ASIC Policy Statement [PS 185]

Proposed policy statement for non-cash payment facilities

Regulation impact statement (RIS)

November 2005

What this regulation impact statement is about

ASIC proposes to publish a policy statement [PS 185] on the regulation of non-cash payment (NCP) facilities. This Regulation Impact Statement (RIS) outlines the issues regarding the approach ASIC intends to take in its policy on NCP facilities, particularly in relation to relief proposed for certain NCP facilities. The RIS will explore the costs and benefits of the different options available to ASIC. The RIS recommends that ASIC publish [PS 185] in order to provide regulatory certainty to industry, as well as protection to consumers.

Contents

Issue/problem

Background

The Law

1. The regulation of NCP facilities under the *Corporations Act 2001* (Corporations Act) was introduced by the *Financial Services Reform Act 2001* (FSR Act). NCP facilities are treated as ‘financial products’, brought under the licensing, conduct and disclosure framework for financial products and services in Ch 7 of the Corporations Act.

2. 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.

3. The facility through which a person makes such a payment is the financial product regulated by the Corporations Act: s763A(1)(c). A ‘facility’ includes intangible property, an arrangement or contract, or a combination of any of these things: s762C. Specific examples of NCP facilities include cheque accounts, travellers cheques, stored value cards, electronic cash, direct debit services, payroll cards, gift vouchers and cards, funds transfer services, electronic bill payment services and some loyalty schemes.

4. The Corporations Act and Corporations Regulations 2001 (Corporations Regulations) exclude certain NCP facilities from the definition of ‘financial product’. These exemptions include facilities that allow payments to be made to one person or payments made by letter of credit and NCP facilities that are an incidental component of another facility: s763D(2) and 763E.

5. There are also exemptions provided in the Corporations Regulations for persons providing financial services in relation to NCP facilities from the requirement to hold an Australian Financial Services (AFS) licence. For example, an AFS licence is not required for a financial service that is the issue of a non-cash payment facility where payments are made to the issuer of the facility or to a related body corporate of the issuer: reg 7.6.01(1)(lb).

ASIC’s current policy

6. ASIC published guidance on NCP facilities in the form of Frequently Asked Question QFS 120 in 2003, which was revised in March 2004. ASIC also published its position on interim conditional

relief for low-value NCP facilities and loyalty schemes in February 2004. The interim relief now expires on 28 February 2006.

7. ASIC released its policy proposals in December 2004 (PPP). After consultation with some industry bodies, retailers and consumer groups, ASIC has been in the process of formulating a final policy, taking into account the written submissions received in response to the PPP and industry and consumer needs, together with guidance from the Federal Government in this area.

Federal Government's position

8. The Government has acknowledged that there have been concerns about the unintended application of the financial services regulatory regime to certain kinds of NCP facilities. It stated in its proposals paper *Refinements to Financial Services Regulation* (May 2005) that:

- it was not intended that loyalty schemes should be regulated under the Corporations Act;
- some non-cash payment facilities, such as retailer gift vouchers and some stored value cards, are caught by the definition of 'NCP facility', but should not be treated in the same way as other financial products;
- ASIC will issue guidance and/or relief to exempt from the definition of 'NCP facility' products not intended to be covered; and
- the outcome of ASIC's guidance and/or relief will be to clarify that some NCP facilities may be offered to consumers without the need for compliance with some or all of the requirements imposed by the Corporations Act.

What is the issue/problem being addressed?

9. If financial services in relation to NCP facilities are not conducted with competency and integrity, a substantial loss of value may arise. The express inclusion of NCP facilities as a financial product in the FSR Act shows a clear intention that they be regulated under the financial services regulatory regime and, therefore, be subject to the licensing, conduct and disclosure provisions of the Corporations Act.

10. It has become clear, however, that not all NCP facilities were intended to be caught by this regime. It is also clear that not all NCP facilities should be subject to the full licensing, conduct and disclosure

requirements. This is because the cost of complying with these requirements may not be justified given the risk created by the NCP facility.

