealt with; and
- (e) how any disputes will be dealt with.

Note: We think issuers should consider maintaining an internal dispute resolution process that takes into account guidance in the Australian Standard on Complaints Handling (AS 4269–1995).

RG 185.21 To protect consumers' ongoing interests, we think they should be notified of unilateral variations to the terms and conditions of the facility or changes to fees or charges for using the facility. Issuers should think about giving this ongoing disclosure in a way that is easy for consumers to find (e.g. signage at point-of-sale counters or notice on an internet website).

B Low value NCP facilities

Our policy

What relief is available?

RG 185.22 We have granted conditional class order relief to persons providing financial services in relation to low value NCP facilities from:

- (a) certain provisions in Part 7.6, including the licensing requirements;
- (b) conduct requirements in Parts 7.7 and 7.8;
- (c) the product disclosure requirements in Part 7.9; and
- (d) the hawking prohibition in s992A.

See Class Order [CO 05/736].

RG 185.23 Our relief applies to low value NCP facilities that satisfy the following test:

- (a) the total amount available for the making of non-cash payments under all facilities of the same class held by any one client does not exceed \$1000 at any one time;
- (b) the total amount available for making non-cash payments under all facilities of the same class does not exceed \$10 million at any time; and
- (c) the facility is not part of another financial product.

What are the conditions of relief?

RG 185.24 Under our relief, the low value NCP facility issuer must take reasonable steps to ensure that:

- (a) before or at the time the facility is offered to a retail client, the terms and conditions of the facility are disclosed to the client in a document (disclosure document) worded and presented in a clear, concise and effective manner. The disclosure document must separately set out in a prominent manner:
 - (i) whether any of the terms and conditions may be unilaterally varied by the issuer and how the client can find information about any new terms and conditions;
 - (ii) whether the whole or any part of the benefits from the facility is subject to an expiry date and if so, how the client can find out details of the expiry date;
 - (iii) how unauthorised or mistaken transactions, or the loss or theft of the physical device (if there is one) for or means of using the facility, are dealt with; and

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- (iv) fees or charges for acquiring and using the facility and, where they are subject to change during the life of the facility, how the client can find information about new fees or charges;
 - (b) where the facility is subject to an expiry date:
 - (i) if the client is provided with a physical device (such as a stored value card or document) to make non-cash payments, the expiry date is prominently set out on the device; and
 - (ii) otherwise, the expiry date is set out in the disclosure document;
- Note: Handwriting the expiry date on the physical device or disclosure document will meet the requirements of this condition.
- (c) the client is provided with a convenient means by which, at no charge, they can:
 - (i) check their balance under the facility;
 - (ii) if they are not provided with a physical device, check any relevant expiry date applying to the facility; and
 - (iii) obtain at reasonable intervals a transaction history of the past ten transactions, or such transactions that have occurred;
 - (d) if the terms and conditions of the facility are unilaterally varied or the fees or charges for using the facility are changed during its life:
 - (i) information about the variation or change is made available to the client in the manner described in the disclosure document;
 - (ii) at each place where the facility may be acquired:
 - (A) a statement setting out the effect of the variation or change is displayed in a public area; and
 - (B) the new terms and conditions or fees or charges are made available to the client on request; and
 - (iii) if the issuer makes information about the facility available on an internet website, a statement setting out the effect of the variation or change, information about the variation or change and the new terms and conditions or fees and charges are made available on the website; and
 - (e) if the facility is issued to a retail client, adequate internal dispute resolution processes in accordance with the Australian Standard on Complaints Handling (AS 4269–1995) are maintained.

Note: We consider it good practice for the issuer to document internal dispute resolution processes. For more detail, see Regulatory Guide 165 *Licensing: Internal and external dispute resolution* at RG 165.17.

The low value NCP facility issuer must lodge with us a notice in writing that they intend to rely on the class order: see RG 185.31.

RG 185.25 Persons, other than issuers, who provide financial services in relation to low value NCP facilities must take reasonable steps to ensure that:

- (a) before or at the time the facility is offered to a retail client, the client is given a disclosure document; and
- (b) where the facility is subject to an expiry date:
 - (i) if the client is provided with a physical device to make non-cash payments, the expiry date is prominently set out on the device; and
 - (ii) otherwise, the expiry date is set out in the disclosure document.

Note: Handwriting the expiry date on the physical device or disclosure document will meet the requirements of this condition.

A notice of reliance on [CO 05/736] must also be lodged with us: see RG 185.31.

Underlying principles

RG 185.26 We have acted to avoid unnecessary or disproportionately burdensome regulation. We consider that it is not appropriate for the Corporations Act obligations to apply in full given the nature, scale and complexity of low value NCP facilities. However, we consider that consumers need some protections from the potential risks created by low value NCP facilities.

Explanations

What relief is available?

RG 185.27 We think low value NCP facilities are generally simple, easy-to-use and well understood by retail consumers. In addition, the costs associated with obtaining and complying with an AFS licence are likely to be disproportionate to:

- (a) the amount of income likely to be derived by the person providing financial services in relation to the low value NCP facility; and
- (b) the extent of risk to any individual client through their use of the low value NCP facility.

