
EXPLANATORY STATEMENT for

ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes the *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211* under subsections 765A(2) and 1020F(1) and paragraphs 601QA(1)(a), 926A(2)(a), 951B(1)(a) and 992B(1)(a) of the *Corporations Act 2001* (the Act).

Paragraph 601QA(1)(a) of the Act provides that ASIC may exempt a person from a provision of Chapter 5C of the Act.

Subsection 765A(2) of the Act provides that ASIC may declare that a specified facility, interest or other thing is not a financial product for the purposes of Chapter 7 of the Act.

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

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

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

Subsection 1020F(1) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.9 of the Act and may declare that Part 7.9 of the Act applies in relation to a person or a class of persons as if specified provisions were omitted, modified or varied.

1. Background

The Act provides that a facility through which, or through the acquisition of which, a person makes payments otherwise than through the delivery of notes or coins – a non-cash payment facility - is a financial product.

These products are subject to the financial services regulatory regime, which requires persons to:

- hold an Australian financial services (AFS) licence in order to provide financial services in relation to a financial product;
- comply with the conduct obligations in Part 7.8 of the Act; and
- provide Product Disclosure Statements and confirmations of transactions to retail clients.

Shortly after the commencement of the financial services regulatory regime, it became apparent that the scope of some of these rules was unintentionally broad. ASIC addressed these issues by making seven legislative instruments relating to non-cash payments products.

2002 – relief for travellers’ cheques

ASIC made Class Order [CO 02/1075] ([CO 02/1075]) *Travellers’ cheques and confirmation of transactions* to address the unnecessary application of the requirement to give a confirmation of transaction in relation to travellers’ cheques at the time of purchase or disposal of the cheque. The benefits associated with the confirmation requirements would be negligible.

[CO 02/1075] sunsets on 1 April 2017.

2003 – relief for licensees who assist clients with payments to third parties

The Corporations Regulations contain AFS licence exemptions for:

- persons who do not generally carry on financial services businesses but advise their customers about forms of payment or ‘deal in’ a non-cash payment facility that a customer may use to pay for their services (regulation 7.6.01(l)) – e.g. a gym who advises their clients about paying for their membership by direct debit; and
- persons who advise their customers about forms of payment or ‘deal in’ a non-cash payment facility that a customer may use to pay them for financial services they provide (regulation 7.6.01(la)) – e.g. an insurer who advises their clients about paying for their insurance by BPAY.

However, these exemptions do not apply to payments to third parties that are related to the person’s business. For instance, a financial planner could rely on reg 7.6.01(la) in order to advise their clients on how to pay a fee for service, but would require a non-cash payments AFS licence authorisation in order to suggest that the same client use a certain facility to pay for an investment they had recommended.

The AFS licensing requirement was disproportionately burdensome in these circumstances relative to the low risk of this kind of conduct and the cost to the affected AFS licensees who otherwise had limited involvement with non-cash payments facilities.

ASIC addressed this problem by making Class Order [CO 03/705] ([CO 03/705]) *Non-cash payment facilities – licensing exemption*. ASIC limited the scope of this instrument to:

- AFS licensees who do not issue their own non-cash payments facilities (as issuers would normally require a non-cash payments licence authorisation in the course of their business); and

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- services provided in relation to specified classes of conventional non-cash payments facilities (in order to reduce the risk that technological developments would alter the effect of the relief).

[CO 03/705] sunsets on 1 April 2017.

2005 – Refinements to Financial Services Regulation

In 2005, the Government stated in its proposals paper Refinements to Financial Services Regulation (May 2005) that:

- it was not intended that loyalty schemes (potentially a kind of non-cash payment facility) should be regulated under the Act;
- 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; and
- alternative regulation may be available.