11. The cost of complying with the licensing, conduct and disclosure requirements is difficult to quantify, particularly because costs will vary for different businesses, depending on the nature, scale and complexity of the business. In addition to the cost of applying for a licence (which will vary depending on whether a business uses external lawyers in its preparation), there may be a cost of complying with the legal requirements (including ongoing licence conditions and disclosure and conduct obligations), such as having systems to manage risk, ensuring the business remains solvent, meeting ongoing financial reporting obligations and providing a Product Disclosure Statement (PDS) for the issue or sale of an NCP facility.

12. The cost of regulation outlined in paragraph [11] should be balanced against the risks associated with an NCP facility. NCP facilities may create risks for consumers, such as the risk that the NCP facility issuer or distributor fails to carry out its obligations due to insolvency, the risk of losing money due to fraud or negligence, or other detriment to the consumer due to lack of disclosure by the issuer (such as the consumer being unaware that the issuer can unilaterally alter terms and conditions).

13. However, certain types of NCP facilities appear to pose lower risks for consumers. This may be due to one or more of the following reasons:

- the facility is generally simple, easy-to-use and well understood by retail consumers;
- the amount stored in the facility is generally low and does not present a high level of financial risk to the retail consumer;
- losses may occur in only a small proportion of cases; and
- there may be alternative regulation of the facility.

In such circumstances, the costs associated with complying with the licensing, conduct and disclosure obligations are likely to be disproportionate to the risks and, thus, relief may be justified.

14. The issue, therefore, is whether ASIC should grant relief to certain types of NCP facilities. If so, which facilities should be covered by the relief and what should be the scope and extent of the relief granted?

Objectives

15. ASIC aims to regulate NCP facilities in a way that avoids unnecessary or disproportionately burdensome regulation while promoting market integrity, regulatory certainty for industry and protection for consumers.

16. As part of this objective, ASIC aims to regulate NCP facilities in a way that does not create regulatory duplication, given requirements set by other regulatory bodies. For example, NCP facilities may be subject to the jurisdiction of the Reserve Bank of Australia (RBA) and the Australian Prudential Regulation Authority (APRA).

17. The RBA is responsible for regulating purchased payment facilities under the *Payments 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 is similar in concept to an ‘NCP facility’ and includes new forms of payment instruments such as stored value cards and internet-based payment systems.

18. APRA is responsible for the prudential regulation of Australian deposit-taking institutions (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 under the *Banking Act 1959*. APRA has discretion to determine whether the provision of a ‘purchased payment facility’ constitutes ‘banking business’.

Options

Option 1 – Maintain the *status quo*

19. If this option were adopted, persons providing financial services in relation to NCP facilities would be required to comply with the licensing, conduct and disclosure obligation set out in the Corporations Act. No relief would be provided in relation to NCP facilities except on a case-by-case basis.

Option 2 – Grant unconditional class order relief for certain types of NCP facilities

20. If this option were adopted, ASIC would grant unconditional relief for certain types of NCP facilities, depending on the nature, scale and complexity of the NCP facility. In some cases, this option

could extend to a declaration that an NCP facility is not a financial product and hence not subject to the financial services regulatory regime under the Corporations Act.

21. ASIC identified that the following groups of NCP facilities may require specific relief in some form because the cost of compliance with the financial services regulatory regime would outweigh the regulatory benefit for these relatively low-risk NCP facilities:

- low-value NCP facilities;
- gift vouchers and cards;
- prepaid mobile phone accounts;
- loyalty schemes; and
- electronic road toll devices.

It may be appropriate to grant unconditional relief in relation to gift vouchers and cards, prepaid mobile phone accounts, loyalty schemes, and electronic road toll devices (as discussed below in the Impact Analysis section).

Option 3 – Grant conditional class order relief for certain types of NCP facilities

22. If this option were adopted, ASIC would grant conditional relief for certain types of NCP facilities, depending on the nature, scale and complexity of the NCP facility. Persons providing financial services in relation to these NCP facilities would be required to comply with conditions in order to benefit from the relief granted to ensure that consumer protection and market integrity objectives are met. These conditions would include requiring disclosure relating to, for example, terms and conditions, fees or charges and the ability to check the balance under the facility.

