



ASIC
Australian Securities &
Investments Commission

Inquiry into mobile payment and digital wallet financial services

Submission by the Australian Securities and Investments Commission

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Executive summary

- 1 The Australian Securities and Investments Commission (ASIC) is Australia's corporate, markets, financial services and consumer credit regulator. With the Reserve Bank of Australia (RBA) and the Australian Prudential Regulation Authority (APRA), ASIC regulates and supervises the Australian financial system and the entities that operate within it.
- 2 Each regulator has a different remit and area of focus. ASIC is responsible for market conduct and elements of consumer protection. APRA is responsible for prudential regulation. The RBA regulates the payments system and oversees the stability of the financial system as a whole.
- 3 ASIC welcomes the opportunity to provide a submission to the [Inquiry into mobile payment and digital wallet financial services](#) by the Parliamentary Joint Committee on Corporations and Financial Services.
- 4 Our submission relates to point 4 of the terms of reference for the inquiry, which covers the adequacy, performance and international comparison of Australian legislation, regulations, self-regulation, industry codes, standards and dispute resolution arrangements.

A ASIC's role in financial services regulation

Key points

ASIC administers the financial services regulatory regime in the Corporations Act, as well as the consumer protections in the ASIC Act.

ASIC also administers the ePayments Code, a voluntary code of practice which includes requirements that apply to electronic payment transactions.

Laws administered by ASIC

- 5 ASIC regulates many payments products and the businesses that provide them. The laws ASIC administers focus on the contractual relationship between the business providing the payment product and the consumer. ASIC does not regulate payment systems, or other aspects of the payments ecosystem.
- 6 The laws that ASIC administers that apply to payments products are:
 - (a) the financial services regulatory regime in the *Corporations Act 2001* (Corporations Act); and
 - (b) the general consumer law protections, which apply across the economy and are replicated in the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

Corporations Act

- 7 Under the Corporations Act, a person who carries on financial services business in Australia must hold an Australian financial services (AFS) licence. A person provides a financial service if, among other things, they deal in a financial product or provide financial product advice.

What is a financial product?

- 8 The term 'financial product' includes facilities through which, or through the acquisition of which, a person makes non-cash payments. These products are commonly known as 'non-cash payment facilities'. A person makes a non-cash payment if they make payments, or cause payments to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins.
- 9 ASIC has published guidance on how the law applies to non-cash payment facilities: see [Regulatory Guide 185 Non-cash payment facilities](#) (RG 185), including the schedule at the end of the guide. Unless an exemption applies, non-cash payment facilities are regulated by ASIC under the Corporations Act.

- 10 Digital wallets, which allow for one or more separate product(s) to be ‘linked’ and used to make payments, may be non-cash payment facilities in their own right. Whether these wallets are regulated by ASIC depends on how they operate and the rights and obligations associated with the wallet. For instance, if payments initiated using a digital wallet will all be debited to a credit facility, the wallet is not a financial product: see s765A(1)(h).
- 11 There are some exemptions from the definition of a financial product. Exempt products are not regulated by ASIC under the Corporations Act. There are exemptions for:
- (a) non-cash payment facilities where payments can only be made to one person (see s763D(2));
 - (b) facilities that are incidental to another component or facility and the main purpose of the whole is not a financial product purpose (see s763E);
 - (c) non-cash payment facilities where payments are debited from a credit facility (see s765A(1)(h));
 - (d) designated payments systems under the *Payment Systems (Regulation) Act 1998* (see s765A(1)(j));
- Note: A list of designated payments systems is available on the [RBA’s website](#), and includes systems provided by Visa, Mastercard, EFTPOS and American Express.
- (e) the exchange and settlement of non-cash payments between facility providers (see s765A(1)(k));
 - (f) physical infrastructure through which non-cash payment facilities are provided (see s765A(1)(x)); and
 - (g) electronic funds transfers that meet certain specific requirements (see reg 7.1.07G).
- 12 Additionally, ASIC can, subject to certain constraints—including having the power under legislation (see [Regulatory Guide 51 Applications for relief \(RG 51\)](#)):
- (a) declare that a product, including a facility used to make non-cash payments, is not a financial product;
 - (b) exempt people from the need to hold an AFS licence;
 - (c) exempt AFS licensees from other obligations; or
 - (d) otherwise modify how the regime applies.
- 13 ASIC has made a legislative instrument that provides exemptions for certain types of non-cash payment facilities: see [ASIC Corporations \(Non-cash Payment Facilities\) Instrument 2016/211](#). The instrument includes exemptions for:
- (a) non-cash payment facilities used for third party payments;
 - (b) low value non-cash payment facilities;

