Australian Securities & Investments Commission

By email: ePaymentsCode@asic.gov.au

2 July 2021

Dear Sir / Madam

Consultation Paper 341: Review of the ePayments Code

Indue Ltd (**Indue**) welcomes the opportunity to provide feedback on ASIC's consultation paper 341 Review of the ePayments Code: Further consultation (**CP 341**).

About Indue

Indue is an Authorised Deposit-taking Institution (**ADI**) that is regulated by the Australian Prudential Regulation Authority. Indue is owned by financial institutions each of which is an ADI and provides transaction processing and settlement services to credit unions, building societies, church funds, mortgage originators, commercial clients and the Australian government.

Indue provides processing and settlement services on behalf of its clients, many of whom would be too small individually to be able to provide a competitive alternative financial services offering without Indue.

Relevant to our submissions below regarding 'low value facilities', Indue provides Australian businesses the opportunity to offer gift and prepaid cards to their customers through the provision of the following key activities and services:

- transaction processing and settlement;
- the provision of a fully hosted card platform;
- the ability to offer closed loop, eftpos, Visa or Mastercard branded cards to the market by leveraging Indue's principal membership with each of the payment schemes; and
- account management.

In this submission we have limited our comments to those aspects of CP341 where we have a strong view.

Low Value Facility

Consideration under CP310 and CP341

We note CP341 is the second of two papers ASIC has issued in relation to its review of the ePayments Code (**Code**). The first paper being Consultation Paper 310 (**CP310**).

CP310 addresses ASIC's consideration of the Code's approach to low-value facilities and its inconsistencies with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and AFS licensing exemptions; specifically *ASIC Corporations (Non-cash Payment Facilities*

Instrument) 2016/211) (**Relief Instrument**). It is noted in CP310 that notwithstanding the higher limit of $1,000 for licensing and disclosure relief for AFS licences for non-cash payment facilities under the Relief Instrument, ASIC considers the current limit of $500 is appropriate for the Code because its protections are quite different to those covered by the relief in the Relief Instrument.

While not expressly stated, presumably based on ASIC's position in CP310, ASIC has not proposed any amendments to the definition or treatment of low value facilities in CP341 nor sought feedback on same.

Relief Instrument

As noted in CP310, ASIC has granted licencing and disclosure relief for AFS licences for non-cash payment facilities.

Under the Relief Instrument, non-reloadable payment products marketed solely as gift facilities are exempt from the licensing, conduct and disclosure obligations in the Corporations Act. This exemption applies to gift cards, irrespective of the value that can be loaded onto the card. The Relief Instrument also provides conditional relief in relation to the provision of 'low value non-cash payment facilities'. For the purposes of the Relief Instrument, a facility is 'low-value' if, amongst other things, the maximum value of the facility does not at any one time exceed $1,000.

To provide some rationale for the exemptions in the Relief Instrument, the Explanatory Statement for the Relief Instrument prepared by ASIC provides:

> *Shortly after the commencement of the financial services regulatory regime, it became apparent that the scope of some of these rules* [under Part 7 Corporations Act] *was unintentionally broad. In 2005, the Government stated in its proposals paper Refinements to Financial Services Regulation (May 2005) that:*
>
> - *……*
> - *some non-cash payment facilities, such as retail gift vouchers and some stored value cards, are non-cash payment facilities but should not be treated in the same way as other financial products; and*
> - *ASIC will exempt from the definition of 'non-cash payment facility' products not intended to be covered and products where there is no need for compliance with some or all of the Corporations Act obligations.*
>
>   *Even where the intention of the Act is for a particular facility to be a financial product, the compliance with all the usual obligations may not be necessary given the risks posed by the facility. Certain types of non-cash payment facilities pose lower risks for consumers because:*
>
>   - *they are 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; ….*
>   - *alternative regulation may be available*

Indue Submissions

Indue submits that there are legal, policy and commercial reasons as to why the value of low value facilities in the Code should be increased from $500 to align with the value of 'gift cards' and 'low value non-cash payment facilities' that are exempt under the Relief Instrument.

As supported by the Explanatory Statement, gift cards and prepaid cards with a maximum value of $1,000 are typically simple products that do not have features similar to banking products or pose material risks to the average consumer. The very limited risks that do exist are already managed by general conduct-of-business obligations that apply to all financial products under the Australian Consumer Law as implemented under Division 2 of Part 2 of the ASIC Act.