23. As discussed in paragraph [21], ASIC has identified some groups of NCP facilities that may require specific relief in some form because the cost of compliance with the financial services regulatory regime would outweigh the regulatory benefit for these relatively low-risk NCP facilities. It may be appropriate to grant conditional relief only in relation to low-value NCP facilities (as discussed below in the Impact Analysis section).

Option 4 – Grant conditional or unconditional class order relief (as appropriate) for certain types of NCP facilities

24. If this option were adopted, ASIC would grant conditional or unconditional class order relief, as appropriate, to persons providing financial services in relation to certain types of NCP facilities, depending on their nature, scale and complexity. This option would allow flexibility in granting relevant class order relief to certain NCP facilities. It may be appropriate to grant unconditional class order relief to some types of NCP facilities, but not to others. As a corollary, it may not be suitable to grant conditional relief to some types of NCP facilities.

25. ASIC has identified that unconditional relief may be appropriate for gift vouchers and cards, prepaid mobile phone accounts, loyalty schemes and electronic road toll devices (as discussed below in the Impact Analysis section).

26. ASIC has also identified that conditional relief may be suitable for low-value NCP facilities. A low-value NCP facility would be one where the total credit or stored value held by each client does not exceed $1,000. To rely on such relief, ASIC would impose conditions on persons providing financial services in relation to low-value NCP facilities and relying on relief. The conditions would include requiring disclosure of information such as terms and conditions, balances and fees and charges.

Impact analysis

Affected parties

27. The parties that would be affected by ASIC’s proposals are:

(a) persons providing financial services in relation to NCP facilities;

(b) consumers who are issued or provided with NCP facilities; and

(c) ASIC and other regulators.

28. As at 18 October 2005, there were 564 licensees who were authorised to provide financial product advice in ‘deposit and payment products – non-cash deposit products’ and 635 licensees who were authorised to deal in ‘deposit and payment products – non-cash deposit products’.

Note: Many licensees will hold authorisations for both advising and dealing in 'deposit and payment products – non-cash deposit products'. Further, these figures do not include those entities that fall into exemptions in the Corporations Act or Corporations Regulations or who have been granted relief from requiring a licence to provide financial product advice on and/or deal in 'deposit and payment products – non-cash deposit products'. Therefore, it is difficult to accurately quantify the number of persons providing financial services in relation to NCP facilities in Australia.

29. Given the wide range of NCP facilities, as indicated in paragraph [3], it would appear that many Australian consumers may be consumers of some form of NCP facility, which would indicate that many consumers will be affected by ASIC's proposals. However, it is difficult to ascertain exact figures for how many people are consumers of NCP facilities.

Costs and benefits of each option

Option 1 – Maintain the status quo

Costs

30. If this option were adopted, all persons providing financial services in relation to NCP facilities would be caught by the financial services regulatory regime. This would result in industry participants that are not able to benefit from the exemptions already provided in the Corporations Act and Corporations Regulations or specific relief, having to comply with the licensing, conduct and disclosure requirements of the Corporations Act. The cost of compliance may be substantial, potentially including:

(a) electronic application for an Australian financial services (AFS) licence for a body corporate, partnership or trustee is $270 and $150 for an individual;

(b) paper-based application for an AFS licence for a body corporate, partnership or trustee is $540 and $330 for an individual;

(c) costs associated with an AFS licensee appointing authorised representatives;

(d) meeting financial requirements in accordance with [PS 166], setting up and maintaining adequate compliance systems (e.g. in accordance with Policy Statement 164 *Licensing: Organisational capacities* [PS 164]), and ensuring employees meet training and educational requirements (e.g. in accordance with Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146]);

(e) preparing, producing and issuing disclosure documents, such as PDSs, to consumers, the nature, scale and complexity of which will depend on the product; and

(f) any external advice (such as legal advice, auditing, etc.).

