



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 59

Non-cash payment facilities

December 2004

Your comments

You are invited to comment on the proposals and issues for consideration in this paper, including the explanation sections. We will not treat your submission as confidential unless you specifically request that we treat the whole or part of your submission as confidential. We will not treat an automatic email confidentiality notice as a specific request to treat a submission as confidential.

Comments are due by 25 February 2005 and should be sent to:

**Liz Roberts
Regulatory Policy Branch
Australian Securities & Investments Commission
GPO Box 9827
Sydney NSW 2001
email: policy.submissions@asic.gov.au**

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

What this policy proposal is about

1 The financial services reform amendments to the *Corporations Act 2001* (Corporations Act) added a new kind of product to be regulated as a financial product, namely, a non-cash payment (NCP) facility.

2 This policy proposal paper sets out our approach to regulating NCP facilities under the Corporations Act. It discusses:

- (a) what class order relief we are considering from the licensing and disclosure obligations of the Corporations Act for specific types of NCP facilities, and the conditions we propose on that relief (**Section A**); and
- (b) how the Corporations Act applies to NCP facilities that are not covered by our proposed relief (**Section B**).

We have also included a 'Background' section at the beginning of this paper, which gives an overview of what an NCP facility is and how NCP facilities are regulated.

3 The specific types of NCP facilities for which we are proposing class order relief are:

- (a) low-value NCP facilities (including limited use low-value NCP facilities); and
- (b) NCP facilities issued under loyalty schemes.

Note: We have granted conditional interim relief for these types of NCP facilities, which expires on 30 June 2005. See Information Releases [IR 04-06] 'ASIC guidelines for interim relief for loyalty schemes' and [IR 04-07] 'ASIC guidelines for interim relief for low-value non-cash payment facilities'. We will consider extending this interim relief when finalising our policy to give providers of services related to NCP facilities enough time to arrange themselves to comply with the Corporations Act (including any exemptions ASIC may provide).

4 This paper will help to develop our policy on the regulation of NCP facilities. One purpose of our proposals is to promote discussion about how these facilities should be regulated. We are also conducting our own research into the NCP facilities industry and will take into account developments and trends in the industry in forming our final policy.

5 The proposals in this paper are only an indication of the approach we may take and should not be seen as our final policy. We encourage you to put forward:

- (a) your views in response to the specific questions in this paper; and
- (b) any additional views you have about regulation of NCP facilities.

Contents

What this policy proposal is about	3
Background	5
Policy proposals.....	16
A What class order relief is available?.....	18
B How will we regulate other NCP facilities?.....	34
Regulatory and financial impact	38
Development of policy proposal	40
Key terms	41
Related papers.....	45

Important note: The proposals and explanations in this paper do not constitute legal advice. People who intend to provide financial services in relation to NCP facilities should seek their own legal advice. This paper is based on the Corporations Act as at 22 December 2004. We do not anticipate any changes to the Corporations Act that will affect our proposals. However, if there are relevant changes to the Corporations Act before we publish our final policy, we will take them into account.

Background

1 This section provides an overview of how NCP facilities are regulated to assist in understanding our policy proposals. It outlines:

- (a) what is a non-cash payment facility?
- (b) the requirements applying to NCP facilities in Australia, including:
 - (i) the licensing provisions that apply to persons who deal in or provide financial product advice on an NCP facility; and
 - (ii) the conduct and product disclosure provisions imposing obligations on persons who deal in or provide financial product advice on NCP facilities to retail clients; and
- (c) how NCP facilities are regulated by other regulators within Australia and how some types of similar financial products are regulated in other jurisdictions.

What is a non-cash payment facility?

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. An arrangement includes a contract, agreement, understanding or scheme and can be in writing or verbal. An arrangement does not have to be enforceable or contained in a formal document: s761A.

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

- (a) it enables a non-cash payment and the holder of the facility intends it 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).

5 An NCP facility is likely to exist where:

- (a) there is an arrangement that enables the holder of the facility to transfer value by making a non-cash payment to a person (the recipient of the transferred value); and
- (b) the value comprises a right against another person (the operator of the facility), such as a right that the operator pay the recipient.

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

Note 1: 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 token or card) that gives a person the ability to make non-cash payments to various payees from time to time, while presentation of the card 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 2: 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).

6 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.

Note 1: For our proposals and guidance on when a loyalty scheme might be an NCP facility, see policy proposal paragraphs A8–A11.

Note 2: For more information on the current interim regulation of loyalty schemes under the Corporations Act, see Information Release [IR 04–06] 'ASIC guidelines for interim relief for loyalty schemes'.

Links to another financial product

7 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 or item of intangible property. If the holder of the facility or facilities can elect to receive one of the components without taking the other component, 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 both or all components are in fact acquired).

8 An arrangement may also incorporate within it two or more facilities and those facilities may be financial products regardless of whether the wider arrangement is or is not a financial product. For example, one of the facilities that is a component of the arrangement, and the arrangement itself, may be excluded from being a financial product by the credit facility exclusion (reg 7.1.06) (if applicable), without another component of the arrangement that is itself a financial product (e.g. because it is a term of the arrangement) being excluded.

9 For example, if a loyalty scheme that includes a facility for making non-cash payments is part of an arrangement that also involves the provision of credit, then the loyalty scheme may be regulated as a financial product unaffected by the credit facility financial product exclusion in s765A(1)(h)(i) as it applies to the credit facility comprising part of the arrangement and the arrangement as a whole, even though the provision of credit and the wider arrangement that involves both the provision of credit and the loyalty scheme are excluded by the credit facility exclusion. Whether this is the case will depend on the structure of the wider arrangement and each facility that forms part of the arrangement.

What exemptions are available?

10 The Corporations Act excludes certain NCP facilities from being financial products. The exemptions are:

- (a) a facility that only allows payment to be made to one person (s763D(2)(a)(i));
- (b) a facility that allows payments by means of a letter of credit (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));
- (h) a money order issued as a money order by, or for, Australia Post (reg 7.1.07F); and
- (i) limited use payment electronic funds transfers (reg 7.1.07G).

Note 1: For more detail on the exclusion in paragraph (a), see paragraph 11 of this section.

Note 2: The exclusion in paragraph (g) would include a credit card where all transactions are paid for on a revolving credit basis.

Note 3: For more detail on the exclusion in paragraph (i), see paragraph 12 of this section.

11 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. department store cards, pre-paid phone cards or transport cards which can only have one payee, as well as pre-paid photocopying cards redeemable at a single institution): see Revised Explanatory Memorandum to the *Financial Services Reform Bill 2001* at paragraph 6.66.