In Indue's view there is no, or very limited, consumer benefit in applying the regime of the Code to high value gift cards or prepaid cards under $1,000. To the extent there is any benefit it is outweighed by the commercial cost of complying with the Code.

Given the objectives of both the Relief Instrument and the Code are to balance consumer protection with industry interests, we submit that it should follow that the monetary threshold for gift and prepaid cards that are afforded relief under the respective regimes should be consistent.

In addition to the legal and policy reasons, we note that there are a number of practical difficulties with issuers of high value gift cards (ie more than $500) complying with the Code. In particular the provisions relating to unauthorised and mistaken payments and avenues for customer complaints and appeals – all of which do not apply to low value facilities. We have expanded upon some of these difficulties in more detail in Annexure 1 to these submissions. In the event that the limit in the Code is not increased from the current value of $500, it is not clear how issuers of existing high value gift cards will be able to continue to offer these products should the Code be mandated in the future.

Mandating of the Code

We note that the proposals in CP341 reflect the interim nature of our review of the Code in its voluntary form and are designed to ensure the Code is relevant and effective in the short to medium term. The positions set out in CP341, and those ultimately in an updated voluntary Code, may be revisited when the Code is mandated at a future date.

We would welcome the opportunity to provide further submissions should the decision be made to mandate the Code in the future. In the interim we make the observation that if the value of low value facilities remains at $500 and the Code is mandated, it may not be feasible for current issuers of high value cards (who are not voluntary subscribers) to continue offering these products due to increased compliance costs and, as such, consumers will not have access to as large of a range of gift or prepaid card options in the future.

On- Screen Consumer Warning

In relation to the proposal in CP341 to require ADIs to provide additional important information in the on-screen warning about mistaken internet payments, we note that it is already a requirement under section 25 of the ePayments Code that:

- funds may be credited to the account of an unintended recipient if the BSB and/or identifier do not belong to the named recipient; and

- it may not be possible to recover funds from an unintended recipient.

The warning must be delivered on screen and before the transaction is finally confirmed.

Indue submits that the existing requirement is clear, unambiguous and provides consumers with sufficient warning that if they insert the wrong BSB or account number the intended recipient will not receive the funds. We do not believe there will be any material benefit to consumers by providing the additional information proposed in CP341 and any benefit would be outweighed by the commercial cost of making the necessary changes to the underlying systems.

Indue Contact

If you wish to discuss this submission, please contact on or via email .

Yours faithfully

Head of Legal & Company Secretary
Indue Ltd

Schedule 1 – Practical difficulties with complying with the Code for issuers of high value (ie more than $500) gift cards

Obligation	Requirement under the Code	Requirement under the Relief Instrument	Practical Difficulty
Providing terms and conditions	Terms and conditions are required to be provided to customers before or at the time that a customer first performs a transaction. This does not apply to low value facilities.	No requirement to provide terms and conditions to a customer who has purchased a gift card before they perform a transaction.	Retailers who distribute gift cards in excess of $500 that are issued by subscribers may find it difficult to comply with the Code as they would need to either: • require all gift cards to be activated online, at which point gift card recipients could be provided with terms and conditions online; or • provide a terms and conditions booklet with each gift card sold in-store (which is contrary to standard practice today)
Liability for losses	There is a detailed regime for dealing with losses arising from unauthorised transactions. Where a transaction can be made using a device, or a device and an identifier, but does not require a pass code, the holder is liable only if the user unreasonably delays reporting the loss or theft of the device The regime does not currently apply to low value facilities.	No liability regime mandated	Gift cards are generally treated like cash. To the extent they have a PIN, they are typically printed on the card. To impose liability on the issuer for unauthorised transactions on lost or stolen gift cards is inconsistent with current industry practice and will likely impact the feasibility of issuing such cards. Furthermore, gift cards are typically anonymous and in most instances the issuer will not be able to verify the cardholder or identify the card in question.
Reporting unauthorised transactions, loss and theft	Issuers must have a free service that allows customers to report unauthorised transactions, and	No reporting requirements	As gift cards are generally treated like cash and are typically anonymous, in most instances the issuer

	loss or theft of devices. This requirement does not currently apply to low value facilities.		will not be able to verify the cardholder or identify the card in question.