



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;

- (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)(b) 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

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

- (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.

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).

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)(b).

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)