- (c) loyalty schemes;
 - (d) gift facilities;
 - (e) prepaid mobile facilities; and
 - (f) road toll facilities.
- 14 The effect of the instrument is that some classes of facilities (such as loyalty facilities) are not treated as financial products and are not regulated by ASIC. For other classes of facilities, such as low-value non-cash payment facilities, there are conditional exemptions from many Corporations Act requirements such as the need to have an AFS licence and to provide product disclosure and the hawking prohibition. ASIC's approach to these exemptions is set out in detail in RG 185.

Obligations under the Corporations Act

- 15 Unless an exemption applies, AFS licensees must comply with general conduct obligations in s912A which include obligations to:
- (a) operate the regulated business in an efficient, honest and fair manner;
 - (b) maintain organisational competence to provide the financial services covered by the AFS licence;
 - (c) have processes to manage conflicts and risk;
 - (d) have adequate resources;
 - (e) supervise representatives; and
 - (f) have compensation arrangements.
- 16 Some of these obligations do not apply to AFS licensees who are also regulated by APRA.
- 17 The Corporations Act also imposes specific obligations on AFS licensees and other parties. These include requirements to provide certain product and financial disclosure documents to consumers, and a framework for the handling of client funds. From October 2021, the design and distribution obligations will also apply to issuers and distributors of financial products.
- 18 AFS licensees and other product issuers that deal with retail clients are required to have a dispute resolution system. This must include:
- (a) an internal dispute resolution procedure which complies with ASIC's requirements; and
 - (b) membership of the Australian Financial Complaints Authority (AFCA), the external dispute resolution provider for financial services. AFCA provides consumers and small businesses with a free channel to make complaints about financial services.

- 19 ASIC's guidance on the dispute resolution requirements includes:
- (a) [Regulatory Guide 165](#) *Licensing: Internal and external dispute resolution* (RG 165), which applies to complaints received before 5 October 2021;
 - (b) [Regulatory Guide 271](#) *Internal dispute resolution* (RG 271), which applies from 5 October 2021; and
 - (c) [Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority* (RG 267).

ASIC Act

- 20 In addition to the requirements under the Corporations Act, businesses providing financial services (including issuing financial products) also need to comply with the consumer protection provisions in the ASIC Act. These take a similar form to the Australian Consumer Law (set out in Sch 2 to the *Competition and Consumer Act 2010* and various pieces of state and territory legislation).
- 21 The provisions include prohibitions on unconscionable conduct, false or misleading representations, as well as misleading and deceptive conduct in relation to financial products and financial services. The provisions also address unfair contract terms for standard-form financial services contracts.
- 22 These obligations apply to a wider set of payments products than the requirements under the Corporations Act.