RG 185.28 We have adopted the thresholds in RG 185.23 to limit potential consumer detriment and to ensure that the relief is confined to facilities that are conducted on a small scale.

RG 185.29 Our approach is consistent with approaches to the regulation of similar facilities in other jurisdictions. For example, the framework for regulating electronic money in the European Union is set

out in the European Commission's E-Money Directive, which grants Member States discretion to waive the application of requirements for small e-money issuers.

Note 1: For further information, see Directive 2004/46/EC. The European Commission has launched a review of this Directive to reassess whether the legal framework reflects modern market developments.

Note 2: This approach has been implemented in the United Kingdom: see 'FSA Handbook—Electronic Money Specialist Sourcebook' (March 2005) and 'Guidance on the scope of the regulated activity of issuing e-money (AUTH App 3)' (March 2005).

What are the conditions of relief?

RG 185.30 Low value NCP facilities can carry amounts of monetary value up to \$1000 for the holder's benefit. For some people, this is quite a substantial amount of money. Therefore, we have imposed some initial and ongoing conduct and disclosure obligations that will:

- (a) help consumers make informed decisions before they acquire low value NCP facilities; and
- (b) provide ongoing protection of their interests.

Notice of reliance

RG 185.31 Under our relief, a person providing financial services in relation to a low value NCP facility must be covered by a notice, lodged with us, informing us that they are relying on the relief in [CO 05/736]. This will allow us to carry out our monitoring and surveillance activities more effectively.

How to lodge a notice of reliance

- Lodge the notice of reliance in writing addressed to:
Australian Securities and Investments Commission
Business Management and Services—Regulation
GPO Box 9827, Sydney NSW 2001
- Make sure the notice:
 - identifies the entity or entities relying on this relief;
 - includes a reference to ASCOT Form Number FS86B;
 - notes the relief to be relied on (i.e. [CO 05/736]); and
 - is signed by an appropriate person. In the case of a company, this means a director or company secretary of the company.

You can also contact ASIC Infoline on 1300 300 630 for information and assistance.

C Other relief

Our policy

RG 185.32 This section sets out our approach to the following specific products where they constitute NCP facilities and are not part of other financial products:

- (a) gift vouchers or cards (see RG 185.33–RG 185.35);
- (b) prepaid mobile phone accounts (see RG 185.36–RG 185.37);
- (c) loyalty schemes (see RG 185.38–RG 185.40); and
- (d) electronic road toll devices (see RG 185.41–RG 185.42).

Gift vouchers or cards

RG 185.33 We have granted unconditional class order relief to persons providing financial services in relation to gift vouchers or cards constituting NCP facilities from:

- (a) certain provisions in Part 7.6, including the licensing requirements;
- (b) conduct requirements in Parts 7.7 and 7.8;
- (c) the product disclosure requirements in Part 7.9; and
- (d) the hawking prohibition in s992A.

See Class Order [CO 05/738].

RG 185.34 This relief applies where the gift voucher or card constituting the NCP facility has the following characteristics:

- (a) it has the ability to store monetary value, which is not redeemable for cash, except where amounts unlikely to be conveniently used under the facility are withdrawn;

Note: For example, a nominal amount standing to the credit of the facility as a result of one or more non-cash payments through the facility (i.e. as 'change' from a transaction or transactions) can be redeemed as cash.

- (b) it is not reloadable (i.e. a client can only make one payment for the gift voucher or card and no person can make additional payments that increase the value of the gift voucher or card, after it is initially acquired);

Note: A gift voucher or card is not reloadable where the stored value on the gift voucher or card is increased to reverse payments in the case of refunds or corrections.

- (c) it can be used on multiple occasions;
- (d) it is marketed solely as a *gift* voucher or *gift* card; and
- (e) where it is subject to an expiry date, appropriate arrangements are in place to prominently disclose that expiry date.

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Note: For example, where use of the facility requires a physical device, the expiry date must be prominently set out on the device. This includes handwriting it on the device.

RG 185.35 Our relief means that the financial services licensing, conduct and disclosure obligations of the Corporations Act (together with the hawking prohibition) will not apply to gift vouchers and cards.

Prepaid mobile phone accounts

RG 185.36 We have granted unconditional class order relief to persons providing financial services in relation to prepaid mobile phone accounts constituting NCP facilities from:

- (a) certain provisions in Part 7.6, including the licensing requirements;
- (b) conduct requirements in Parts 7.7 and 7.8;
- (c) the product disclosure requirements in Part 7.9; and
- (d) the hawking prohibition in s992A.

See Class Order [CO 05/740].

RG 185.37 Our relief means that the financial services licensing, conduct and disclosure obligations of the Corporations Act (together with the hawking prohibition) will not apply to these accounts.

Loyalty schemes

RG 185.38 We have declared that loyalty schemes are not financial products for the purposes of Ch 7 of the Corporations Act where those schemes have the following characteristics:

- (a) their sole or main purpose is to promote spending on the goods and/or services of the issuer or third parties participating in the scheme;
- (b) clients are allocated a measure of value (credits) as a result of acquiring or using goods and/or services of the issuer or third parties participating in the scheme, whether or not a monetary value is expressly attributed to the credits; and
- (c) the credits can be used to make a payment or part payment for goods or services or to obtain some other benefit.

