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The Manager
Consumer Policy Framework Unit
Infrastructure, Competition and Consumer Department
Treasury
Langton Crescent
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Issues paper – Gift cards in the Australian market

We refer to your issues paper that we received in December 2011 concerning the protection of consumers who use gift card products.

In considering the important questions that you raised in the issues paper and the role that we play in the issuance of gift cards in Australia, we have put together responses to your questions in light of our specific circumstances.

By way of background, Indue Ltd is an authorised deposit-taking institution (ADI), regulated by Australian Prudential Regulation Authority (APRA). Our diverse customer base includes:

- banks, building societies and credit unions
- retailers, corporates, mortgage originators, church funds and insurance companies
- gift and loyalty card providers, and
- Australian Government.

Indue's gift card services include the provision of a gift card processing platform to manage the card accounts, authorisation system, settlement and back-office servicing (disputes, third-party vendor management).

We thank you for the invitation to contribute to your review on gift cards. Our responses to your specific questions are contained in the attachment to this letter.

We would welcome the opportunity to meet with you to discuss our submission further. In the meantime should you have any questions or require further information please do not hesitate to contact me on (07) 3258 4248 or mswannell@indue.com.au.

Yours sincerely,



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Part I - Background

Question 1.1: What are the features that characterise the gift card market and what trends are likely to shape the manner in which consumers use gift cards in the future?

One of the key features that characterises the gift card market today is whether the gift card is an open or closed loop product.

In the past, paper vouchers restricted the end user to purchasing a product or service at a specific merchant group. With the introduction of the plastic gift card, the gift card market has expanded providing consumers and end users with greater choice on the type of card available for purchase and where it can be redeemed.

Legislative and scheme requirements and the payment network have played a significant role in determining the features that characterise the gift card market. Legislative and scheme requirements in regards to not only the physical characteristics of a card but the functionality such as no cash out on gift cards, online use for scheme, maximum values and PIN or signature. The use of gift cards through the existing Australian Payments system meant that cards were required to be magnetic stripe encoded, however this is changing for scheme cards with the introduction of EMV (chip) and payWave enabled terminals.

The rapid change in payments technology has had some impact on the gift card market: albeit in the form of the gift card itself. Over the past 7 years the gift card has evolved from a paper voucher to that of a plastic card and now in some cases, a virtual card delivered electronically by email and SMS. Recently with the advancement here in Australia of Near Field Communication (NFC), we anticipate the integration of gift cards into the mobile wallet, again removing the requirement to produce plastic.

Question 1.2: Why do consumers purchase gift cards and how are any advantages or disadvantages shared between the giver and receiver?

Consumers mainly purchase gift cards as a convenient solution to giving a gift, allowing the end user to apply the gift card funds to their product /service of choice. It does enable the giver to specify to a certain extent how and what the funds are spent on in contrast to a cash gift where there are no restrictions.

Question 1.3: Does the existing consumer protection framework provide practical protections for consumers who experience problems or issues when the purchase or receive gift cards?

It is our view that gift cards are simple, easy to use and well understood by consumers. This is evident by the significant growth in the gift card industry over recent years.

Whilst "gift cards" are classified as a "financial product" and fall within the scope of the financial services regime, ASIC has recognised that *"the costs associated with gift card issuers being required to obtain and comply with an AFS licence are likely to be disproportionate to any risks to consumers created by the use of gift vouchers or cards"*.¹ We strongly support ASIC's view and in particular, the adoption by ASIC of the

¹ ASIC's Regulatory Guide 185, Non-cash Payment Facilities at RG185.44.

Class Order [CO 05/738] (“Gift Card Class Order”). This Gift Card Class Order provides unconditional financial services regime relief to gift card issuers, provided that they meet the requirements set out in the Gift Card Class Order.

Gift card issuers currently have obligations to comply with the Gift Card Class Order, certain provisions of the Corporations Act, the ASIC Act and the Australian Consumer Law (which includes the unfair terms legislation and unconscionable conduct obligations). Indue’s view is that these laws provide consumers with adequate protection. These protections are similar to protections that are afforded to consumers when they purchase any other goods or services, other than gift card products.

We have significant concerns that over regulation of the gift card industry will create burdensome and expensive compliance requirements on gift card issuers. These requirements have the potential to overcomplicate a simple and well understood product and cause detriment to consumers. Our view is that the adoption of burdensome compliance regimes will potentially dilute the gift card industry (especially for small retailers) or cause gift card issuers to be placed in a position where they are required to increase their fees and charges to consumers to cover the compliance costs.