31. The cost of complying with the licensing, conduct and disclosure requirements may be passed on to consumers. In some cases, NCP facilities may be withdrawn due to the operating costs.

32. On the other hand, as there may be some uncertainty as to whether particular products constitute an NCP facility, some industry participants may apply for comfort relief from the licensing, conduct and disclosure requirements. Fees are prescribed for certain relief applications in the following way:

(a) application for licensing relief is $270 for a body corporate, partnership or non-corporate trustee or $150 for an individual;

(b) application for a declaration that something is not a financial product is $400; and

(c) application for relief from disclosure requirements is $33.

The costs associated with applying for relief would increase in circumstances where external lawyers are used and the nature of the NCP facility is more complex.

33. Doing nothing could also impact on ASIC's resources. If ASIC does not issue guidance, industry may be uncertain as to their status, which could result in more applications for relief. This would require more resources for ASIC in dealing with the relief applications. Additionally, adopting this option may send a message discouraging compliance in this area (including by entities that are already fully compliant with the financial services regulatory regime). ASIC's resources may therefore be required to conduct surveillance work.

34. This option is also inconsistent with *Refinements to Financial Services Regulation*, which has specifically stated that ASIC should provide guidance and/or relief in relation to NCP facilities that were not intended to be caught under the Corporations Act.

Benefits

35. If ASIC were to adopt this option, ASIC would require compliance with the licensing, conduct and disclosure obligations under the Corporations Act. Such an approach could benefit consumers, who would be provided with more protection because persons providing financial services in relation to NCP facilities would be licensed (and therefore required to comply with ongoing

disclosure and conduct obligations), regardless of whether they pose high or low risk to consumers. For example, by requiring a person providing financial services in relation to NCP facilities to obtain an AFS licence, consumers would be assured that they are competent to provide such services before committing to acquiring the NCP facility (and potentially exposing themselves to financial loss). Similarly, by requiring a person providing financial services in relation to NCP facilities to give a disclosure document to a consumer, that consumer would be assisted in making an informed decision.

36. Additionally, ASIC would not be required to use its resources in the development of policy for the regulation of NCP facilities.

Option 2 – Grant unconditional class order relief for certain types of NCP facilities

Costs

37. If this option were adopted, there would be increased consumer risk because there would be no mandated disclosure requirements, nor protection through the licensing of persons providing financial services in relation to these NCP facilities. For example, disclosure of whether terms and conditions can be unilaterally varied is an important consumer protection mechanism. Similarly, the absence of licensing requirements may increase a consumer’s exposure to financial loss since the person providing financial services in relation to these NCP facilities may not be competent to provide such services. Although any exposure to financial loss may be limited given the relative low risk associated with some NCP facilities, the risk nonetheless remains and could affect large numbers of consumers. For example, a significant number of consumers may hold prepaid mobile phone accounts, gift vouchers and cards and, increasingly, electronic road toll devices.

Benefits

38. Unconditional class order relief would allow persons providing financial services in relation to certain NCP facilities to provide the services without bearing the cost of licence or relief applications or compliance. The cost of complying with the licensing, conduct and disclosure requirements is set out in paragraph [30].

39. This option would benefit consumers in that the lower costs of regulation may lead to greater product availability and may be passed on to consumers as lower costs in relation to the provision of NCP facilities. For example, reducing compliance costs for providers of gift vouchers and cards could potentially lower the cost of providing them and may encourage providers to offer gift vouchers and cards.

40. This option may remove any legal uncertainty that surrounds certain NCP facilities. For example, there is uncertainty about whether loyalty schemes constitute NCP facilities. It would be consistent with Parliament's intention to provide unconditional relief to loyalty schemes, as enunciated in *Refinements to Financial Services Regulation*.

41. This option may provide clarity of regulatory status for certain NCP facilities. For example, electronic road toll devices are simple products, which are generally easy-to-understand given their limited scope and involve low financial risk. Any conditions that may be attached to relief may unnecessarily confuse consumers and not add any relevant information to assist the consumer in deciding whether to acquire an electronic road toll device.