See Class Order [CO 05/737].

Note: Examples of loyalty schemes that would fall within [CO 05/737] may include schemes that encourage the use of credit card payments or airline services, as well as schemes that promote spending at shopping centres or department stores.

RG 185.39 This means that the financial services licensing, conduct and disclosure requirements (including the hawking prohibitions) and Part 7.10 of the Corporations Act will not apply to these loyalty schemes.

RG 185.40 We have also granted unconditional relief from the requirement to be registered under Ch 5C of the Corporations Act where

a loyalty scheme constitutes a managed investment scheme: see [CO 05/737].

Electronic road toll devices

RG 185.41 We have declared that electronic road toll devices constituting NCP facilities are not financial products for the purposes of Ch 7 of the Corporations Act: see Class Order [CO 05/739].

RG 185.42 Our relief means that the financial services licensing, conduct and disclosure obligations (together with the hawking prohibition) and Part 7.10 of the Corporations Act will not apply to these devices.

Underlying principles

RG 185.43 In adopting a flexible approach to NCP facilities, we have taken into account the consumer protection and market integrity goals of the Corporations Act, the risks posed by NCP facilities and the need to avoid unnecessary or disproportionately burdensome regulation. In doing so, we have been guided by the factors in RG 185.8 in tailoring our relief.

Explanations

Gift vouchers or cards

RG 185.44 We think:

- (a) gift vouchers and cards are simple, easy-to-use and well understood by retail consumers;
- (b) providing gift vouchers or cards that are NCP facilities does not generally constitute a significant part of the business of the person providing financial services in relation to the gift voucher or card; and
- (c) the costs associated with obtaining and complying with an AFS licence are likely to be disproportionate to any risks to consumers created by the use of gift vouchers or cards.

RG 185.45 [CO 05/738] does not apply to gift vouchers or cards constituting NCP facilities that are:

- (a) redeemable for cash;
- (b) reloadable; or
- (c) not marketed as gifts (for example, [CO 05/738] will not apply if the gift voucher or card is marketed as being a debit-style device or a tool that helps consumers with their domestic budgeting).

This is because we think that relief for facilities with these characteristics would create unacceptable consumer outcomes. Such facilities have the

features of 'smart cards' or bank-issued debit cards, both of which are intended to be regulated NCP facilities in the Corporations Act.

RG 185.46 We have granted unconditional relief for gift vouchers or cards, rather than declare them not to be financial products, because we think that potential developments in the use or features of these products may mean that they will create consumer or market integrity risks in the future. We may need to impose conditions on our relief or apply all or part of Ch 7 of the Corporations Act to address these risks. We will follow any developments (including any complaints from consumers) in deciding whether to review our policy at some point in the future.

Prepaid mobile phone accounts

RG 185.47 Our assessment of prepaid mobile phone accounts is that they are currently not intended to be used primarily for making non-cash payments to persons other than the issuer of the prepaid mobile phone account. This means that their provision as an NCP facility, at present, is not a significant part of the business of the person providing them.

RG 185.48 There is also an alternative regulatory regime, primarily under the *Telecommunications Act 1997*, that governs the operations of mobile telecommunications suppliers. While this regime is not directed to the exact objectives of the Corporations Act, it provides for:

- (a) certain disclosures to be made to consumers about contracts, prices and terms and conditions;
- (b) adequate complaints handling procedures; and
- (c) the ability to approach the Telecommunications Industry Ombudsman (i.e. an external dispute resolution forum) in the case of some unresolved consumer complaints.

We expect that mobile telecommunications suppliers will continue to comply fully with this regime when relying on our relief under [CO 05/740].

RG 185.49 We have granted unconditional relief to prepaid mobile phone accounts, rather than declare that they are not financial products, because we think future developments in the mobile telecommunications industry may lead to prepaid mobile phone accounts being used to make significant purchases from third parties. Such developments may create greater consumer and market integrity risks and warrant the imposition of conditions on our relief or partial or full application of the financial services regulatory regime under Ch 7 of the Corporations Act. We will follow this industry's developments and may review our policy at some point in the future depending on the scope and extent of the developments.

RG 185.50 Our approach is consistent with approaches to the regulation of prepaid mobile phone accounts in other jurisdictions. For example, the European Commission has indicated that when regulating prepaid mobile phone accounts:

- (a) a flexible approach should be adopted because market practice may change over time given technological advances in the mobile phone industry; and
- (b) it may be difficult to justify imposing all elements of the E-Money Directive from a 'proportionality' viewpoint considering the risks taken by both mobile operators and consumers. The European Commission does not preclude imposing the requirements for consumer protection or financial stability reasons in the future.

Note: See 'Guidance Note: Application of the E-Money Directive to Mobile Operators' and 'Consultation Paper of DG Internal Market: Application of the E-Money Directive to Mobile Operators'. For further information about the E-Money Directive, see RG 185.29.