Whilst the practices that have been adopted by some recent high profile retailers who have become insolvent have received significant news coverage, these practices are no different to any other industry where a retailer or merchant receives upfront payment for goods or services that will be provided at a later date (e.g. airlines, travel agencies, gyms, schools, education). A recent example is the collapse of Air Australia. In these industries, the relevant consumer would also become an unsecured creditor on the winding up of a company, and will not receive their claims until priority payments have been made. We fail to see why gift card issuers should be treated differently to any other retailers that supply consumer goods and services after receiving upfront payment. We do not support the over regulation of the gift card industry in the event of a gift card issuer becoming insolvent. Certainly if the government is intending to regulate the gift card industry with respect to this issue, we would expect all other industries where pre-payments are made by consumers to also be regulated. We note that such regulation needs to consider administrators legal liability, in particular the need to be relieved of any personal liability for exercising preferential payments.

Question 1.4: What specific features of the ASIC Act and ACL should be promoted to consumers to better inform them of their rights in relation to gift cards?

Gift cards are products that are well understood by consumers. We do not believe that there is a requirement for any specific features of the ASIC Act and ACL to be specifically promoted to consumers in relation to gift cards. Certainly, in publications and material that are produced to assist consumers in understanding the ASIC Act and ACL, it could be noted that these features extend to financial products (including gift cards).

Part II - Issues in relation to the purchase and use of gift cards in Australia

Question 2.1: What evidence is there to demonstrate that issues related to gift card terms and conditions lead to consumer detriment?

We believe that there is no detriment to consumers as Terms and Conditions are well published on the card, the card carrier and more often these days, online through the gift card program manager's website.

Question 2.2: What experiences have individual consumers had with the terms and conditions that apply to gift cards, including the resolution of any complaints either direct with the gift card issuer or through a consumer affairs or fair trading body?

There is no differentiation between the experiences that a consumer would have with the terms and conditions that apply to gift cards to that they would experience with an eftpos debit card or other such card product. Based on our experience, gift card issuers include in their terms and conditions documents sufficient contact details to enable a cardholder to contact the gift card issuer if he/she has a complaint.

Question 2.3: What are the specific issues associated with the application of the terms and conditions including expiry dates, restrictions on low value use, changes in terms and conditions in the event of insolvency, fees and charges, limitations on use, and restrictions on receiving change. Please provide examples?

Expiry Dates: For a gift card to fall within the scope of the Gift Card Class Order, the gift card must, in circumstances where the presentation of a device (such as a gift card) is the means by which a person uses the facility, set out the expiry date prominently on the device in a manner that makes it clear that it is an expiry date. We support this requirement and believe that it provides consumers with adequate notice of the expiry date of gift cards.

Given that gift cards can be used for a large range of purposes, the expiry dates between gift card products will vary (for example, a gift card may be provided for a specific event and can only be used whilst that event is operating where as in comparison, a store gift card may be able to be redeemed over a 12 month period). Other gift cards may be provided by large business retailers who are able to offer a longer period for redemption of the gift cards.

We do not support the model adopted in Canada where gift cards cannot have an expiry date. We also do not support any proposal to align gift cards to a set expiry date (i.e. all gift cards must have a minimum redemption period of 12 months). In our view, both these requirements will impose significant costs to gift card issuers due to:

- gift card issuers being placed in a position where they will be required to maintain contracts and legal arrangements with third party suppliers (such as settlement providers and gift card system providers) for an indefinite period of time. This is an impractical and burdensome requirement; and
- the ongoing financial burden on gift card issuers' balance sheets (including potential financial reporting requirements and taxation and accounting issues).

We believe that the adoption of any such models will significantly dilute the gift card industry and have an adverse impact to consumers.

In our view, the Gift Card Class Order requirements are adequate and no further regulation is required.

Restrictions on Low Value Use: If a gift card is closed loop (i.e. can only be used at one merchant store), that merchant may individually impose terms on the use of the gift card (including not allowing the gift card to be used to purchase items below a certain value). Our view is that this is acceptable provided that the restriction is adequately and clearly disclosed in the gift card terms and conditions document.

Gift cards that are open loop (i.e. can be used at multiple or all merchants that have an Eftpos terminal) may have restrictions on low value use. These restrictions are usually imposed by the individual merchants who are not related to or associated with the gift card issuer. These restrictions are not unique to gift cards and impact all card products (including credit cards and debit cards). Merchants have the right to refuse to accept any card that is presented to it (including a gift card) or the right to refuse to allow a card to be used (including a gift card) if the purchase is below a certain value. Gift card issuers cannot control these restrictions in an open loop environment. Any regulation by the government, which places such a requirement on a gift card issuer to ensure merchants accept the gift cards, is likely to result in open loop gift card programs becoming redundant.

