Law Council
OF AUSTRALIA

Business Law Section

20 July 2023

Director
Payments System and Strategy Unit
Financial System Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: paymentsconsultation@treasury.gov.au

Dear Director

Reforms to the *Payment Systems (Regulation) Act 1998*

The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) makes this submission to the Treasury in response to the consultation paper titled "Reforms to the *Payment Systems (Regulation) Act 1998*" (the **Consultation Paper**), which was released on 7 June 2023.

The Committee also thanks Treasury for granting an extension of time for the Committee to respond to the Consultation Paper and apologises for its delay in providing this submission.

If Treasury has any questions or would like to further discuss with any matters raised in this submission with the Committee, please do not hesitate to contact Pip Bell, Chair of the Committee (pbell@pmclegal-australia.com).

Yours faithfully

Philip Argy
Chairman
Business Law Section

Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • ***Email*** jessica.morrow@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • Level 1, MODE3, 24 Lonsdale St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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Telephone +61 2 6246 3737 • *Fax* +61 2 6248 0639
Email Jessica.Morrow@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
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Table of Contents

Submission

Preliminary comments

1. The Committee welcomes and supports the initiative to update the *Payment Systems (Regulation) Act 1998* (Cth) (the **PSRA**) to reflect the evolving payments landscape.

2. Below, the Committee has sought to respond to questions posed in the Consultation Paper, to the extent that the Committee considers that:

   (a) they raise legal issues; or

   (b) based on Committee members' experience in assisting clients to comply with the existing PSRA, the proposals set out in the Consultation Paper may have practical effects that warrant careful examination.

Definition of "payment system"

> 1) *Does the proposed approach to updating the definition of 'payment system' appropriately capture arrangements that are involved in facilitating or enabling payments?*

3. Page 7 of the Consultation Paper states:

   A revised definition [of payment system] *could apply to an arrangement or series of arrangements for enabling or facilitating payment or transfer of value, or a class of payments or transfer of value, and includes any instruments and procedures that relate to the arrangement or series of arrangements.*

4. Based on the explanation provided on page 6 of the Consultation Paper, and having regard to evolving mechanisms for enabling payments, the Committee understands the rationale for Treasury's proposal to extend the definition of a payment system beyond a multilateral arrangement.

5. However, the Committee questions whether the use of the language of inclusion of "instruments and procedures that relate to the arrangement …", in the page 7 description quoted above, would be appropriate because, on one reading, this could be so broad that it would characterise documents and agreements governing the use of the system as if they were themselves the system. The Committee believes this may not have been the intention.

6. Historically, a payment may have been thought of as something that involved a movement of 'money'. What should be seen as 'money' is a complex subject, but it is usually confined to either something that is generally accepted to satisfy a debt, or meets the economic function of money. In addition to physical currency, this would include an arrangement leading to the crediting of an amount denominated in a currency to a bank account.

7. The Committee submits that the proposed extension of the definition of "payment system" by including the expression "payments or ***transfer of value***" would expand what could potentially be a "payment system" to any arrangement for enabling or facilitating the transfer of anything of worth (even a physical object, such as a vehicle on a transporter), which need not be:

   (a) money or amounts denominated in fiat currency; nor

   (b) something commonly accepted in satisfaction of a debt.

8. The Committee therefore queries whether this definition might be broader in scope than was intended, and whether it might rather have been intended to capture the more limited category of transfers of worth which amount to a "value transfer system" (but need not be limited to "money" or "payments").

Definition of "participant"

> *2) Does the proposed approach to updating the definition of 'participant' appropriately capture the full range of entities that currently and may in future play a role in the payments system?*

9. Page 8 of the Consultation Paper states:

   A revised definition of participant could apply to a constitutional corporation that operates, participates in or administers a payment system.

   It could also include a constitutional corporation that provides services to a payment system, or provides services for the purposes of enabling or facilitating a transfer of value using a payment system.

10. The Committee submits that this would significantly widen the definition of "participant" to the extent that almost *any* provider of services to an operator of a (too broadly defined) payment system could be classified as a participant, no matter how trivial their role.

11. The Committee suggests that, alternatively, a provider of services to an operator perhaps ought to be characterised as a "participant" if (and only if) the services that they provide:

    (a) directly implement a transfer;

    (b) make records of the relevant transaction; and/or

    (c) involve holding any funds or value at any stage in the processing of the transfer.

Definitions of "payment system" and "participant"

3) *Should other considerations be taken into account in updating the definitions?*

12. In the view of the Committee, the scope of definitions should be limited so that:

    (a) a "payment system" is an arrangement for making money available, or making available a commonly accepted equivalent to money, to discharge a debt or make payments; and

    (b) a "participant" in the payment system is:

        (i) the provider/operator of the arrangement; or

        (ii) the provider of a service that affects the risk of loss of funds or of failure of the arrangement to achieve its purpose.