ePayments Code

- 23 The ePayments Code is a voluntary code of practice that relates to electronic payments made using payment facilities provided to consumers, including ATM, EFTPOS transactions, credit and debit card transactions, internet and mobile banking and BPAY.
- 24 The ePayments Code applies to payment, funds transfer and cash withdrawal transactions initiated using electronic equipment. It covers transactions made through mobile payments facilities and digital wallets if the provider of the facility subscribes to the Code.
- 25 The ePayments Code does not apply to facilities designed primarily for use by a business, and established primarily for business purposes. ASIC is consulting on extending the Code to small businesses on an opt-out basis: see [Consultation Paper 341](#) *Review of the ePayments Code: Further consultation* (CP 341). In March 2019 ASIC also released [Consultation Paper 310](#) *Review of the ePayments Code: Scope of the review* (CP 310).
- 26 The ePayments Code protects consumers who deal with the voluntary subscribers to the Code; most banks, credit unions and building societies, as

well as a small number of other payment service providers, [subscribe](#) to the Code. ASIC is responsible for administering the ePayments Code, including monitoring compliance and conducting reviews of the Code. ASIC is currently conducting such a review.

27 Among other things, the ePayments Code requires subscribers to provide clear and unambiguous terms and conditions and stipulates how to give consumers receipts, statements and changes to terms and conditions. It also sets out the rules for determining who pays for unauthorised transactions and establishes a framework for recovering mistaken internet payments.

28 In its final report, the 2014 Financial System Inquiry recommended, and the Government accepted, that the ePayments Code should be mandated. In 2018, the Productivity Commission's inquiry into competition in the Australian financial system also recommended that the Code be made mandatory.

Note: See Financial System Inquiry, [Final report](#), December 2014 and Department of the Treasury, [Government response to the Financial System Inquiry](#), October 2015. See also Productivity Commission, [Competition in the Australian financial system](#), August 2018.

29 Most recently, in its 2019 review of the regulation of stored-value facilities, the Council of Financial Regulators (CFR) recommended that ASIC be given the power to make compliance with the ePayments Code mandatory, such as through a legislative rule-making power. The Assistant Minister for Superannuation, Financial Services and Financial Technology issued a media release stating she had asked Treasury to work with APRA and ASIC to develop the reform package to implement the CFR's recommendations.

Note: See CFR, [Regulation of stored-value facilities in Australia: Conclusions of a review by the CFR](#), October 2019. See also Senator the Hon Jane Hume, 'Supporting competition and innovation in payment services', [media release](#), 6 November 2020.

B Other regulatory regimes

Key points

The financial services regime is supplemented by self-regulation through the Australian Payments Network and various industry codes.

ASIC is a member of the Council of Financial Regulators (CFR) with Treasury, the RBA and the APRA. The CFR recently reviewed the regulatory arrangements for stored-value facilities.

The Government has announced that it will progress reforms in line with the 11 recommendations in the CFR's review.

Self-regulation

Australian Payments Network (AusPayNet)

- 30 The Australian Payments Network (AusPayNet) is an industry association that self-regulates the Australian payments system. Members include financial institutions, retailers, other payment service providers, providers of card processing and related services, automatic teller machines (ATMs) and point-of-sale terminals, and payment system operators and technology companies. AusPayNet represents the industry in developing Australian and global standards.
- 31 Payments made through the systems overseen by AusPayNet need to comply with the relevant regulations and guidelines for that payment system. These cover matters including the technical aspects of how payments are made and settled. These requirements may be relevant to digital wallets and mobile payment facilities where payments made using these facilities rely on systems administered by AusPayNet.
- Note: These requirements are distinct from the legal requirements administered by ASIC, which apply to the non-cash payment facilities the consumer holds (and the business that issues it) and not at the level of individual payments. The regulation of these products is graduated, and shared between ASIC, the RBA and APRA.
- 32 Real-time payments, and their machinery, under the New Payments Platform are governed and overseen by a public company, NPP Australia Limited, and the RBA.

Industry codes

- 33 In addition to the regulatory requirements set out above, there are other industry codes of conduct which may be relevant to some businesses providing payments services, including mobile payments and digital wallets.

Banking Code of Practice

- 34 The Australian Banking Association (ABA) has an industry code, the Banking Code of Practice (Banking Code), which sets out the standards of practice for the banking industry for individual and small business customers. If a mobile payment or digital wallet falls within the Banking Code's definition of 'banking service', banks that subscribe to the Code have particular obligations to their customers in relation to those services.
- 35 The Banking Code Compliance Committee monitors ABA member banks' compliance with the Banking Code. The current version of the Banking Code dated 1 March 2020 has been approved by ASIC.