Fees and Charges: Gift card issuers (like any other card issuers) can impose fees and charges that are associated with the use of the gift card. We do not believe there should be any restrictions on gift card issuers charging fees and charges provided they are fair (i.e. not a penalty) and adequately disclosed in the terms and conditions document. This includes any dormancy or breakage fees.

Existing consumer law obligations address these issues and our view is that no further regulation is required.

Limitations on use with respect to Retailers that accept the Gift Card: Provided that any restrictions on the use of cards are adequately disclosed to consumers (e.g. specifying that a shopping centre gift card may not be used at all retailers in that shopping centre) we do not consider that this is an issue that requires further regulation.

Receiving Change: For open loop gift card programs (i.e. where the cardholder can use the gift card at multiple merchants or all merchants via the Eftpos network) it is impractical for the merchant to offer change to the gift cardholder in circumstances where the remaining balance on the gift card is less than a certain amount. For these programs, the merchant will not have an arrangement with the gift card issuer to give cash to the cardholder. The merchant will also not know the balance that is remaining on the gift card as it will not have access to the gift card issuer's systems.

It is further noted that to fall within the scope of the Gift Card Class Order, the remaining credit on the gift card, must not be withdrawn from the facility in whole or in part by means of a cash payment (except for the withdrawal of the full amount standing to the credit of the facility after one or more non-cash payments have been made through the facility being an amount in the reasonable

Opinion of the issuer, is unlikely to be conveniently used under the facility. In an open loop environment, an issuer does not have arrangements in place with merchants to enable merchants to act on their behalf and make a decision to return the remaining funds to the cardholder by means of a cash payment.

Gift card issuers traditionally do not charge cardholders a fee per transaction. Instead, the gift card issuer retains any "breakage" on the gift cards if they expire or are closed. If gift card issuers are obliged to return funds to cardholders by means of a cash payment, gift card issuers will be required to revisit their fee structure and implement other arrangements to charge cardholders fees. This may include charging a cardholder a per transaction fee. Such changes will require gift card issuers to change gift card systems and set up reporting and other processes. In our view, the costs of a gift card issuer adopting these requirements will be passed back on to the end consumer.

Terms and Conditions in the Event of Insolvency:

Similar to other industries where a consumer purchases goods or services in advance, in the event of the insolvency of a gift card issuer, the gift cardholder will become an unsecured creditor. We do not believe that documenting this risk to a gift cardholder in the terms and conditions document provides the cardholder with any additional rights or benefits.

The ability to unilaterally change terms and conditions (for example, administrators imposing new conditions where gift cardholders must spend an additional dollar for every dollar redeemed on the gift card) to a cardholder's detriment is governed by the unfair terms legislation. The unfair terms legislation should provide cardholders and the community with adequate protection in the event that an administrator does impose new terms and conditions which are unfair. However, in these circumstances, consumers are offered a choice. They can accept the new terms and conditions imposed (i.e. redeem their gift cards by spending an additional dollar for every dollar redeemed on the gift card) or become an unsecured creditor.

Question 2.4: What flexible policies or 'grace periods' are offered by retailers to support gift card holders who are unsatisfied with the terms and conditions that may apply?

Indue's gift card program "owners", have full flexibility in the setting of the policies governing how they will respond to gift cardholders who are unsatisfied with the cards terms and conditions. These policies includes how they will treat lost or stolen cards and whether they will replace cards where there are unspent funds, refunds and the term of a grace period after the expiry date.

Question 2.5: How do terms and conditions vary between gift cards and what expectations do consumers have with respect to the core terms and conditions that apply?

We believe that there is very little variance between the terms and conditions of gift card products in the market place. Indue provides its clients with a base generic terms and conditions document which can be amended by our individual program managers.

Question 2.6: Broadly speaking, are terms and conditions of gift cards adequately disclosed to gift card purchasers and recipients? Please provide examples.

We believe that consumers are provided with sufficient disclosure in respect to the terms and conditions of the gift card product. The majority of gift cards have an overview of the important terms and conditions printed on the reverse side of the actual card and in most cases the card carrier also discloses the terms and conditions of use. Today, it is common practice to direct consumers to a website where they can view the full disclosure document.

Question 2.7: What specific information is useful to consumers at the point of sale?