Loyalty schemes

RG 185.51 We regard loyalty schemes as generally simple, easy-to-use and well understood by retail consumers. They are usually issued at limited cost (if any) to the client and as marketing tools ancillary to other services (such as credit) provided by the issuer or its business partners. Therefore, the provision of loyalty schemes is not a significant part of the business of the scheme's issuer or business partners.

Note: There is also adequate alternative regulation for unsolicited contact with clients (i.e. hawking) for loyalty schemes associated with credit products regulated under the Uniform Consumer Credit Code: see s145 and 146 of that Code.

RG 185.52 For the reasons outlined in RG 185.51, we think it was not intended that loyalty schemes be regulated as an NCP facility under the Corporations Act. Therefore, we have declared that loyalty schemes are not financial products for the purposes of Ch 7 of the Corporations Act.

RG 185.53 [CO 05/737] does not preclude the need to comply with the consumer protection provisions of the ASIC Act: see RG 185.11. We expect persons providing financial services in relation to loyalty schemes to maintain full compliance with these provisions.

Note 1: The consumer protection provisions of the ASIC Act will apply if the loyalty scheme is a financial product. This will be the case where the loyalty scheme has the characteristics set out in RG 185.38 and no exemption from being a financial product under the ASIC Act applies. The consumer protection provisions also apply to conduct in relation to financial services. For example, providing loyalty schemes as an adjunct to credit facilities may involve conduct in relation to financial services.

Note 2: Where the consumer protection provisions under Div 2 of Part 2 of the ASIC Act do not apply to a loyalty scheme, such loyalty schemes will be subject to the relevant provisions in the *Trade Practices Act 1974*.

Electronic road toll devices

RG 185.54 We think electronic road toll devices are simple, easy-to-use and well understood by retail consumers. In addition, these products are not provided to facilitate multi-purpose payments. They are directed to the limited purpose of paying road tolls. Given this background, we think Parliament did not intend electronic road toll devices to be caught by the financial services regulatory regime. Accordingly, we have declared that they are not financial products for the purposes of Ch 7 of the Corporations Act.

RG 185.55 [CO 05/739] does not preclude the need for compliance with the consumer protection requirements in the ASIC Act: see RG 185.11. Persons providing financial services in relation to electronic road toll devices must fully comply with these requirements.

Schedule: The regulatory framework

Important note: The information in this Schedule does not constitute legal advice. It provides general guidance about the regulatory framework for NCP facilities under the Corporations Act. If you intend to provide financial services in relation to NCP facilities, you need to seek your own professional advice to find out how the Corporations Act applies to you. It is your responsibility to determine your obligations under the Corporations Act.

RG 185.56 This Schedule provides an overview of how NCP facilities are regulated. It outlines:

- (a) what an NCP facility is;
- (b) the requirements applying to NCP facilities in Australia, including:
 - (i) the licensing provisions that apply to persons who provide financial services in relation to NCP facilities (e.g. by providing financial product advice or dealing); and
 - (ii) the conduct and disclosure provisions imposing obligations on persons who provide financial services in relation to NCP facilities; and
- (c) how NCP facilities are regulated by other Australian regulators.

What is a non-cash payment facility?

RG 185.57 A person makes a non-cash payment if they make a payment or cause a payment to be made otherwise than through the physical delivery of Australian or foreign currency: s763D.

RG 185.58 The facility through which, or through the acquisition of which, a person makes such a payment is the financial product regulated under the Corporations Act: s763A(1)(c). A 'facility' includes intangible property, an arrangement (or one of its terms) or a combination of these things: s762C. An arrangement includes a contract, agreement, understanding or scheme and can be in writing or oral. An arrangement does not have to be enforceable or contained in a formal document: s761A.

RG 185.59 An arrangement (or term of an arrangement) may be an NCP facility if:

- (a) it enables a non-cash payment to be made and the facility is intended to be used to make such a payment; or
- (b) facilities of that kind are commonly used to make a non-cash payment: s763A(2).

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RG 185.60 The act of making a non-cash payment to the recipient is a 'use' of the NCP facility by the holder. For example:

- (a) an instruction by a client to make a non-cash payment to a particular payee is a 'use' of the NCP facility by the client;
- (b) for a cheque facility, the writing of a cheque to a particular payee is a 'use' of the facility by the client, while the arrangement giving the ability to write that cheque is the NCP facility;
- (c) for a stored value facility, the NCP facility is the arrangement (which may include a physical device) that gives a person the ability to make non-cash payments to various payees from time to time, while presentation of the device to make a purchase is a 'use' of that facility; and
- (d) for direct debits, the NCP facility is the arrangement between the client and a financial institution that gives the client the ability to make direct debit payments to various persons (payees) from time to time, while an order by the client to make a direct debit payment to a payee is a 'use' of the facility.

Note: Telephone or computer equipment may be the means of giving instructions to make a payment using a particular NCP facility. However, while the underlying NCP facility may be the financial product (e.g. direct debit), the physical communication system is not: see s765A(1)(x).