12 The exemption for limited use payment electronic funds transfer products (reg 7.1.07G) is limited to products that meet the following criteria:

- (a) the operator is an authorised deposit-taking institution (ADI) or the operator of a ‘payment system’ (e.g. well-established and substantial remittance dealers);
- (b) payment is to be made (i.e. money is available to the recipient) within two business days (or such longer period as is reasonable);
- (c) the funds are to be transferred electronically; and
- (d) there is no standing arrangement with the client to transfer funds in that manner.

Note: For further information, see Schedule 1 of the Explanatory Statement to the *Corporations Amendment Regulations 2003* (No. 8) No. 282.

How are NCP facilities regulated in Australia?

13 The regulation of NCP facilities under the Corporations Act was introduced by the *Financial Services Reform Act 2001* (FSR Act). One aim of the FSR Act was to implement a single licensing, conduct and disclosure framework for financial products and services.

14 The express inclusion of NCP products as a financial product in the FSR Act shows a clear intention that they should be regulated as part of the financial services reform regime. NCP facilities raise consumer protection and market integrity issues that are similar to those raised by other financial products and services regulated by us. NCP facilities are a mechanism allowing for the transfer of value that must be conducted with competency and integrity, or substantial risks of loss of the value will arise.

15 NCP facilities may raise a number of risks for clients that the Australian financial services (AFS) licensing, conduct and product disclosure requirements of the Corporations Act help to address. Like other financial products, the licensing, conduct and product disclosure requirements in the Corporations Act address key competency, compliance and disclosure risks. Particular issues for NCP facilities that our regulation helps to address include:

- (a) competency and other capacity risks because clients depend on performance by issuers and distributors of NCP facilities to carry out obligations in delivering financial services under the arrangement constituting the NCP facility—in particular, the licensing assessment process helps address this risk by issuers and distributors having to demonstrate adequate competency and resource levels (including minimum standards on education and training);
- (b) compliance risks from fraudulent or negligent conduct by issuers and/or distributors of NCP facilities; and
- (c) disclosure risks, including clients' lack of awareness of risks such as:
 - (i) the terms and conditions being able to be changed unilaterally by an issuer of NCP facilities without notice to clients (e.g. reducing the value of points without consultation);
 - (ii) restricted or no access to refunds for unused value;
 - (iii) limited means of promptly replacing a card or other item required for the NCP facility without detriment if it is lost or stolen; and
 - (iv) the risk of loss of value if the issuer becomes insolvent.

Licensing requirements

16 A person who carries on a financial services business must hold an AFS licence, unless an exemption applies: s911A. The licensing regime applies to financial services businesses carried on in Australia and covers persons carrying on a financial services business in other jurisdictions who are offering financial services to Australian retail clients: s911D.

Note 1: Class Order [CO 03/824] *Licensing relief for financial service providers with limited connection to Australia dealing with wholesale clients* gives an exemption from the requirement to hold an AFS licence to certain foreign persons that do not carry on business in Australia for financial services provided to wholesale clients.

Note 2: For further information about how the licensing regime applies to wholesale foreign financial service providers, see Policy Statement 176 *Licensing: Discretionary powers—Wholesale foreign financial services providers* [PS 176].

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

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

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

18 The Corporations Act covers three types of financial product:

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

Subject to the exemptions outlined in paragraphs 10–12 of this section, a facility through which a person makes a non-cash payment (or causes one to be made) is generally a financial product: s763A.

19 If you intend to carry on or are carrying on a financial services business involving dealing in, or providing financial product advice on, an NCP facility in Australia, you must hold an AFS licence authorising you to do so, unless an exemption applies (see paragraphs 10–12 of this section): s911A(1) and reg 7.6.01, 7.6.01A 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 *Licensing: The scope of the licensing regime: Financial product advice and dealing—An ASIC guide*. For further information about how to apply for an AFS licence, see Parts 1 and 2 of the *ASIC Licensing Kit*.

Note 2: For information about how ASIC will exercise its licensing exemption power in s911A(2)(1), see Section A of Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167].

20 To obtain an AFS licence, you will need to demonstrate that you meet certain requirements relating to matters such as your organisational capacities, 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 Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146], Policy Statement 164 *Licensing: Organisational capacities* [PS 164], Policy Statement 165 *Licensing: Internal and external dispute resolution* [PS 165], Policy Statement 166 *Licensing: Financial requirements* [PS 166] and Policy Statement 181 *Licensing: Managing conflicts of interest* [PS 181].

21 Certain financial requirements are imposed on all AFS licensees as conditions on their AFS licence. [PS 166] sets out the financial requirements we expect you to meet as an AFS licensee. If you are a body regulated by APRA, then the requirements of [PS 166] will not apply to you: s912A(1)(d).

22 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. Our financial requirements cannot guarantee that you will meet your financial commitments (although one of our requirements is that you are solvent and able to pay your debts as and when they are due and payable).

Conduct and disclosure obligations

23 The Corporations Act also imposes conduct and disclosure obligations on persons who provide financial product advice or deal in a financial product with retail clients, unless an exemption applies: Parts 7.7, 7.8 and 7.9. These include the obligations imposed on:

- (a) AFS licensees or their authorised representatives to give a 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 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 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 client a statement confirming a transaction; and
- (f) NCP facility issuers to give a client specific ongoing disclosures about a financial product (e.g. informing product holders of an NCP facility of material changes or significant events in relation to the NCP facility).

Note: For further information about some of these obligations, see Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168] and Policy Statement 175 *Licensing: Financial product advisers—conduct and disclosure* [PS 175].

24 The Corporations Act also prohibits the hawking of financial products to retail clients.

Note: For further information about this prohibition, see *The hawking prohibitions—An ASIC guide*.

Other requirements administered by ASIC

25 Other regulatory requirements may be applicable regardless of whether you are required to hold an AFS licence (e.g. the market conduct provisions of Part 7.10). These provisions relate to things like the prohibition against misleading or deceptive conduct, and cover both criminal and civil actions.

26 The consumer protection provisions in Div 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* also apply regardless of whether you hold an AFS licence. These provisions relate to things like the prohibition against unconscionable conduct, as well as misleading or deceptive conduct, and also cover both criminal and civil actions.

27 We also administer 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

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

29 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 an authority from APRA.

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

30 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.

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*'.

31 You may also be subject to regulation by relevant State or Territory bodies.

International comparisons

32 In formulating our policy proposals, we have considered the approaches taken to the regulation of some types of NCP facilities in several other jurisdictions.

European Union

33 The European Union (EU) regulates electronic money. 'Electronic money' means a monetary value represented by a claim on the issuer that is:

- (a) stored on an electronic device;
- (b) issued on receipt of funds of an amount not less than the monetary value issued; and
- (c) accepted as a means of payment by persons other than the issuer.

34 The framework for regulating electronic money is set out in a number of EU directives.

Note: See *Directive 2000/46/EC Electronic Money*, *Directive 2000/12/EC Codified Banking Directive* and *Directive 2000/28/EC Amendments to the Codified Banking Directive*.