Information such as the use of PIN or signature and any merchant acceptance limitations (as does apply with other card types) may be useful to consumers at the point of sale. In regards to the first point, the instructions on using a card are usually provided in an overview on the back or in full in the Terms and Conditions of Use document.

Question 2.8: How can information about gift card terms and conditions be effectively communicated to people purchasing gift cards as well as to those receiving gift cards?

We believe that today the terms and conditions are effectively communicated through the use of card carriers and website content.

Question 2.9: What evidence is there to demonstrate that issues related to gift card administration lead to consumer detriment?

Indue believes that there is no evidence of consumer detriment as the gift card "owner" has full control over the administration of its program and in particular how lost/stolen and expired cards with funds and unspent monies will be treated. Consumers are made fully aware through the Terms and Conditions of Use as to how these cards work as is the same with other card payment products.

Question 2.10: What are the specific issues associated with lost or stolen cards, the use of unspent monies and interest accumulated on unused gift cards and gift card holder rights in the event of insolvency? Please provide examples.

Lost or Stolen Cards: Gift cards are issued to individuals who are not identifiable to the gift card issuer. In most cases the person that purchases the gift card is not the end user of the gift card. For this reason, it is virtually impossible for a gift card issuer to take appropriate action if a gift card is lost or stolen. Gift card issuers may be able to issue a replacement gift card to a cardholder if the cardholder knows the gift card number and the value on the gift card remains available and has not been redeemed. In our view, cardholder's are well informed that they should treat the gift card like cash.

Use of Unspent Monies: In our view, giving cardholders rights to claim unspent monies will create burdensome compliance and process requirements on gift card issuers. It would be virtually impossible for a gift card issuer to validate a cardholder's right to the unspent monies, given the cardholder is not identifiable to the gift card issuer. This

has the potential to expose gift card issuers to claims for returning unspent funds to the wrong person. It also may expose the gift card issuer to large fraud. Gift card issuers recover costs and earn revenue on the unspent monies. If this is to change, gift card issuers will be required to revisit their fee charging structure to incorporate fees such as transaction fees and monthly administration fees. In our view, this complicates a simple product and will be costly for gift card issuers to implement.

Interest Accumulated on Unused Funds: Gift cards are not an investment product and to introduce an investment component to gift cards (i.e. interest on unused funds) will create complexities under the Corporations Act. It has the potential of requiring gift card issuers to comply with Chapter 7 of the Corporations Act (including the requirement to hold an AFSL and issue PDS and FSG documents). In our view, this will cripple the gift card market and result in only the large players remaining in the market. Practically, once again we don't understand how gift card issuers will identify the persons entitled to the interest accumulated on unused funds. Financially, it will create significant issues for gift card issuers (including financial reporting, revenue structure changes and trust accounting structure issues) and require gift card issuers to develop and implement new systems.

Gift Card holders rights in insolvency: Refer to our earlier comments at Questions 1.3 and 2.3 in relation to this issue. Our view is that Administrators may be subject to unfair preferential claims if they favour gift cardholders as creditors over other creditors of the company. There is also the potential that gift card issuers will struggle to receive funding from commercial entities (such as banks) if they issue gift cards. Banks and other third parties that lend funds to gift card issuers are unlikely to allow those gift card issuers to issue or continue to issue gift cards if it has the potential of providing the cardholders with preferential treatment in the event of insolvency.

Question 2.11: Are the generic consumer protections afforded under the ACL and the ASIC Act capable of addressing concerns relating to gift card administration?

Unlike other financial products, gift cards are not identifiable to an individual cardholder. If a cardholder has an issue with a gift card (such as it being faulty, lost or stolen), a gift card issuer cannot assist that cardholder without the cardholder providing to the gift card issuer some type of record (such as the gift card number or gift card account number). In our experience, cardholders are advised in their terms and conditions documents to keep a record of their gift card number. They are also advised to treat their gift card like cash as if the gift card is stolen or lost, it may be used by a third party. Provided cardholders are advised of these risks and issues in the terms and conditions documents, the ACL and ASIC Act provides sufficient protection. The introduction of burdensome practices (like identification of cardholders and tracking systems) will in our view, significantly increase the costs to gift card issuers, which will be passed on to consumers.

Gift card issuers in most circumstances retain the breakage on any unused gift cards. Unlike other financial products, where monthly account fees and transaction fees are charged to the cardholder, gift cards usually do not impose transactional and administration fees and charges on the cardholder. The breakage earned by gift card issuers is how gift card issuers recover their expenses associated with administering the gift card products. This breakage is described and outlined very clearly in the terms and conditions documents. If gift card issuers are regulated so that they may

not retain breakage, they will be required to introduce other fees and charges which will be charged to the cardholder. This is burdensome (in terms of system developments that may be required and other accounting requirements) and will create complexities for consumers.