Customer Owned Banking Code of Practice

- 36 The Customer Owned Banking Association has an industry code, the Customer Owned Banking Code of Practice, which sets out the standards of practice for customer-owned banking institutions (e.g. credit unions, building societies and some mutual banks) that [subscribe](#) to the Code.
- 37 If a mobile payment or digital wallets falls within the 'coverage of the code', subscribers will have obligations to their customers relating to those products. The Customer Owned Banking Code Compliance Committee monitors compliance with the Customer Owned Banking Code of Practice.

ASIC approval of codes of conduct

- 38 On 1 January 2021, changes to ASIC's power to approve codes of conduct commenced, including a framework for enforceable code provisions. This means that if an application to approve, or amend an approved code, is received, ASIC can identify a provision of the code as an 'enforceable code provision' if that provision meets specific legislative criteria.
- 39 To the extent that such codes contain obligations relating to payments, there is the possibility that ASIC and the industry body (who is seeking ASIC's code approval) will agree to identify particular payments-related provisions as enforceable code provisions.
- 40 ASIC has not yet approved an industry code under the new enforceable codes statutory framework, and intends to update our guidance in [Regulatory Guide 183 Approval of financial services sector codes of conduct](#) (RG 183) to reflect the enforceable code provisions reforms.

Coordination with other regulators

- 41 As noted earlier, the RBA and APRA are responsible for other requirements which may be relevant to payments businesses.
- 42 The RBA, APRA, ASIC and Treasury are members of the CFR. The CFR provides an important opportunity to ensure coordination and information sharing across regulators. ASIC also has memoranda of understanding with both the RBA and APRA.

CFR review of stored-value facilities

- 43 In 2018 and 2019, the CFR reviewed the regulatory requirements that apply to stored-value facilities. These facilities are a particular kind of non-cash payment facility, which allow the holder to store funds in a facility for the purpose of making future payments.
- 44 Stored-value facilities share some functional similarities with deposit products and may be subject to obligations under RBA, APRA and ASIC legislation. Digital wallets can enable access to a range of underlying stores of value, including deposit accounts, credit accounts and stored-value facilities. Some digital wallets may also be stored-value facilities.
- 45 The CFR's review considered other matters relevant to the regulation of retail payment service providers that could be improved or clarified.
- Note: See CFR, [Regulation of stored-value facilities in Australia: Conclusions of a review by the CFR](#), October 2019, and [Review of retail payments regulation: Stored-value facilities](#), issues paper, September 2018.
- 46 As noted in paragraph 29, the Government announced that it will progress reforms in line with the recommendations from the CFR's review to modernise the regulation of Australian payments companies. The agencies in the CFR are currently working on how the 11 recommendations from the review will be implemented, including what legislative changes may be needed.

International regulation

- 47 The CFR's review includes some detail on overseas regimes for stored-value facilities. In the European Union, for example, mobile wallets are regulated as e-money and providers must be authorised under a licensing framework administered by member states.
- 48 In Singapore, the Monetary Authority of Singapore regulates and issues licences to payment providers. In Hong Kong, the Hong Kong Monetary Authority regulates (including licensing) stored-value facility providers, such as AliPay, WeChat Pay and PayPal.

Key terms

Term	Meaning in this document
ABA	Australian Banking Association
AFCA	Australian Financial Complaints Authority
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
AusPayNet	The Australian Payments Network, an industry association that self-regulates the Australian payments system
Banking Code	Banking Code of Practice, administered by the ABA
CFR	Council of Financial Regulators
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
ePayments Code	A voluntary code of conduct, which includes requirements that apply to electronic payment transactions, administered by ASIC
RBA	Reserve Bank of Australia
s765A(1)(h) (for example)	A section of the Corporations Act (in this example, s765A(1)(h)), unless otherwise specified