35 Member states have discretion to waive application of EU directives for the regulation of electronic money where:

- (a) the amount of outstanding electronic funds does not generally exceed € million;
- (b) the electronic money is only accepted by the parent or a subsidiary of an electronic money institution (EMI); or
- (c) the use of electronic money on issue by an EMI is limited to a particular geographic location or to a particular business relationship (usually with the issuer of the electronic money).

United Kingdom

36 The Financial Services Authority (FSA) regulates the issue of e-money. 'E-money' is defined as monetary value represented by a claim on the issuer, which is:

- (a) stored on an electronic device;
- (b) issued on receipt of funds; and
- (c) accepted as a means of payment by persons other than the issuer.

Note: For further information, see the Electronic Money source in the *FSA Handbook of Rules and Guidance*, Electronic Money sourcebook (code ELM).

37 The FSA has discretion to issue a certificate to small e-money schemes exempting them from regulation where the issuer meets certain conditions. Issuers of e-money that do not meet these conditions are expected to comply with the guidelines set out in the FSA's Electronic Money sourcebook.

Singapore

38 Currently, the Monetary Authority of Singapore (MAS) regulates stored value cards (SVCs) under the *Banking Act*. An SVC is a card for which a person pays a sum of money to the issuer of the card in exchange for an understanding that, on production of the card to the issuer or some other third party, goods and services will be provided to that person. An exemption exists under the *Banking Act* for SVCs that can only be used to purchase goods and services from the issuer of the SVC.

39 Singapore proposes to change its regulation of SVCs to cover multi-purpose stored value facilities (MPSVFs) under its *Systems Oversight Act*. A facility is an MPSVF if:

- (a) the facility is purchased by a person from another person;
- (b) the facility is used as a means of making payments up to the amount that is available for use under the conditions of the facility; and
- (c) payments are to be made by the provider of the facility or some other person who has an arrangement with the facility provider.

Note: For further information, see 'MAS releases consultation paper on *Payment Systems Oversight Act*' (16 April 2003) and 'Response to feedback received— Consultation on *Payment Systems Oversight Act*' (September 2003).

Hong Kong

40 The Hong Kong Monetary Authority (HKMA) regulates multi-purpose stored value cards (MPSVCs) under the *Banking (Amendment) Ordinance 1997*. An MPSVC is a card on which data may be stored in electronic, magnetic or optical form. Under an MPSVC, a person pays a sum of money to the issuer of the card in exchange for:

- (a) storing the value of the money (in whole or in part) on the card; and
- (b) an undertaking by the issuer of the card that it or some other third party will provide goods and services on production of the card.

41 Single-purpose stored value cards are excluded from regulation under the *Banking (Amendment) Ordinance 1997*. Issuers and facilitators of MPSVCs can apply to the HKMA for an exemption on a case-by-case basis. In general, the HKMA will take the following matters into account in deciding whether to grant an exemption:

- (a) the financial strength of the applicant;
- (b) whether the applicant has reputable ownership; and
- (c) whether the applicant has demonstrated that it has the technical competence to operate an MPSVC.

United States of America

42 The regulation of facilities for making non-cash payments in the United States of America varies from state to state.

Policy proposals

In this paper, we have two groups of policy proposals. For each group, we have set out the proposals and identified the issues we would like you to comment on. When necessary, we have also included some explanations of our proposals.

Special note: There may be other issues that you consider important. We are keen to hear from you on our general approach and any other issues you consider important, as well as your answers to our specific questions.

Table 1: Summary of relief proposals

NCP facility	Description	Proposed relief	Reference
Low-value NCP facilities	NCP facility conducted on a small scale that is not part of another financial product	Licensing relief Ongoing disclosure obligation relief Product disclosure relief under consideration	Policy proposal paragraphs A4–A6 and A16–A20 (including details of the proposed conditions of relief)
Limited use low-value NCP facilities	Low-value NCP facility where the client can only make one payment for the facility and no further payments can be made	Licensing relief Product disclosure relief (including from the ongoing disclosure obligations and advertising provisions)	Policy proposal paragraphs A7, A13 and A16–A20 (including details of the proposed conditions of relief)
NCP facilities issued under loyalty schemes	A scheme operated by or on behalf of the issuer to encourage the use or purchase of property and/or services that the issuer or associated third parties provide	Licensing relief Ongoing disclosure obligation relief Product disclosure relief under consideration	Policy proposal paragraphs A8–A11 and A16–A20 (including details of the proposed conditions of relief)
Other NCP facilities	NCP facilities other than: <ul style="list-style-type: none"> • low-value NCP facilities; • limited use low-value NCP facilities; and • NCP facilities issued under loyalty schemes 	None	Policy proposal paragraphs B1–B3

A What class order relief is available?

Policy proposal	Your feedback
<p>Our approach to granting licensing and ongoing disclosure relief</p> <p>A1 We intend to adopt a tailored approach to administering the licensing and ongoing disclosure obligations for NCP facilities under the Corporations Act.</p> <p>Note: For our approach to granting product disclosure relief, see policy proposal paragraphs A12–A15.</p> <p>Which services and facilities will our relief apply to?</p> <p>A2 We intend to give conditional class order relief to any person who issues or otherwise deals in or provides general financial product advice on:</p> <p>(a) low-value NCP facilities (including limited use low-value NCP facilities); and</p> <p>Note: See policy proposal paragraphs A4–A6 for our definition of a low-value NCP facility. See policy proposal paragraph A7 for our definition of a limited use low-value NCP facility.</p> <p>(b) NCP facilities issued under loyalty schemes.</p> <p>Note: See policy proposal paragraphs A8–A11 for our definition of an NCP facility issued under a loyalty scheme.</p>	<p>A2Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.</p> <p>A2Q2 Are there circumstances where we should give relief to any person who provides <i>personal</i> financial product advice on these NCP facilities? If so, why?</p> <p>A2Q3 In what circumstances (if any) do you think loyalty schemes are not regulated under the Corporations Act as a financial product and therefore need no consideration for relief by ASIC? Please give details.</p> <p>A2Q4 Are there any other NCP facilities that you think should be included in our relief? If so, what are they and why should they be included? Please give details.</p>

Policy proposal

What requirements do we propose to give relief from?

A3 We intend to give conditional class order relief from the licensing provisions (including the requirement to obtain an AFS licence in Part 7.6) and the ongoing disclosure requirements in Div 3 of Part 7.9 in relation to:

- (a) low-value NCP facilities (including limited use low-value NCP facilities); and

Note: See policy proposal paragraphs A4–A6 for further discussion of our proposed relief for low-value NCP facilities. See also policy proposal paragraphs A16–A20 for the conditions that we propose to attach to this relief. For our approach to granting product disclosure relief, see policy proposal paragraphs A12–A15.

- (b) NCP facilities issued under loyalty schemes.