RG 185.61 Specific examples of NCP facilities include cheque accounts, traveller's cheques, stored value cards, electronic cash, direct debit services, payroll cards, funds transfer services and electronic bill payment services.

Links to another financial product

RG 185.62 Some NCP facilities will be linked to another facility. Depending on the circumstances, the NCP facility and the other facility may together form a single financial product because they are part of the one arrangement. If the holder of the facility or facilities can choose to receive one component without taking another, while not affecting the terms of the component they take, then the facilities are not likely to be part of the one arrangement and there may be two or more separate financial products (even if more than one component is in fact acquired).

RG 185.63 An arrangement may also incorporate within it two or more facilities. Those facilities may be financial products regardless of whether the wider arrangement is or is not a financial product.

Note: For example, if one of the facilities that is a component of the wider arrangement or the wider arrangement itself, is excluded from being a financial product by the credit facility exclusion (reg 7.1.06), another component of the wider arrangement that is itself a financial product need not necessarily be excluded.

What exemptions are available?

RG 185.64 The Corporations Act excludes certain NCP facilities from being financial products. These exemptions include:

- (a) a facility that only allows payments to be made to one person (s763D(2)(a)(i));
- (b) a facility that allows payments by means of a letter of credit from a financial institution (s763D(2)(b)(i));
- (c) a facility that allows payments by means of a cheque drawn by a financial institution on itself (s763D(2)(b)(ii));
- (d) a facility that allows payments to be made by means of a guarantee given by a financial institution (s763D(2)(b)(iii));
- (e) an NCP facility that is an incidental component of another facility or incidental to another facility in certain circumstances (s763E);
- (f) a credit facility (s765A(1)(h)(i));
- (g) a facility by which non-cash payments will all be debited to a credit facility (s765A(1)(h)(ii))—this would include a credit card where all transactions are paid for on a revolving basis;
- (h) a money order issued as a money order by, or for, Australia Post (reg 7.1.07F); and
- (i) certain electronic funds transfers (reg 7.1.07G).

Note: See RG 185.66 for further discussion of this exemption.

RG 185.65 The single payee exemption under s763D(2)(a)(i) covers products where there is only one person to whom a payment can be made (e.g. transport cards which have one payee and prepaid photocopying cards redeemable at a single institution).

Note 1: For further explanation, see the Revised Explanatory Memorandum to the *Financial Services Reform Bill 2001* at paragraph 6.66.

Note 2: Licensing relief is also provided for an NCP facility that only allows payment to be made to the issuer of the facility or a related body corporate of the issuer: reg 7.6.01(1)(lb).

RG 185.66 The exemption for certain electronic funds transfer products (reg 7.1.07G) is limited to products that meet the following criteria:

- (a) the issuer is an authorised deposit-taking institution (ADI) or an operator of a payment system (e.g. well-established and substantial remittance dealers);
- (b) payment is made (i.e. money is available to the recipient) within two business days (or such longer period as is reasonable);
- (c) the funds are transferred electronically; and

- (d) there is no standing arrangement with the client to transfer funds in that manner.

RG 185.67 ASIC has also exercised its powers to:

- (a) grant relief to persons providing financial services in relation to low value NCP facilities, gift vouchers or cards and prepaid mobile phone accounts; and
- (b) declare that loyalty schemes and electronic road toll devices are not financial products for the purposes of Ch 7 of the Corporations Act.

Note 1: See Sections B and C of this guide.

Note 2: ASIC will also consider applications for individual or class order relief for other products or arrangements that constitute NCP facilities on a case-by-case basis: see Section A of this guide.

How are NCP facilities regulated in Australia?

RG 185.68 The FSR Act introduced the regulation of NCP facilities under the Corporations Act. Their express inclusion as financial products shows a clear intention that they should be regulated as part of the financial services regulatory regime.

RG 185.69 One aim of the FSR Act was to implement a single licensing, conduct and disclosure framework for financial products and services. NCP facilities may raise a number of market integrity and consumer protection risks that the Australian financial services licensing, conduct and disclosure requirements of the Corporations Act help to address.

Licensing requirements

RG 185.70 A person who carries on a financial services business in Australia must hold an AFS licence, unless an exemption applies: s911A.

RG 185.71 A financial services business means a business of providing financial services: s761A. A person provides a financial service if (among other things) they:

- (a) provide financial product advice: s766A and 766B; or
- (b) deal in a financial product: s766A and 766C.

Note: See 'Key terms' for definitions of 'deal' and 'financial product advice'. See also RG 36 *Licensing: The scope of the licensing regime: Financial product advice and dealing—An ASIC guide* for a discussion of these financial services.

RG 185.72 The Corporations Act covers three types of financial product:

- (a) investment products;
- (b) financial risk management products; and
- (c) NCP facilities.

A facility through which, or through the acquisition of which, a person makes a non-cash payment (or causes one to be made) is generally a financial product: see s763A and 763D.

Note: For further information about NCP facilities generally, see RG 185.57–RG 185.67.