42. This option may assist in avoiding any regulatory duplication that may arise. For example, there is an alternative regulatory regime – primarily under the *Telecommunications Act 1997 (Cth)* – that governs the operation of suppliers of prepaid mobile phone accounts. While not replicating Corporations Act requirements in relation to the provision of financial services, this regime provides for certain disclosures to be made to consumers about contracts, prices, terms and conditions, adequate complaints handling procedures and the ability to approach the Telecommunications Industry Ombudsman.

43. Providing unconditional relief may prevent any stifling of innovation of certain NCP facilities. For example, it is likely that there will be movement in the mobile telecommunications industry, which will impact on prepaid mobile phone accounts. Granting unconditional relief would be consistent with the approach taken in the European Union in relation to mobile operators.

44. This option would provide benefits for ASIC because, for certain types of NCP facilities, ASIC would not need to monitor compliance with the regulatory regime or conditions of relief.

Option 3 – Grant conditional class order relief for certain types of NCP facilities

Costs

45. If this option were adopted, consumers would not be given the protection provided by compliance with the full financial services regulatory regime. However, this option would pose less risk to consumers than Option 2 (granting unconditional relief) because the conditions imposed can afford some protection to consumers.

46. If this option were adopted, there would be compliance costs incurred by persons providing financial services in relation to NCP facilities. These costs would depend on the conditions imposed, and might include costs associated with providing minimum disclosure to consumers. This may cause persons providing financial services in relation to NCP facilities to withdraw products from the market, which would impact on consumers who acquire and use such products. For example, imposing conditions on gift vouchers and cards might increase the cost of offering these facilities. This may mean that it would not be beneficial for retailers to offer gift vouchers and cards to consumers, despite the low risk that they pose and consumers' high level of understanding of these products.

47. Imposing conditions on relief would shift regulatory risk to ASIC such that ASIC would need to ensure that the conditions are complied with. This would impact on ASIC’s resourcing priorities.

48. This option might not abate the uncertainty that exists in relation to whether certain NCP facilities, such as loyalty schemes, are caught by the financial services regulatory regime.

49. This option may cause regulatory confusion for certain NCP facilities. For example, conditions imposed on any relief granted to the mobile telecommunications industry would impose a compliance cost on mobile telecommunications suppliers in relation to prepaid mobile phone accounts, but not post-paid arrangements. This may cause potential confusion for consumers deciding whether to acquire a prepaid mobile phone account.

50. This option could result in regulatory duplication. For example, prepaid mobile phone accounts are subject to alternative regulation under the *Telecommunications Act 1997 (Cth)*, requiring certain disclosures to consumers, complaints handling mechanisms and membership of the Telecommunications Industry Ombudsman. While this alternate regulation is not directed to financial services regulatory regime objects, conditions attached to licensing, conduct and disclosure relief may be disproportionately burdensome for prepaid mobile phone suppliers in light of this alternate regulation.

Benefits

51. This option is less burdensome for persons providing financial services in relation to NCP facilities because they do not have to comply with the full gamut of financial services regulatory regime requirements. However, it should be noted that there is still a cost in complying with conditions, which would make this option more

burdensome for persons providing financial services in relation to NCP facilities than Option 2.

52. Conditions on relief may be advantageous because conditions can be tailored to specific NCP facilities and provide appropriate consumer protections, given potential risk of financial loss to a large number of consumers (see discussion in paragraph [37]). For example, low-value NCP facilities, which may have a threshold amount of up to $1000, may put consumers at risk of losing up to $1000. Further, low-value NCP facilities may not be as well understood as other facilities identified at paragraph [21]. Imposition of conditions in these circumstances would alert consumers who hold such NCP facilities to the risk of financial loss.

53. The imposition of conditions in these circumstances is also advantageous to the person providing financial services in relation to NCP facilities. For example, conditions requiring disclosure of terms and conditions will ensure that such terms and conditions are reasonable, thereby improving a consumer's perception of the person providing financial services in relation to NCP facilities.