In 2005, ASIC addressed these issues by making the following legislative instruments:

- Class Order [CO 05/736] ([CO 05/736]) *Low value non-cash payment facilities* – which contained a tailored regulatory regime for ‘low value’ products;
- Class Order [CO 05/737] ([CO 05/737]) *Loyalty schemes* – which declared that loyalty schemes are not financial products;
- Class Order [CO 05/738] ([CO 05/738]) *Gift facilities* - which exempted non-reloadable payment products marketed solely as gift facilities from the licensing, conduct and disclosure obligations in the Act;
- Class Order [CO 05/739] ([CO 05/739]) *Road toll facilities*– which declared that facilities solely used for paying road tolls are not financial products; and

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- Class Order [CO 05/740] ([CO 05/740]) *Prepaid mobile facilities* – which exempted prepaid mobile phone accounts from the licensing, conduct and disclosure obligations in the Act.

[CO 05/736], [CO 05/737], [CO 05/738], [CO 05/739] and [CO 05/740] sunset on 1 April 2016.

The Financial System Inquiry

The 2014 Financial System Inquiry (FSI) also considered the policy settings underpinning the regulation of non-cash payment facilities. The final report of the FSI recommended that the Government:

- Enhance graduation of retail payments regulation by clarifying thresholds for regulation by ASIC and the Australian Prudential Regulation Authority (APRA).
- Strengthen consumer protection by mandating the ePayments Code.
- Introduce a separate prudential regime with two tiers for purchased payment facilities.

In its response to the FSI, the Government stated that APRA, ASIC and the Reserve Bank of Australia would review the framework for payments system regulation and develop clear guidance. This work is ongoing and the Government, Treasury and the relevant regulators are still considering how to give effect to the FSI's recommendation that payments regulation be made clearer and more graduated.

In order to provide certainty while the final policy settings for payments regulation as established, ASIC remade [CO 02/1075], [CO 03/705], [CO 05/736], [CO 05/737], [CO 05/738], [CO 05/739] and [CO 05/740] without substantive changes as the *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211* for three years.

2. Purpose of the instrument

The purpose of the *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211* is to preserve the effect of [CO 02/1075], [CO 03/705], [CO 05/736], [CO 05/737], [CO 05/738], [CO 05/739] and [CO 05/740] for three years while the policy settings for the regulation of payments products are clarified.

3. Operation of the instrument

Loyalty schemes

Clause 6 provides that a loyalty scheme is not a financial product and does not need to be registered as a managed investment scheme. As a result, the financial services regime in the Act does not apply to these products.

This relief applies to loyalty schemes where:

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- the dominant purpose of the scheme is to promote the purchase of goods from, or the use of services of, the issuer or participating third parties;
 - clients are allocated credits (however described) as a result of the purchase of goods from, or the use of the services of, the issuer or participating third parties;
 - the credits can be used to make a payment or part payment for goods or services or to obtain some other benefit; and
 - the scheme is not part of another financial product.

Road toll facilities

Clause 7 provides that a non-cash payment facility used to make payments for road tolls, but no other kinds of payments, is not a financial product. As a result, the financial services regime in the Act does not apply to these products.

Licensing exemption for payments to third parties

Clause 8 provides that an AFS licensee does not need to hold a licence authorisation relating to payments products in order to:

- advise a person in relation to a non-cash payment facility that the person may use, or has used, to pay a third party; or
- arrange for a person to deal in a non-cash payment facility that that person may use to pay a third party.

This exemption applies to licensees who do not themselves issue payments products (as those entities are likely to have the relevant authorisations on their AFS licence). Additionally, the exemption is limited to services provided in relation to conventional payment products (e.g. those issued by licensed persons)

Low value non-cash payment facilities

Clause 9 provides conditional relief to persons to provide financial services in relation to 'low value non-cash payment facilities'. A facility is 'low value' if:

- 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;
- the total amount available for making non-cash payments under all facilities of the same class does not exceed \$10,000,000; and
- it is not a component of another financial product.

Clause 9 contains conditions that issuers of low-value facilities and other persons must comply with in order to rely on the relief.