RG 185.73 If you intend to carry on or are carrying on a financial services business involving providing financial product advice on, or dealing in, an NCP facility in Australia, you must hold an AFS licence authorising you to do so, unless an exemption applies (see RG 185.64–RG 185.67): s911A(1) and reg 7.6.01 and 7.6.01B. You should obtain your own legal advice to determine whether an exemption applies to you.

Note 1: For further information about the scope of the licensing regime, see Regulatory Guide 36 *Licensing: Financial product advice and dealing* (RG 36). For further information about how to apply for an AFS licence, see RG 1–RG 3 *AFS Licensing Kit*.

Note 2: For information about how ASIC will exercise its licensing exemption power in s911A(2)(l), see Section A of Regulatory Guide 167 *Discretionary powers* (RG 167).

RG 185.74 To obtain an AFS licence, you will need to demonstrate that you meet certain requirements relating to matters such as your organisational capacity, education and training levels, and—except for bodies regulated by the Australian Prudential Regulation Authority (APRA)—your risk management systems and financial position. You must continue to meet these requirements at all times while you hold your AFS licence.

Note: For guidance about how to satisfy AFS licensing requirements, see RG 146, RG 164, RG 165, RG 166 and RG 181.

RG 185.75 Certain financial requirements are imposed on all non-APRA regulated AFS licensees as conditions on their AFS licence. RG 166 sets out the financial requirements we expect you to meet as an AFS licensee. We are not a prudential regulator. We impose financial requirements to help ensure that you have sufficient financial resources to conduct your financial services business in compliance with the Corporations Act.

Conduct and disclosure obligations

RG 185.76 The Corporations Act also imposes conduct and disclosure obligations on persons who provide financial product advice on or deal in a financial product: see Parts 7.7, 7.8 and 7.9. These include the obligations imposed on:

- (a) AFS licensees or their authorised representatives to give a retail client a Financial Services Guide (FSG)—an FSG is required to contain information so that consumers can make an informed decision about whether to acquire a financial service;

- (b) AFS licensees or their authorised representatives to give a retail client a Statement of Advice (SOA)—an SOA must contain information about personal advice given to a retail client so that they can make an informed decision about whether to act upon that advice;
- (c) AFS licensees and NCP facility issuers in relation to handling client money and property;
- (d) NCP facility issuers and persons offering or recommending an NCP facility to give a retail client a Product Disclosure Statement (PDS)—a PDS is required to contain sufficient information so that a retail client may make an informed decision about whether to purchase a financial product;
- (e) NCP facility issuers to give a retail client a statement confirming a transaction; and
- (f) NCP facility issuers to give a retail client specific ongoing disclosures about a financial product (e.g. informing NCP facility holders of material changes or significant events in relation to the NCP facility).

Note 1: Exemptions from some of these obligations might apply in certain circumstances.

Note 2: For further information about some of these obligations, see RG 168 and RG 175.

RG 185.77 The Corporations Act also prohibits the hawking of financial products to retail clients: see s992A and 992AA.

Note: For further information about this prohibition, see Regulatory Guide 38 *The hawking prohibitions* (RG 38).

Other requirements administered by ASIC

RG 185.78 Other regulatory requirements may be applicable regardless of whether you are required to hold an AFS licence.

RG 185.79 The market misconduct provisions of Part 7.10 will apply regardless of whether you hold an AFS licence (except where ASIC has declared that a certain NCP facility is not a financial product for the purposes of Ch 7 of the Corporations Act). They prohibit (among other things) misleading or deceptive conduct in relation to financial products such as NCP facilities.

RG 185.80 The consumer protection provisions in Div 2 of Part 2 of the ASIC Act also apply regardless of whether you hold an AFS licence. These provisions relate to (among other things) prohibitions against unconscionable conduct, as well as misleading or deceptive conduct.

RG 185.81 In addition, ASIC administers the *Electronic Funds Transfer Code of Conduct* (EFT Code). This is a self-regulatory code of conduct that sets out minimum standards on a number of matters including disclosure, privacy, refund rights, dispute resolution and lost

or stolen cards. The EFT Code is relevant to many NCP facilities such as stored value cards. Almost all Australian retail banks, building societies and credit unions subscribe to the EFT Code. We believe that compliance with the EFT Code constitutes good practice and we generally expect that your conduct will comply with the EFT Code.

Other Australian regulators' requirements

RG 185.82 NCP facilities may also be subject to the jurisdiction of other regulators such as APRA and the Reserve Bank of Australia (RBA).

RG 185.83 APRA is responsible for the prudential regulation of ADIs (such as banks, credit unions and building societies), insurance companies, superannuation funds and friendly societies. In general, a person must not carry on 'banking business' in Australia without authority from APRA.

Note: Under the *Banking Act 1959*, APRA has discretion to determine whether the provision of a 'purchased payment facility' constitutes 'banking business'. A 'purchased payment facility' is defined in the *Payment Systems (Regulation) Act 1998* and is similar in concept to an 'NCP facility' in the Corporations Act.

RG 185.84 The RBA is responsible for regulating purchased payment facilities under the *Payment Systems (Regulation) Act 1998*. In general, a purchased payment facility is a facility that stores value that can be used to make payments by the holder of the facility. It includes new forms of payment instruments such as stored value cards and internet-based payment systems.