Note: See policy proposal paragraphs A8–A11 for further discussion of our proposed relief for NCP facilities issued under a loyalty scheme. See also policy proposal paragraphs A16–A20 for the conditions that we propose to attach to this relief. For our approach to granting product disclosure relief, see policy proposal paragraphs A12–A15.

Low-value NCP facilities

A4 A low-value NCP facility is one that satisfies both parts of the following test:

- (a) the total current credit or stored value of all facilities that have been issued by the product issuer that are held by each client does not exceed \$1000 at any one time; and
- (b) the total current credit or stored value of all NCP facilities that have been issued by the product issuer does not exceed \$10 million at any one time.

Note: This test also applies to limited use NCP facilities (see policy proposal paragraph A7), which are a kind of low-value NCP facility.

Your feedback

A3Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

A3Q2 Is the proposed relief inappropriate for any of these facilities? Please give details.

A3Q3 Should any of the ongoing disclosure requirements in Div 3 of Part 7.9 apply to any of these NCP facilities? If so, why?

A4Q1 Do you agree with our approach to defining a low-value NCP facility? If not, why not, and what approach would you prefer? Please give details.

A4Q2 If an NCP facility is provided in this jurisdiction as part of a global NCP facility, should our definition of a low-value NCP facility apply only to that part of the business being conducted in this jurisdiction (e.g. the value of the facility attributable to Australian clients)? If so, why?

Policy proposal

low-value NCP facility.

A5 Our proposed class order relief from the requirement to obtain an AFS licence and the ongoing disclosure requirements for low-value NCP facilities applies to facilities that are conducted on a small scale and are not part of another financial product.

A6 We understand that some NCP facilities are designed in such a way that it may be difficult for an issuer to ensure that the balance of facilities held by a client does not exceed \$1000. In addition to the relief proposed in policy proposal paragraphs A3 and A5, we will consider giving relief on a case-by-case basis on condition that:

- (a) you take reasonable steps to ensure that clients do not hold NCP facilities with balances in excess of \$1000; and

Note: For example, these might include refunding any excess balances where the identity of the holder of the facility should reasonably be known to the issuer. Where the holder of the facility is not known to the issuer (such as might be the case for pre-paid mobile phone stored value cards or gift vouchers), statements should be made when marketing the facility that it is not recommended to have a balance over \$1000.

- (b) you demonstrate to us that you have reasonable grounds to believe that at all times only a small proportion of clients will have balances in excess of \$1000 when totalling the balances under the facilities they hold.

Note: Your application for relief would need to comply with Policy Statement 51 *Applications for relief* [PS 51].

Limited use low-value NCP facilities

Note: We have included this definition here for convenience. Limited use low-value NCP facilities are a

Your feedback

A5Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

A5Q2 Are there any low-value NCP facilities that you consider this relief should not apply to? Please give details.

A6Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

A7Q1 Do you agree with our approach to defining a limited use

Policy proposal

subset of low-value NCP facilities and we accordingly propose that they receive the same licensing and ongoing disclosure relief. Importantly, we also propose product disclosure relief for this subset of low-value NCP facilities: see policy proposal paragraph A13.

A7 A facility is a limited use low-value NCP facility if:

- (a) the client can only make one payment for the facility; and
- (b) no payments for the facility may be made after the facility is acquired (even if the facility can be used on multiple occasions).

Note 1: For example, gift vouchers and stored value cards that can be used to make payments to a number of different merchants will generally fall within this category where the gift voucher or stored value card is paid for in one payment by the client and cannot be ‘topped up’ at any time.

Note 2: There is no limit to the number of uses that may be made of the facility. For example, a stored value card could be debited with several payments, each use reducing the value stored on the card.

NCP facilities issued under loyalty schemes

A8 A loyalty scheme is a scheme operated by or on behalf of a person (the issuer) to encourage the use or purchase of property and/or services that the issuer or associated third parties provide.

Note: For example, a scheme to encourage the use of credit card payments or airline services, or increase shopping at a shopping centre or department store, may constitute a loyalty scheme.

A9 We propose to give relief if:

- (a) the sole or predominant purpose of the scheme is to reward customer loyalty or promote spending on the property or services of the issuer or associated third parties (such

Your feedback

low-value NCP facility? If not, why not, and what approach would you prefer? Please give details.

A8Q1 Do you agree with our approach to the definition of ‘loyalty scheme’? If not, why not, and what approach would you prefer? Please give details.

A9Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

Policy proposal

- as merchants participating in the loyalty scheme);
- (b) clients are allocated a measure of value ('points') as a result of using or acquiring the issuer's or participating merchant's property or services, whether or not a monetary value is expressly attributed to the points;
 - (c) the points allocated to a client can be used by the client to make non-cash payments (including for property or services, to transfer value in money or money's worth to third parties, or to obtain points for other loyalty schemes); and
 - (d) clients can only make a contribution in cash for points or payments to the issuer or a person acting on its behalf to enable a non-cash payment to be made under the loyalty scheme where:
 - (i) the client payments using points are for the purpose of a specifically identified non-cash payment; and
 - (ii) the client's cash contribution does not exceed 20% of the payment.

A10 We propose to give conditional class order relief from the requirement to obtain an AFS licence for dealing in or providing general financial product advice on an NCP facility issued under a loyalty scheme and from the ongoing disclosure requirements.

A11 Some loyalty schemes may also constitute a managed investment scheme that must be registered under Ch 5C. We are not proposing to give any class order relief from Ch 5C to those who operate such loyalty schemes. However, we will consider individual applications for relief in accordance with our general exemption and modification powers under Ch 5C. You should make any application in accordance with our relevant policy statements.

Your feedback

A10Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

A11Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

Policy proposal

Note: For further information, see Information Release [IR 04–06] ‘ASIC guidelines for interim relief for loyalty schemes’. See also Policy Statement 51 *Applications for relief* [PS 51] and Policy Statement 136 *Managed investments: Discretionary powers and closely related schemes* [PS 136].

Our approach to granting product disclosure relief

A12 We intend to adopt a tailored approach to administering the product disclosure and other obligations for NCP facilities under the Corporations Act (Div 2 and 4 of Part 7.9).

Note: Whether or not product disclosure relief is granted, we consider that issuers that have relief from the licensing and ongoing disclosure provisions will need to meet specific minimum product disclosure standards, as set out in policy proposal paragraph A15.

Limited use low-value NCP facilities

A13 We propose to give class order relief from the product disclosure and other requirements (Div 2 and 4 of Part 7.9) for limited use low-value NCP facilities.

Low-value NCP facilities and NCP facilities issued under loyalty schemes

A14 At this time, we are considering whether to give relief from the product disclosure and other requirements in Div 2 and 4 of Part 7.9 for low-value NCP facilities (other than limited use low-value NCP facilities) and NCP facilities issued under loyalty schemes. Without relief, a Product Disclosure Statement (PDS) would need to be given before a low-value NCP facility or NCP facility issued under a loyalty scheme is offered.

