

ASIC CLASS ORDER [05/736]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

Paragraphs 911A(2)(l), 926A(2)(a), 951B(1)(a), 992B(1)(a) and 1020F(1)(a) —
Exemptions

Section 911A(2)(l) of the *Corporations Act 2001* (the *Act*) provides that a person is exempt from the requirement to hold an Australian financial services licence for a financial service they provide if the provision of the service is covered by an exemption specified by the Australian Securities and Investments Commission (*ASIC*) in writing and published in the *Gazette*.

Section 926A(2)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.6 of the Act (other than Divisions 4 and 8).

Section 951B(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.7 of the Act.

Section 992B(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.8 of the Act.

Section 1020F(1)(a) provides that ASIC may exempt a person or a class of persons from all or specified provisions of Part 7.9 of the Act.

1. Background

Section 763D of the Act provides that a person makes non-cash payments if they make payments, or cause payments to be made, otherwise than through the physical delivery of Australian or foreign currency in the form of notes and/or coins. The facility through which, or through the acquisition of which, a person makes such a payment is a financial product: s763A(1)(c).

This means that if a person carries on a financial services business involving dealing in, or providing financial product advice on, a non-cash payment (*NCP*) facility in Australia, the person must hold an Australian financial services licence unless an exemption applies. Parts 7.7, 7.8 and 7.9 of the Act impose conduct and disclosure obligations on persons who provide financial product advice or deal in a financial product. The Act also prohibits the hawking of financial products to retail clients.

ASIC issued its Policy proposal paper *Non-cash payment facilities (Non-cash payment facilities PPP)* in December 2004. The *Non-cash payment facilities PPP* set out how ASIC proposed to regulate non-cash payment facilities and sought feedback from interested parties. (The *Non-cash payment facilities PPP* may be accessed at <http://www.asic.gov.au>.)

The Australian Government released its proposals paper *Refinements to Financial Services Regulation* on 2 May 2005. The proposals paper noted there is ‘[u]ncertainty as to whether loyalty schemes, retailer gift vouchers and certain low-value non-cash payment facilities are intended to be regulated under the financial services regime’. (This paper may be accessed at <http://www.treasury.gov.au>.) In response, ASIC announced it would issue guidance and/or relief to deal with the unintended application of the non-cash payment facility definition to certain kinds of facilities as part of its project on the regulation of non-cash payment facilities (see Information Release [IR 05-22] *ASIC provides details on financial services refinement projects* (12 May 2005), which can be accessed at <http://www.asic.gov.au>).

2. Purpose of the class order

The purpose of Class Order [CO 05/736] is to ensure that persons providing financial services in relation to low value NCP facilities that are conducted on a small scale are not subject to unnecessary and inappropriate regulation under the financial services regulatory regime and to protect consumers of those facilities. Low value NCP facilities are simple, easy-to-use and well understood by retail consumers. [CO 05/736] recognises that the costs of complying with the financial services regulatory regime are disproportionate to the risks an individual client may be exposed to through their use of the facility. However, important initial and ongoing consumer protections need to be maintained to limit potential consumer detriment.

3. The class order

[CO 05/736] provides relief for low value NCP facilities where:

- (a) the total amount available for making non-cash payments under all facilities of the same class held by any person at any one time does not exceed \$1,000;
- (b) the total amount available for making non-cash payments under all facilities of the same class does not exceed \$10,000,000 at any time; and
- (c) the facility is not a component of another financial product.

Issuers

Relief is available to an issuer of a low value NCP facility if the issuer takes reasonable steps to ensure that:

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

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

Issuers must also lodge with ASIC a notice in writing stating that they intend to rely on the class order.

Non-issuers

Relief is available to persons, other than issuers, who provide financial services in relation to low value NCP facilities if the person takes reasonable steps to ensure that:

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

A notice of reliance must also be lodged with ASIC.

4. Consultation

In response to the *Non-cash payment facilities PPP*, we received 27 submissions, which were considered in the development of [CO 05/736].

ASIC has also taken into account the Australian Government's proposals paper *Refinements to Financial Services Regulation* (2 May 2005).

In addition, a Regulation Impact Statement (*RIS*) was prepared for ASIC's proposed Policy Statement 185 *Non-cash payment facilities* before [CO 05/736] was made. The RIS is attached to this statement.