Issuers are required to provide retail clients with a clear, concise and effective disclosure document, which includes the terms and conditions of the facility and separate information about:

- variations to the terms and conditions;
- expiry dates (including where those dates can be found);
- the procedures for dealing with unauthorised or mistaken transactions, as well as the loss or theft of the device (if any) through which the facility is used; and
- the fees associated with the facility (and if those fees are varied, how updated information can be obtained).

Issuers are also subject to obligations relating to:

- how expiry dates are disclosed, including on any device that is used to access the facility;
- the provision of a cost-free way for consumers to check the amount of value standing to the credit of the facility, the expiry date and the last 10 transactions (at reasonable intervals);
- disclosure of changes to terms, conditions or fees; and
- the maintenance of an appropriate internal dispute resolution system.

Persons who provide financial services in relation to low value non-cash payment facilities but do not issue those facilities may also rely on the exemptions in clause 9 where:

- retail clients are provided with a disclosure document; and
- any expiry date associated with the facility is disclosed on the device (or, if no device is provided to access the facility, in the disclosure document or another written statement).

As this instrument is a re-enactment of [CO 05/736], persons who rely on the exemptions in clause 9 will continue to benefit from the exemption in reg 9.12.04 (first occurring) from Division 2 of Part 7.7A of the Act: section 10A *Acts Interpretation Act 1901*; subsection 13(1) *Legislation Act 2003*.

Gift facilities

Clause 10 provides relief from the licensing, conduct and disclosure obligations in the Act for certain gift facilities. The relief applies to payment products if:

- the product is non-reloadable;
- the funds standing to the credit of the facility cannot be withdrawn as cash unless the facility has been used to make one or more payments and the withdrawal is of the full

amount standing to the credit of the facility (which is an amount that unlikely to be able to be conveniently used);

- the facility may be used to make non-cash payments on more than one occasion;
- the facility is only promoted or marketed as a gift product;
- any expiry date is prominently and clearly disclosed (including on the device used to access the facility if such a device is provided); and
- the facility is not a component of another financial product.

Prepaid mobile facilities

Clause 11 provides relief from the licensing, conduct and disclosure obligations in the Act for prepaid mobile facilities where:

- the facility is a part of an arrangement for the supply of a public mobile telecommunication service under which the service may be used to the extent it is covered by an amount paid in advance which remains unused;
- the non-cash payments made under the facility are debited against the prepaid amount; and
- the facility is not a component of another financial product.

Travellers' cheques and confirmation of transactions

Clause 12 provides that travellers' cheques are exempt from the requirements of section 1017F of the Act to provide confirmation of transactions.

4. Consultation

ASIC consulted with industry stakeholders on its proposal to remake [CO 02/1075], [CO 03/705], [CO 05/736], [CO 05/737], [CO 05/738], [CO 05/739] and [CO 05/740] for a period of 3 years while the final policy settings for payments regulation are determined and the FSI recommendation is implemented. We received four responses, each of which broadly approved of the way in which we have remade our non-cash payments relief. One response included suggested changes to the policy settings for low value payments products; ASIC will consider these suggestions in the context of the implementation of the FSI recommendation.

Once the policy uncertainty associated with payments regulation is resolved, ASIC will review the *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211*. At this time we will consult publically on any changes that we propose to make.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211

ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 provides relief for the following types of non-cash payment products:

- travellers' cheques, which are exempt from the requirement to provide confirmation of transaction under the Corporations Act;
- loyalty schemes and road toll facilities, which are not subject to the financial services laws in the Corporations Act;
- prepaid mobile facilities and some non-reloadable gift facilities, which are exempt from the licensing, conduct and disclosure obligations in the Corporations Act;
- low value payments products, which are exempt from the licensing, conduct and disclosure obligations in the Corporations Act but subject to alternative disclosure and dispute resolution obligations.

The *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211* also exempts financial services licensees from the need to hold a payment product authorisation in order to advise their clients on, and arrange for their clients to deal in, conventional payments products they may use to pay third parties for goods and services.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Australian Securities and Investments Commission