Your feedback

A13Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

A14Q1 Should we give Part 7.9 relief to all low-value NCP facilities and for all NCP facilities issued under loyalty schemes? If so, why? Please consider the flexibility of these disclosure obligations (including the PDS content requirements in s1013D–1013F).

A14Q2 Are there any practical issues in complying with the

Policy proposal

Product disclosure requirements

A15 We consider that issuers of NCP facilities should meet minimum product disclosure requirements before or at the time the facility is offered to a retail client. This applies whether or not relief from the requirement to give a PDS is given. We propose to require that issuers with relief from the licensing and ongoing disclosure provisions must disclose the following information in a document that is worded and presented in a clear, concise and effective manner:

- (a) the key terms and conditions of the NCP facility, including disclosing prominently:
 - (i) whether you may unilaterally vary any of the terms or conditions of the facility;
 - (ii) any expiry date (if there is one) by which the client must use the facility to enable the client to derive the whole or any part of the benefits from the facility; and
 - (iii) fees or charges for acquiring or using the facility;
- (b) how any disputes will be dealt with (e.g. the applicable internal dispute resolution and external dispute resolution processes);
- (c) how unauthorised or mistaken transactions or the loss or theft of the means of using the facility are dealt with;
- (d) whether you subscribe to any relevant code (e.g. the EFT Code); and
- (e) that issue of the facility is not subject to the

Your feedback

product disclosure and other obligations in Div 2 and 4 of Part 7.9? If so, what are they and do you consider any relief to be appropriate? Please give details.

A15Q1 Should any other information be disclosed to meet minimum disclosure standards? If so, what information? Please give details.

A15Q2 Would the product disclosure regime already provide for some or all of the proposed disclosures in PDSs under s1013D and 1013E? If so, how? Please give details.

A15Q3 If ASIC required compliance with the PDS requirements, would additional information be required to be provided in a PDS beyond the minimum proposed disclosures? If so, what information? Would providing that information be disproportionately burdensome to the benefit obtained by a retail client receiving the information? Please give details.

A15Q4 If ASIC required compliance with the PDS requirements, should the proposed minimum disclosures be specifically required in a PDS? If so, why? If not, why not?

A15Q5 If ASIC required compliance with the PDS requirements in Div 2 and 4 of Part 7.9, are there any practical issues in

Policy proposal

licensing (Part 7.6–7.8) or specified disclosure (Part 7.9) requirements of the Corporations Act.

What are the conditions of our relief?

A16 The conditions we impose will depend on whether you are an issuer of an NCP facility or a person who provides general financial product advice on or deals in NCP facilities. We have imposed more stringent conditions on issuers of NCP facilities given that they are ultimately responsible for their product.

Issuers of NCP facilities

A17 We propose to impose the following conditions on our relief for issuers of low-value NCP facilities (including limited use low-value NCP facilities) and NCP facilities issued under a loyalty scheme:

- (a) if an issue is made to a retail client, you must have an adequate internal dispute resolution (IDR) system (i.e. one that would comply with s1017G(2)(a) if it applied);

Note: For a discussion of adequate IDR systems, see Policy Statement 165 *Licensing: Internal and external dispute resolution* [PS 165].

- (b) if an issue is made to a retail client, you must:
- (i) belong to an external dispute resolution (EDR) scheme that can make binding determinations on complaints about the

Your feedback

complying (e.g. timing of the provision of PDSs)? If so, what are they and do you consider any relief to be appropriate? Please give details.

A15Q6 Where a PDS is not given, are there any practical problems with providing disclosure at or before the time of offer to a retail client? If so, what are they?

A16Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

A17Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

A17Q2 Are there any practical issues in complying with paragraph (b) (i.e. the condition to belong to an EDR scheme)? Are there any kinds of NCP facilities for which there are no EDR schemes that could satisfy the requirement in paragraph (b)? Please give details.

A17Q3 Do any of these conditions raise practical problems of compliance? If so, please give details.

A17Q4 Should we impose any other

Policy proposal	Your feedback
<p>NCP facilities (including orders for you to provide compensation), if such a scheme is reasonably available to you; or</p> <p>(ii) if you do not belong to an EDR scheme complying with subparagraph (i), you must provide us within 3 months after the end of each financial year with a report containing such information as we require about the number and nature of complaints you received over that financial year and how they were dealt with;</p> <p>(c) unless you are a body regulated by APRA, a foreign bank or other entity of undoubted financial substance approved by ASIC for this purpose, you must:</p> <p>(i) hold on trust for clients until all obligations to clients under the NCP facilities are performed:</p> <p>(A) an amount that you believe on reasonable and documented grounds will be sufficient to enable you to fulfil all obligations to all clients under NCP facilities you have issued to which the exemption applies; and</p> <p>(B) any money paid into NCP facilities that you have not yet issued to which the exemption applies, in an account:</p> <p>(C) into which no moneys are paid that do not relate to NCP facilities you have issued; and</p> <p>(D) that is with an Australian authorised deposit-taking institution or a foreign bank approved by ASIC for this purpose; and</p> <p>(ii) provide ASIC with a report within 3</p>	<p>conditions on our relief? Please give details.</p>

Policy proposal

months of the end of each financial year from a registered company auditor giving the auditor's opinion on whether you have complied with this condition;

Note 1: The amount required to be held in trust cannot be discounted on the basis that you consider that some of the obligations that continue to exist will not in fact be required to be performed, for example, because of points expiry or loss of cards by clients.

Note 2: You can withdraw for your own use any money that is more than the total amount that you could be required to pay to meet obligations to clients.

- (d) you must give clients 30 days' written notice of any material changes to the terms and conditions of the facility (including for a loyalty scheme, what may be acquired with points);
- (e) you must provide clients with a means, which is reasonably convenient and which they can access at no substantial cost within 5 business days, to:
 - (i) check their balance under the facility;
 - (ii) check any relevant expiry date applying to the facility; and
 - (iii) obtain a transaction history from time to time;
- (f) in the case of an NCP facility that uses a device or document to make payments (such as a stored value card or gift voucher), where balances under the facility are subject to an expiry date, you must prominently disclose the expiry date on the device or document;
- (g) you must maintain adequate written records about the issue of the facility and transactions made using the facility;
- (h) you must give reports in writing to ASIC about the issue and operation of the facility when requested; and
- (i) when you become aware (or should

Your feedback

Policy proposal

reasonably have become aware) of matters that give you reason to believe that a significant breach of these conditions has occurred, you must report such breaches to ASIC in writing.

Note 1: Reliance on the proposed relief will cease to apply to you 10 business days after you have become aware (or should reasonably have become aware) of such matters, unless we have notified you in writing to the contrary.

Note 2: We will have a power to notify you that, from the date specified in a notice, you are no longer entitled to rely on the class order.