Gift cards are not identifiable to an individual cardholder. The introduction of practices where gift card issuers must return funds to cardholders (without being able to verify the cardholder) will create increased administration, compliance and risk to gift card issuers. Any increased costs to gift card issuers are likely to be passed on to the consumers.

Question 2.12: What accounting, record keeping and administration processes typically support gift card facilities?

Cardholders can typically access their gift card details including transaction history and card balance through online portals, IVR functionality and/or call centres.

Question 2.13: Are there any market indicators which suggest that the Australian gift card market is not operating efficiently?

The continual growth in the sale and use of gift cards indicates that the market is operating efficiently.

Question 2.14: What factors do gift card issuers consider when determining the terms, conditions and administration processes typically applied to gift cards?

In our experience, when preparing gift card terms and conditions, gift card issuers usually consider factors such as:

- (a) whether the gift card issuer will incur fees and charges from merchants, other financial institutions and gift card system providers as a result of the cardholder using the gift card;
- (b) how the gift card issuer will identify the cardholder if a gift card is lost or stolen and whether it is possible for a replacement card to be issued. For example, this is likely only to be possible if the cardholder knows his gift card number and expiry date;
- (c) where the gift card can be used and whether there are any restrictions on its use (for example, it is at the merchant's discretion whether or not it will choose to accept the gift card as a means for making payment);
- (d) how a cardholder may contact the gift card issuer if there is a dispute or issue with the gift card; and
- (e) the costs associated with printing hard copy terms and conditions documents.

Question 2.15: Do consumers compare the terms and conditions of alternative gift card products when making gift card purchases? Please provide examples.

We believe that some consumers, not all, compare gift card product features when making a gift card purchase. These comparisons would be mainly around where a card can be used i.e. closed (single merchant group only) versus open loop (scheme card), and whether there is a cost to purchase on top of the card value.

Question 2.16: How would gift card issuers be affected if there were any restrictions on allowable terms and conditions, including expiry date, applied to gift cards?

Any mandatory requirements or restrictions on allowable terms and conditions which place obligations on gift card issuers to:

- introduce new processes and procedures (such as returning unused funds to unidentified cardholders or investigating lost or stolen cards);
- revisit fee and charging structures (for example, to introduce a fee per transaction rather than breakage);
- implement burdensome compliance requirements (such as monitoring of expiry dates and financial reporting requirements);
- implement gift card system changes; or
- tailor programs to meet a “one size fits all” obligation;

will have a significant impact on the gift card industry.

Our view is that such requirements will:

- reduce competition between gift card issuers;
- cause the smaller players in the market (such as smaller retailers and merchants) to cease offering gift card programs;
- increase gift card issuers’ operational and compliance costs;
- require gift card issuers to increase fees and charges to the end consumer; and
- result in a simple and well understood product becoming complicated to the end consumer.

Part III - International regulatory approaches

Question 3.1: Are there any other notable international regulatory approaches that specifically address the issues raised in this issues paper?

Indue’s gift card business is restricted to the issuance of cards in Australia and as such we do not have first-hand experience in having to comply with regulation in other jurisdictions.

Part IV - Options

Question 4.1: How can consumers be further assisted to develop a practical understanding of how to enforce their rights under the generic consumer protection provisions of the ASIC Act and the ACL?

In our view, currently the information available on the ACCC website for consumers is easy to access, easy to find and written in plain English. These types of publications should continue to be promoted to consumers.

Question 4.2: What are fair terms and conditions in balancing the issues faced by consumers purchasing and using gift cards, and gift card issuers?

As noted in this response, gift cardholders are not identifiable to the gift card issuer. Therefore, some of the terms in the terms and conditions documents for gift cards are

drafted to reflect this (such as lost or stolen cards). Our view is that provided that there is adequate disclosure in the terms and conditions (for example, unspent funds will be returned to the gift card issuer) and that these documents meet the requirements of the unfair terms legislation, then the terms and conditions adequately balance the issues faced by consumers compared to gift card issuers.

Question 4.3: What are fair gift card administration practices in balancing the issues faced by consumers purchasing and using gift cards, and gift card issuers?

To ensure consumers have protection and the ability to dispute purchases on their card, conditions of use and terms of sale, an appropriate complaints handling process must be available. In addition to this, a cardholder must have access to the gift card issuer using channels such as phone or website, to obtain information their gift card. This information could include card expiry date, card balance and transactional information.