Option 4 – Grant conditional or unconditional class order relief (as appropriate) for certain types of NCP facilities

Costs

54. If this option were adopted, costs that have been discussed above in the analysis of Option 2 in paragraph [37] would exist in the case of granting unconditional relief.

55. Further, costs that have been discussed in the analysis of Option 3 in paragraphs [45–47] would also exist in the case of granting conditional relief. It should be noted, however, that the cost of complying with Option 4 in this respect, while greater than Option 2 (grant unconditional relief), could be lower than Options 1 (maintain *status quo*) and 3 (grant conditional relief).

Benefits

56. If this option were adopted, ASIC would propose to grant unconditional relief to loyalty schemes, electronic road toll devices and prepaid mobile phone accounts. The benefits of granting unconditional class order relief are similar in nature to those identified for Option 2 in paragraphs [38–44]. ASIC considers gift vouchers and cards, prepaid mobile phone accounts, loyalty schemes, and electronic road toll devices to be sufficiently low risk and easy-to-understand so as to not require conditions.

57. If this option were adopted, ASIC would also propose to grant conditional relief to low-value NCP facilities. The benefits of doing so are similar in nature to those identified for Option 3 in paragraphs [51–53].

58. Adopting Option 4 would allow ASIC to be more flexible than either Option 2 or Option 3. Option 4 would allow ASIC to tailor appropriate class order relief, depending on the nature, scale and complexity of the NCP facility in question.

Consultation

59. ASIC began considering the issues associated with the application of the FSR Act licensing, conduct and disclosure requirements for NCP facilities in response to applications for AFS licences and relief from certain industry participants. ASIC recognised that there were certain types of NCP facilities operating in the market that needed some form of relief. ASIC therefore published interim policy guidance for the regulation of low-value NCP facilities and loyalty schemes, while it considered its long-term policy position.

60. ASIC released its PPP in December 2004. ASIC received 27 submissions from a variety of industry associations and NCP facility operators, including loyalty scheme operators, prepaid mobile phone suppliers, road toll operators and various retail sector participants. ASIC representatives also met with the Australian Consumers Association (ACA), the Australian Mobile Telecommunications Authority (and affected member representatives), the Australian Communications Authority and a retailer.

61. Due to the wide range of NCP facility providers and industry associations that responded during the consultation period, the views expressed were diverse. The following are examples of some of the views expressed in the written submissions:

- There was general support for total exemption from the financial services regulatory regime for loyalty schemes. ASIC has responded to this issue by proposing to declare that loyalty schemes are not financial products for the purposes of Ch 7 of the Corporations Act.
- There was concern from retailers that gift vouchers and cards would not come within the proposed low-value NCP facility threshold. Retailers also submitted that gift vouchers and cards were sufficiently low risk and well understood by consumers, so as to warrant little or no regulation under the financial services

regulatory regime. ASIC has responded to this issue by proposing to grant unconditional relief for persons providing financial services in relation to gift vouchers and cards.

- Most submissions considered that the conditions ASIC proposed, such as trust account requirements and PDS disclosure, were disproportionately burdensome given the nature, scale and complexity of certain NCP facilities. ASIC has responded to these concerns by proposing to not prescribe trust account and PDS requirements as conditions. However, for consumer protection reasons, ASIC proposes to impose some minimum disclosure conditions, such as prominently disclosing an expiry date, if one exists, as well as dispute resolution requirements, for low-value NCP facilities.
- The telecommunications industry expressed their concern in relation to possible duplicate regulation affecting prepaid mobile phone accounts if ASIC were to impose conditions on relief. ASIC has responded to these concerns by proposing to grant unconditional relief to persons providing financial services in relation to pre-paid mobile phone accounts.

62. The ACA had some concerns about consumer protection issues, especially where unconditional relief was contemplated and suggested that not regulating certain types of NCP facilities (such as loyalty schemes) could be ‘a missed opportunity’. However, ASIC considers that the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001 (Cth)* arguably provide sufficient protection for consumers.