Note 3: Whether the minimum product disclosures set out at policy proposal paragraph A15 will be imposed as conditions of relief will depend on our consideration of the feedback we receive on product disclosure relief generally: see policy proposal paragraphs A12–A15.

Relief for other persons

A18 We propose to impose the following conditions on our relief for persons who deal in or provide general financial product advice on low-value NCP facilities (including limited use low-value NCP facilities) and NCP facilities issued under a loyalty scheme to retail clients (other than as an issuer):

- (a) you must have an IDR system that meets Australian Standard AS 4269–1995: *Complaints handling* and is able to deal with all complaints by retail clients for the NCP facility;
- (b) you must believe on reasonable grounds that the issuer of the NCP facility is complying with policy proposal paragraph A17(b) (i.e. the condition to belong to an EDR scheme); and
- (c) when you become aware (or should reasonably have become aware) of matters that give you reason to believe that a

Your feedback

A18Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

A18Q2 Do any of these conditions raise practical problems of compliance? Please give details.

A18Q3 Should we impose any other conditions on our relief? Please give details.

Policy proposal

significant breach of these conditions has occurred, you must report such breaches to ASIC in writing.

Note 1: Reliance on the proposed relief will cease to apply to you 10 business days after you have become aware (or should reasonably have become aware) of such matters, unless we have notified you in writing to the contrary.

Note 2: We will have a power to notify you that, from the date specified in a notice, you are no longer entitled to rely on the class order.

A19 We propose to give class order relief for dealing in and providing general financial product advice on NCP facilities where those services are provided to persons carrying on a business of issuing NCP facilities that do not have an AFS licence because of an exemption under Section A of this policy proposal paper. The relief will allow the providers of those financial services to treat the issuers as wholesale clients.

Note: This may mean that we will give a licensing exemption that would be available if the clients were wholesale clients. We may also give exemption from the requirements of Parts 7.7 and 7.9 that apply only to retail clients.

Notice of reliance

A20 To be covered by the proposed class order relief, issuers of an NCP facility or persons who provide general financial product advice on or deal in NCP facilities will need to lodge a notice of reliance with us.

Your feedback

A19Q1 Do you agree with this approach? If not, why not, and what approach would you prefer? Please give details.

A19Q2 Are there any other retail clients that we should allow to be treated as wholesale clients for this purpose (e.g. small businesses that have a significant business of providing services for NCP facilities)? Please give details.

A20Q1 Are there any practical problems associated with the requirement to lodge a notice of reliance? Please give details.

Explanation

Our approach to granting licensing and ongoing disclosure relief

1 In adopting a tailored approach to the regulation of NCP facilities we have taken into account the consumer and market integrity goals of the Corporations Act in light of the risks posed by NCP facilities: see paragraph 15 of the 'Background' section of this policy proposal paper. While we acknowledge the clear intention that NCP facilities be regulated by ASIC, our tailored approach recognises that the nature, scale and complexity of some NCP facilities will be such that it may not be appropriate for the licensing and ongoing disclosure obligations to apply to them in full.

2 We propose to give relief to low-value NCP facilities (including limited use low-value NCP facilities) and NCP facilities issued under a loyalty scheme. Our assessment of these NCP facilities suggests that they are generally simple, easy-to-use and well understood by retail consumers.

3 The conditions of relief are intended, in conjunction with the provisions of the Corporations Act and other laws that would still apply, to effectively address the limited consumer and market integrity risks associated with these products. The proposed conditions on our relief are intended to ensure that consumers retain the most important protections of the licensing, conduct and disclosure framework imposed by Ch 7.

4 Our assessment suggests that the cost of obtaining and complying with an Australian financial services (AFS) licence outweighs the benefits of such compliance for these products, taking into account their general nature, scale and complexity. The conditions we have proposed are intended to address the outcomes that would be achieved by compliance with Div 3 of Part 7.9 (dealing with ongoing disclosure) in a way that is relevant and practical for these schemes. We are not proposing to give relief from the hawking prohibitions: s992A and 992AA. In our view, the benefits to consumers of compliance with the hawking prohibitions far outweigh the costs associated with such compliance.

Low-value NCP facilities

5 For low-value NCP facilities, the costs associated with obtaining and complying with an AFS licence are likely to be disproportionate to the amount of income likely to be derived by the issuer from these facilities

and the extent of risk to any individual clients through their use of the facility.

NCP facilities issued under loyalty schemes

6 We consider that loyalty schemes are likely to constitute or include an NCP facility and may be regulated under the Corporations Act. Loyalty schemes usually involve a facility through which members of the scheme can receive property or services, transfer value in money or money's worth to third parties, or obtain points for other loyalty schemes in return for full or partial extinguishment of rights under the loyalty scheme. Under such facilities, the client may make a non-cash payment for the property or services to the third party or the issuer under the other loyalty scheme.

Note: A loyalty scheme may not be a financial product if there is only one person to whom payments may be made through the facility: s763D(2)(a)(i). This would not be the case if payments made under the NCP facility could also be made to other providers of property or services.

7 A loyalty scheme under which the benefits to members of the scheme do not depend on the use of members' contributions will not constitute a managed investment scheme. This will be the case if the issuer applies contributions in the operation of its business and the actual use of those contributions to the operator's business does not affect the benefits the client is entitled to receive under the loyalty scheme.

8 The benefits to clients of participation in a loyalty scheme include acquiring value ('points') that they can use to acquire other property and services. We note the means by which this value is realised may be of secondary importance to the consumer. However, this does not mean the loyalty scheme is not an NCP facility.

Our approach to granting product disclosure relief

9 In adopting a tailored approach to administering the product disclosure and other obligations for NCP facilities under Div 2 and 4 of Part 7.9 of the Corporations Act we have taken into account the consumer and market integrity goals of the Corporations Act in light of the risks posed by NCP facilities: see paragraph 15 of the 'Background' section of this policy proposal paper. Our tailored approach recognises that the nature, scale and complexity of some NCP facilities will be such that it may not be appropriate for the product disclosure obligations to apply to them in full.

10 We expect that issuers of NCP facilities will meet minimum product disclosure requirements to assist informed decision-making by consumers.

Limited use low-value NCP facilities

11 The cost of compliance with the requirement for a Product Disclosure Statement (PDS) is likely to be disproportionate to the benefit that retail clients would receive from a PDS if the specific disclosure requirements under our proposed relief are met. This is because, where clients can only make one payment for the facility and cannot ‘top up’ the facility, the facility is likely to be seen as a means to make a particular non-cash payment (rather than an ongoing means of making non-cash payments, as would be assumed with a standing facility). In these circumstances, we consider that it is more likely the product is simple and well understood by consumers. In such a case, consumers are less likely to spend time reading product disclosure material except about the minimum conditions of use.