Note: A purchased payment facility will not be subject to regulation by the RBA where:

- (a) the total outstanding amount of the facility is limited to less than \$1 million, or the facility can be used to make payments to 50 or fewer persons only; or
- (b) its obligations are guaranteed by an ADI, or by a Commonwealth, State or local government authority.

See RBA Media Release 2004-04 'Regulation of purchased payment facilities under the *Payment Systems (Regulation) Act 1998*'.

RG 185.85 NCP facilities may also be subject to regulation by relevant State or Territory bodies.

Key terms

RG 185.86 In this guide, the following terms have the following meanings:

adviser A person who provides financial product advice

ADI Authorised deposit-taking institution

AFS licence An Australian financial services licence issued under s913B

APRA The Australian Prudential Regulation Authority

ASIC The Australian Securities and Investments Commission

ASIC Act The *Australian Securities and Investments Commission Act 2001*

body regulated by APRA The meaning given in s3(2) of the *Australian Prudential Regulation Authority Act 1998*

Ch 7 (for example) A chapter of the Corporations Act (in this example numbered 7)

client A person who is provided with a financial service

Corporations Act The *Corporations Act 2001* and includes regulations made for the purposes of the Corporations Act

deal Any of the following conduct:

- (a) applying for or acquiring a financial product;
- (b) issuing a financial product;
- (c) in relation to securities or managed investment schemes, underwriting the securities or interests;
- (d) varying a financial product;
- (e) disposing of a financial product; or
- (f) arranging for a person to engage in conduct referred to in (a)–(e),

unless an exemption applies

Note: This is a definition contained in s766C.

EFT Code The Electronic Funds Transfer Code of Conduct

financial product The meaning set out in s763A

financial product advice A recommendation or a statement of opinion, or a report of either of those things, that is intended to influence a person in making a decision about a financial product, or could reasonably be regarded as being intended to have such an influence, which is not exempted from the definition of ‘financial product advice’

Note: This is a definition contained in s766B.

financial service The meaning set out in s766A

Financial Services Guide (FSG) A document that must be given to a retail client for the provision of a financial service under Div 2 of Part 7.7

FSR Act The *Financial Services Reform Act 2001*

general advice Financial product advice that is not personal advice

Note: This is a definition contained in s766B.

issuer The meaning in s761E

licence An AFS licence

licensee A financial services licensee defined as such under s761A (i.e. a person who holds an AFS licence)

NCP facility A facility through which, or through the acquisition of which, a person makes a non-cash payment

non-cash payment (NCP) A payment made or caused to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins

Part 7.6 (for example) A part of the Corporations Act (in this example numbered 7.6)

personal advice Financial product advice that is given or directed to a person in circumstances where the provider of the advice has considered one or more of the person's objectives, financial situation and needs, or a reasonable person might expect the provider to have considered one or more of those matters

Note: This is a definition contained in s766B.

persons providing financial services in relation to Includes issuers, other dealers and advisers

disclosure provisions The provisions set out in Part 7.9 and related regulations

Product Disclosure Statement (PDS) A document that must be given to a retail client in relation to the offer or issue of a financial product under Div 2 of Part 7.9

RG 168 (for example) A regulatory guide (in this example numbered 168)

RBA The Reserve Bank of Australia

reg 7.1.07G (for example) A regulation of the Corporations Regulations (in this example numbered 7.1.07G)

retail client A client defined as such under s761G

s761 (for example) A section of the Corporations Act (in this example numbered 761)

Statement of Advice (SOA) A document that must be given to a retail client in relation to the provision of personal advice in accordance with Subdivisions C and D of Division 3 of Part 7.7.

Related information

RG 185.87

Headnotes

Non-cash payment facility, licensing, conduct and disclosure relief, hawking prohibition relief, declaration, low value non-cash payment facility, gift voucher or card, prepaid mobile phone account, loyalty scheme, electronic road toll device

Class orders

[CO 05/736] *Low value non-cash payment facilities*

[CO 05/737] *Loyalty schemes*

[CO 05/738] *Gift facilities*

[CO 05/739] *Road toll facilities*

[CO 05/740] *Prepaid mobile facilities*

Regulatory guides

RG 1–RG 3 *AFS Licensing Kit*

RG 36 *Licensing: Financial product advice and dealing*

RG 38 *The hawking prohibitions*

RG 146 *Licensing: Training of financial product advisers*

RG 164 *Licensing: Organisational capacities*

RG 165 *Licensing: Internal and external dispute resolution*

RG 166 *Licensing: Financial requirements*

RG 167 *Licensing: Discretionary powers*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 169 *Disclosure: Discretionary powers*

RG 175 *Licensing: Financial product advisers—Conduct and disclosure*

RG 181 *Licensing: Managing conflicts of interest*

Legislation and codes

Corporations Act, Chapters 7 and 5C, Parts 7.6–7.10, s761A, 761E, 761G, 762C, 763A, 763D, 763E, 765A, 766A, 766B, 766C, 911A, 992A and 992AA and regulations 7.1.06, 7.1.07F, 7.1.07G, 7.6.01, 7.6.01B; ASIC Act, Part 2, Division 2; Australian Prudential Regulation Authority Act; Banking Act; FSR Act; Payment Systems (Regulation) Act; Telecommunications Act; Trade Practices Act; Electronic Funds Transfer Code of Conduct; Uniform Consumer Credit Code, s145 and 146