Conclusion and recommended option

63. This RIS addresses the issue of whether the cost of complying with the licensing, conduct and disclosure requirements under the Corporations Act is justified, given the nature of certain types of NCP facilities that pose little risk. It examines whether ASIC should grant relief to certain types of NCP facilities, and if so, which facilities should be covered by the relief and to what extent.

64. ASIC considers that Option 4 (grant conditional or unconditional class order relief, as appropriate, to certain types of NCP facilities) would be the preferable option. As discussed in paragraph [56], Option 4 allows ASIC to provide unconditional class order relief where appropriate, namely, for gift vouchers and cards, prepaid mobile phone accounts, loyalty schemes, and electronic road toll

devices. Additionally, Option 4 allows ASIC to grant conditional class order relief where it appears that the facility poses some risk to the consumer, namely, low-value NCP facilities. Granting unconditional and conditional class order relief in this way means that ASIC will avoid unnecessary or disproportionately burdensome regulation of NCP facilities, where the products are generally simple, easy to use and well understood by consumers, while also promoting market integrity and protection for consumers where necessary.

65. Due to the range of NCP facilities that ASIC has identified as requiring relief, Options 2 and 3 would not be appropriate.

66. Option 2 (grant unconditional relief) would result in an undesirable outcome whereby low-value NCP facilities had unconditional relief. The benefit for persons providing financial services in relation to low-value NCP facilities not incurring the costs of complying with conditions, such as disclosure requirements, is outweighed by the need for consumer protection to be maintained. This is due to low-value NCP facilities being potentially less well understood than other NCP facilities identified in paragraph [21]. Further, consumers may be exposed to the risk of losing up to $1,000. Conditions on the relief are, therefore, important to counter the element of risk attached to these NCP facilities.

67. Similarly, Option 3 (grant conditional relief) would not be appropriate for persons providing financial services in relation to gift vouchers and cards, prepaid mobile phone accounts, loyalty schemes, electronic road toll devices. The regulatory benefit of imposing conditions would be outweighed by the cost of compliance for facilities that are low-risk, simple and easy-to-understand and may not have been intended to be caught by the financial services regulatory regime.

68. In considering Option 4, ASIC recommends that loyalty schemes and electronic road toll devices be declared not to be financial products for the purposes of Chapter 7 of the Corporations Act to provide certainty to industry in a simpler form and to better reflect the intention of Parliament. However, ASIC does not recommend that gift vouchers and cards and prepaid mobile phone accounts should be treated in the same way. These products are clearly NCP facilities and developments in their use or features may mean that they could create consumer or market integrity risks in the future. In particular, developments may occur in the mobile telecommunications industry, which may lead to prepaid mobile accounts being used to make significant purchases from third party service providers. Such developments may create greater consumer and market integrity risks. ASIC will, therefore, need to follow these developments and may

review its policy in the future depending on the scope and extent of the developments. There is, nonetheless, no specific review planned or scheduled in these respects.

69. Further, in considering Option 4, ASIC recommends that low-value NCP facilities be granted conditional licensing, conduct and disclosure relief, provided persons providing financial services in relation to these products meet, for example, certain disclosure requirements.

Implementation and review

70. ASIC will implement the recommendations in this RIS by publishing Policy Statement 185 *Non-cash payment facilities* [PS 185] and issuing class orders. ASIC will continue to consider applications for individual or class order relief for other products or arrangements that may constitute NCP facilities on a case-by-case basis in accordance with:

(a) ASIC's general exemption and modification powers in Ch 7 of the Corporations Act; and

(b) ASIC's general policy on granting relief from the licensing provisions (see Policy Statement 167 *Licensing: Discretionary powers* [PS 167]) and from the product disclosure requirements (see Policy Statement 169 *Disclosure: Discretionary powers* [PS 169]).

71. Given the dynamic nature of the evolving NCP facility market, ASIC will monitor developments in relation to NCP facilities. If there are developments that raise market integrity or consumer protection issues, ASIC may review its policy on NCP facilities. There is currently no specific review planned or scheduled.