Low-value NCP facilities and NCP facilities issued under loyalty schemes

12 Low-value NCP facilities (other than limited use low-value NCP facilities) and loyalty schemes may carry value for clients over a period of time, and we do not consider it clear that compliance with the PDS requirements by providers of these products would be disproportionately burdensome (unlike for a limited use low-value NCP facility). This is particularly the case where the PDS requirements have been specifically designed:

- (a) to be flexible in their application to a large range of financial products; and
- (b) to take into account the information needs of retail clients, including the extent to which the product is already well understood by the consumer.

13 However, we are considering whether relief from these requirements would be appropriate. Among other things, we acknowledge that details about some low-value NCP facilities and loyalty schemes are relatively well understood by consumers and usually at limited cost to the client. Also, a client’s entitlement usually depends on acquisition of property or services from participating merchants under transactions where the client is not primarily motivated to participate in the loyalty scheme. The means that costs associated with PDSs may be seen to be disproportionate to the benefit to clients.

What are the conditions of our relief?

Issuers of NCP facilities

14 We propose to impose a requirement that issuers of NCP facilities belong to an *adequate* external dispute resolution (EDR) scheme if one is reasonably available. We do not intend to require that the EDR scheme be ASIC-approved. For example, it may be adequate if consumers have access to an appropriate industry ombudsman.

Relief for other persons

15 The holder of an AFS licensee is a wholesale client. Given that NCP facilities are generally not highly complex, it is appropriate to treat an issuer of NCP facilities as a wholesale client. This is so despite an issuer of NCP facilities being exempted from holding an AFS licence (and so, not subject to licensing assessment, nor the obligations of a licensee). We consider it likely that the issuer would be sufficiently sophisticated so as to protect their interests for financial services provided through NCP facilities without the retail client protections.

16 An example of a person who may advise on or deal in NCP facilities they do not issue is an entity that promotes the establishment of loyalty schemes to issuers within a certain neighbourhood or with a relationship to a club. A person that does not hold an AFS licence covering advising or arranging for persons to use an NCP facility to make payments does not require an AFS licence to provide those services in certain circumstances: reg 7.6.01(1)(l) and (la).

B How will we regulate other NCP facilities?

Policy proposal

Our general approach to relief

B1 We are not proposing to give class order relief from the Corporations Act for NCP facilities other than those described in Section A of this policy proposal paper.

B2 We will consider individual applications for relief in accordance with our general exemption and modification powers under Ch 7 of the Corporations Act. You should make any application in accordance with our relevant policy statements.

Note 1: See Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167], Policy Statement 169 *Disclosure: Discretionary powers and transition* [PS 169] and Policy Statement 51 *Applications for relief* [PS 51].

Note 2: Although we are not proposing any specific relief for NCP facilities other than those described in Section A at this stage, we encourage you to raise particular concerns with us. For example, in some cases, we are aware that it may be problematic for an NCP facility issuer to comply with confirmation of transaction requirements and/or ongoing disclosure requirements because the identity of the client is unknown.

Application of ASIC's policies

B3 We propose to apply our general policies on financial services licensing, conduct and disclosure to the provision of financial services that involve NCP facilities.

Note: Our general policies are Policy Statement 146

Your feedback

B1Q1 Are there any other NCP facilities for which relief would be appropriate? Please give details.

B1Q2 Are there any technical issues where additional specific relief may be appropriate for other NCP facilities? Please give details.

B2Q1 Do you agree with this approach? If not, what are your reasons and what approach would you prefer? Please give details.

B3Q1 Do you agree with this approach? If not, what are your reasons and what approach would you prefer? Give details.

B3Q2 Does [PS 166] apply

Policy proposal

Licensing: Training of financial product advisers [PS 146], Policy Statement 164 *Licensing: Organisational capacities* [PS 164], Policy Statement 165 *Licensing: Internal and external dispute resolution* [PS 165], Policy Statement 166 *Licensing: Financial requirements* [PS 166], Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168], Policy Statement 175 *Licensing: Financial product advisers—conduct and disclosure* [PS 175] and Policy Statement 181 *Licensing: Managing conflicts of interest* [PS 181].

Your feedback

appropriately to issuers of NCP facilities that are financial products? Does Section F of [PS 166] (the adjusted surplus liquid funds requirement) apply without disproportionate burden? If not, why not? Please give details.

Explanation

Our general approach to relief

1 Given Parliament's intention to regulate certain NCP facilities as financial products, we are not aware of any general basis for relief from any of the licensing, conduct and product disclosure requirements (other than that set out in Section A of this paper).

2 Unless we are satisfied that there is a basis for relief, if you intend to carry on or are carrying on a business of dealing in or providing financial product advice on an NCP facility that is a financial product in Australia or to Australian clients, then we expect you to hold an Australian financial services (AFS) licence authorising you to deal in or advise on these NCP facilities (unless an exemption applies).

Note: You should get your own legal advice about whether an exemption applies.

3 We will consider any applications for relief for NCP facilities not covered in Section A of this paper under our general policy statements on granting relief. These policy statements are:

- (a) on the licensing provisions—Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167]; and
- (b) on the product disclosure requirements—Policy Statement 169 *Disclosure: Discretionary powers and transition* [PS 169].

Note: We strongly encourage any people suggesting further relief should be given by ASIC for NCP facilities to take into account Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167] and Policy Statement 169 *Disclosure: Discretionary powers and transition* [PS 169] in providing any feedback to ASIC.

Application of ASIC's policies

4 Many persons who deal in, or provide financial product advice on, NCP facilities have obtained an AFS licence. To obtain an AFS licence, you will need to demonstrate to us that you meet certain requirements relating to, for example, organisational capacities, education and training levels and, unless you are a body regulated by APRA, financial requirements. You must continue to meet these requirements at all times while you hold your AFS licence.

Note: See the note to policy proposal paragraph B3 for a list of the general policies on financial services licensing, conduct and disclosure that will apply to the provision of financial services involving NCP facilities.

5 Certain financial requirements are imposed on all AFS licensees as conditions on their AFS licence. Policy Statement 166 *Licensing: Financial requirements* [PS 166] sets out the financial requirements we expect AFS licensees to meet. Generally, Section F of [PS 166] (imposing the adjusted surplus liquid funds requirement) applies if:

- (a) a client is liable to pay an issuer of an NCP facility that is a financial product for the financial product; and
- (b) the issuer incurs a monetary liability to the client by entering that transaction (including a liability to pay a third party at the direction of a client).

6 If you are an entity regulated by APRA, then the requirements of [PS 166] will not apply to you: s912A(1)(d). APRA, and not ASIC, imposes financial resource requirements on bodies it regulates.

7 The Corporations Act also imposes ongoing conduct and disclosure obligations on persons who provide financial product advice to, or deal in a financial product for, retail clients (unless an exemption applies): Parts 7.7 and 7.9. You must comply with these conduct and disclosure obligations where relevant.