Consultation papers

CP 59 *Non-cash payment facilities* (December 2004)

Reports

Refinements to Financial Services Regulation: Proposals Paper,
Department of Treasury, Commonwealth Government (May 2005)

Media and information releases

[IR 04/6] ASIC guidelines for interim relief for loyalty schemes
(24 February 2004)

[IR 04/7] ASIC guidelines for interim relief for low value non-cash
payments (24 February 2004)

[IR 04/74] ASIC consults on the regulation of non-cash payment
facilities (22 December 2004)

[MR 05/110] ASIC welcomes financial services refinements proposals
paper (2 May 2005)

[IR 05/22] ASIC provides details on financial services refinement
projects (12 May 2005)

[IR 05/27] ASIC extends interim relief for some non-cash payment
facilities (1 June 2005)

Speeches

ASIC and the regulation of non-cash payment products, Mark Adams,
Director, Regulatory Policy, Australian Securities and Investments
Commission, Presentation to the CARDS Australia Conference
(5 August 2004)

ATTACHMENT 4

**Australian Securities and Investments Commission Class Order [CO 05/738], 14
November 2005**

**Australian Securities and Investments Commission
Corporations Act 2001 — Paragraphs 911A(2)(l), 926A(2)(a), 951B(1)(a),
992B(1)(a) and 1020F(1)(a) — Exemptions**

Enabling legislation

1. The Australian Securities and Investments Commission grants the exemptions set out in:
 - (a) paragraph 4(a) under paragraphs 911A(2)(l), 992B(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the *Act*);
 - (b) paragraph 4(b) under paragraphs 926A(2)(a), 951B(1)(a) and 992B(1)(a) of the *Act*; and
 - (c) paragraph 4(c) under paragraph 951B(1)(a) of the *Act*.

Title

2. This instrument is ASIC Class Order [CO 05/738].

Commencement

3. This instrument commences on the later of:
 - (a) the date it is registered under the *Legislative Instruments Act 2003*; and
 - (b) the date of its gazettal.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: see *Legislative Instruments Act 2003*, s 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

Exemptions for providers of gift facilities

4. A person who provides financial services in relation to a gift facility does not have to comply with:
 - (a) subsection 911A(1), section 992A and Part 7.9 of the *Act* in relation to those financial services; and
 - (b) where the person is a financial services licensee—Part 7.6 (other than subsection 911A(1) and Divisions 4 and 8), Divisions 2, 3 and 4 of Part 7.7, Divisions 2, 3, 5 and 6 of Part 7.8 of the *Act* in relation to those financial services; and
 - (c) where the person is an authorised representative of a financial services licensee—Divisions 2, 3 and 4 of Part 7.7 of the *Act* in relation to those financial services.

Interpretation

5. In this instrument:

authorised representative has the meaning given by section 761A of the *Act*.

device includes a certificate, voucher, token, card, coin or other object by which a person may use the gift facility.

facility has a meaning affected by section 762C of the *Act*.

gift facility means a facility through which, or through the acquisition of which, a person makes non-cash payments for goods or services, in relation to which all of the following are satisfied:

- (a) the amount standing to the credit of the facility and which is available for the making of non-cash payments under the facility:
 - (i) is determined at the time of the issue of the facility; and
 - (ii) cannot be increased after the issue of the facility unless it is because of the reversal of a payment made under the facility in the case of refund or because of a correction of an error; and
 - (iii) cannot be withdrawn from the facility in whole or in part by means of a cash payment (except for the withdrawal of the full amount standing to the credit of the facility after one or more non-cash payments have been made through the facility being an amount that in the reasonable opinion of the issuer of the facility, is unlikely to be able to be conveniently used under the facility);
- (b) the facility may be used to make non-cash payments on more than one occasion;
- (c) the facility is only promoted or marketed as a gift product;
- (d) if:
 - (i) under the terms of the facility there is a date (the *expiry date*) after which the facility cannot be used for the making of non-cash payments (regardless of whether there is an amount standing to the credit of the facility at the end of the expiry date); and
 - (ii) the facility is issued on or after 1 June 2006;the expiry date is:
 - (iii) in the case where the presentation of a device is the means by which a person uses the facility—prominently set out on the device in a manner that makes it clear that it is an expiry date; or
 - (iv) in any other case—prominently displayed in a manner that:
 - (A) could reasonably be expected to come to the attention of a person who is given or given use of the facility at the time it is given and at the time it is used; and
 - (B) makes it clear that it is an expiry date; and

(e) the facility is not a component of another financial product.

issuer has the meaning given by subsection 761E(4) of the Act.

makes non-cash payments has the meaning given by section 763D of the Act.

Dated this 14th day of November 2005

Signed by Brendan Byrne
as a delegate of the Australian Securities and Investments Commission