Note: For further information about other conduct and disclosure obligations, see paragraphs 23–24 of the ‘Background’ section of this policy proposal paper and Policy Statement 175 *Licensing: Financial product advisers—conduct and disclosure* [PS 175].

8 The Corporations Act imposes product disclosure requirements on issuers and persons offering or recommending an NCP facility to retail clients (unless an exemption applies): Part 7.9. You must comply with these product disclosure requirements where relevant.

Note: For further information about the product disclosure requirements, see paragraph 23 of the ‘Background’ section of this policy proposal paper and Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168].

9 When meeting their Product Disclosure Statement (PDS) content requirements (see s1013D and 1013E), we strongly encourage all issuers of NCP facilities who have an AFS licence to include in their PDS information on the topics set out in policy proposal paragraph A15.

Regulatory and financial impact

We have considered the likely regulatory and financial impact of the policy proposals in this paper. Based on the information that we currently have, we believe that our proposals strike an appropriate balance between facilitating financial services activity and promoting consumer protection and market integrity. To ensure that we have achieved an appropriate balance, we are also developing a Regulatory Impact Statement (RIS).

The RIS will address the following seven key elements:

1 Issue/problem

This will discuss the nature and magnitude of the problem.

2 Objective(s)/analysis of the problem

The objective(s), or the outcome sought for the identified issue/problem, will be addressed.

3 Options/solutions

This will identify all of the alternative options that could achieve the objective(s) stated above for dealing with the issue being considered (e.g. no specific action; ASIC policy proposal; media release; information statement; self-regulation/quasi-regulation; codes of conduct; co-regulation; compliance and enforcement strategies).

4 Impact analysis (costs and benefits) of each option

Impact analysis will include:

- (a) analysis of the benefits and costs of the options, including any restriction on competition for different persons affected;
- (b) identification of persons or bodies affected by the problem and those that will be affected by the solutions or options (e.g. applicant/proponent of issue; consumers; business; government; other interested parties);
- (c) a consideration of how each of the proposed options will affect the existing Act, regulations or policies;

- (d) identification and categorisation of the expected impacts of the proposed options as likely benefits or likely costs against each of the persons/bodies identified as likely to be affected;

Note: We will try to quantify these effects where possible (e.g. will there be any restriction on competition as a result of the proposed regulation?). Costs to businesses affected by a regulatory initiative might include: administrative costs; complying with new regulatory standards; licence fees; delays. Costs to consumers affected could include: higher prices for goods and services; reduced utility of goods and services; delays; more difficult or expensive options for seeking redress.

- (e) identification of the benefits of the options (even where they are not quantifiable); and
- (f) identification of the data sources used and assumptions made in making these assessments.

5 Consultation

The consultation undertaken in the policy process will be detailed.

6 Conclusions and recommended option

The preferred option(s) will be given, and reasons why.

7 Implementation and review

We will discuss how the proposed option will be administered, implemented or enforced (e.g. instrument of relief; policy statement; practice note; no-action letter).

8 Important details sought from you

In order for us to fully assess the financial and regulatory impact of our proposals, we invite you to consider possible options that would achieve our objectives, comment on the impact that these policy proposals might have, and, in particular, give consideration to the costs and benefits of these proposals. Where possible, we are seeking both quantitative and qualitative data.

Any comments that we receive will be taken into account when preparing our final RIS.

Development of policy proposal

We have developed this policy proposal paper by considering:

- (a) the intention of the *Financial Services Reform Act 2001* as indicated in the first and second CLERP 6 papers, Explanatory Memorandum to the Bill and the Second Reading Speech in the House of Representatives on the introduction of the Bill into Federal Parliament;
- (b) relevant comparisons between current and previous legislative requirements for the regulation of financial services activity under the law;
- (c) relevant comparisons with current legislative requirements for the regulation of financial services in relation to NCP facilities in overseas jurisdictions (in particular, the European Union, United Kingdom, Singapore, Hong Kong and the United States of America); and
- (d) existing ASIC policies and practices relevant to the regulation of financial services activity under the law.

Key terms

In this policy proposal paper, the following terms have the following meanings:

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

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

Ch 5C (for example) A chapter of the Corporations Act (in this example numbered 5C)

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 meaning is set out in s766C.

EDR scheme An external dispute resolution scheme

EFT Code The *Electronic Funds Transfer Code of Conduct*

EMI An electronic money institution

EU The European Union

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 meaning is set out 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

FSA The Financial Services Authority in the United Kingdom

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.

HKMA The Hong Kong Monetary Authority

issuer of NCP facility The meaning in s761E

licence An AFS licence

licensee A person who holds an AFS licence

Note: This is a definition contained in s761A.

licensing provisions The provisions contained in Part 7.6–7.8 (other than Div 8 of Part 7.8) and related regulations

MPSVC A multi-purpose stored value card in Hong Kong

MPSVF A multi-purpose stored value facility in Singapore

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 7.7 (for example) A part of the Corporations Act (in this example numbered 7.7)

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.

product 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

PS 168 (for example) An ASIC policy statement (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

SVC A stored value card.

What will happen next?

Stage 1

December 2004 Policy proposal paper released for public comment

Stage 2

January–February 2005 Public consultation

25 February 2005 Public consultation period closes

March 2005 Review of public comments

Stage 3

March–April 2005 Drafting of final policy

May–June 2005 Release of final policy

Your comments

We invite your comments on the proposals and issues for consideration in this paper.

Comments are due by 25 February 2005 and should be sent to:

**Liz Roberts
Regulatory Policy Branch
Australian Securities & Investments Commission
GPO Box 9827
Sydney NSW 2001
email: policy.submissions@asic.gov.au**

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

Related papers

Policy Statement 51 *Applications for relief* [PS 51]

Policy Statement 136 *Managed investments: Discretionary powers and closely related schemes* [PS 136]

Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146]

Policy Statement 164 *Licensing: Organisational capacities* [PS 164]

Policy Statement 165 *Licensing: Internal and external dispute resolution* [PS 165]

Policy Statement 166 *Licensing: Financial requirements* [PS 166]

Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167]

Policy Statement 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* [PS 168]

Policy Statement 169 *Disclosure: Discretionary powers and transition* [PS 169]

Policy Statement 175 *Licensing: Financial product advisers—conduct and disclosure* [PS 175]

Policy Statement 176 *Licensing: Discretionary powers—wholesale foreign financial services providers* [PS 176]

Policy Statement 181 *Licensing: Managing conflicts of interest* [PS 181]

Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209]

ASIC Licensing Kit

Licensing: The scope of the licensing regime: Financial product advice and dealing—An ASIC guide

The hawking prohibitions—An ASIC guide

Copies of papers

Download them from the ASIC home page:
<http://www.asic.gov.au>

You can also get copies of ASIC papers from:
 ASIC Infoline on 1300 300 630