    (Please note that this suggestion of the Committee is conceptual only and is not intended to be a specific drafting recommendation.)

13. Further, whilst each definition is considered in isolation, the Committee notes that falling within the scope of a "participant" in a payment system remains a low threshold for imposing obligations. As identified in the following note on page 8 of the Consultation Paper:

    being within scope of regulation does not mean a participant will be regulated. A decision to regulate a participant must be done on 'public interest' or on 'national interest' grounds.

Definition of "national interest"

4) *Is the proposed 'national interest' test appropriate for achieving the policy as outlined?*

14. It is proposed that this test would be relevant to a decision of the Treasurer to designate a payment system.

15. Page 12 of the Consultation Paper states:

    It is envisaged that in making a decision based on the national interest under the PSRA, the Treasurer would have regard to a range of factors including, but not limited to, the following:

    - *national security*
    - *consumer protection*
    - *data-related issues*
    - *innovation*
    - *cyber security*
    - *anti-money laundering and counter terrorism financing*
    - *crisis management*
    - *accessibility*

    Factors of this kind could be outlined either in the legislation, its explanatory material, or in a separate policy document.

16. The Committee is familiar with a "national interest" test in the context of legislation such as the *Foreign Acquisitions and Takeovers Act 1975* (Cth), where it is often associated with national security concerns, foreign and defence policy, sanctions, competition policy, and tax and economic considerations.

17. The criteria canvassed in the Consultation Paper (which are noted above) appear to include a wide range of policy considerations that would usually be addressed by other Ministerial portfolios. For example, while considerations involving consumer protection (regulated by the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission) may fall within the Treasury Ministerial portfolios and agencies, other relevant considerations—including data-related issues (regulated by the Office of the Australian Information Commissioner), anti-money laundering and counter terrorism financing (regulated by the Australian Transaction Reports and Analysis Centre), and cyber security (for which the Australian Federal Police and others have responsibility)—may not.

18. The Committee suggests that, if the Treasurer were to be able to consider the above matters in designating a payment system, the Treasurer should only be able to consider them to the extent they are relevant to concerns about financial stability and related matters, which could affect confidence in the integrity of the Australian financial system.

19. In any case, the Committee considers that these national interest considerations should be identified in consultation with other relevant Ministers and, where relevant, a decision of the Treasurer ought to be subject to consultation with other relevant Ministers.

5) Is the proposed approach to delineating the Treasurer's national interest powers clear and effective?

20. The Committee has nothing to add to the comments that it has made in response to question 4.

6) Are there views or considerations on whether the Government should include a list of relevant considerations for the Treasurer to have regard to in the legislation, explanatory materials, or a separate policy document?

21. In the view of the Committee, it would be preferable that the relevant considerations be specified in the legislation.

7) Are there other considerations that have not been listed that should generally be considered in relation to the 'national interest'?

22. The Committee has nothing to add to the comments that it has made in response to question 4.

Designating payment systems

> 8) *Is the scope of the proposed Ministerial designation power effective and appropriate?*

23. The Committee does not express a view on the need for, and therefore the appropriateness of, a Ministerial designation power.

24. If a designation power were determined to be appropriate, then the Committee considers that the scope of the proposed power would be effective.

Engaging the regulators

> 9) *Is the Treasurer's proposed ability to allocate responsibility to regulators (within their mandate) other than the RBA appropriate?*

25. If a designation power were to be included, the Committee considers that the ability to allocate responsibility to regulators other than the RBA would appropriate.

Directions to regulators

> 10) *Is the scope of the Treasurer's power to direct Treasury portfolio regulators (ACCC, ASIC, RBA) to implement a policy position appropriate?*

26. The Consultation Paper proposes that a responsibility would be given to the regulator for whom that responsibility would be most aligned and consistent with their mandate.

27. The Committee considers that the Treasurer could give a direction of a general nature to a regulator as part of an allocation of responsibility, as this would appear to be part of defining the allocation.

28. By contrast, the Committee considers that the Treasurer giving a direction for a regulator to implement a particular policy appears to be potentially inconsistent with the reasoning supporting a power to allocate responsibility to the relevant regulator. This is because a power to allocate responsibility to a regulator is justified on the basis that the expertise on a relevant subject is likely to reside with the relevant regulator.

Consultation requirements

> 11) *Is the proposed consultation approach sufficient for both Ministerial designations and directions?*

29. The Committee supports the use of consultation processes in matters of this level of complexity and importance.

30. The Committee notes that it is not proposed that the Treasurer *should* consult before designating a payment system, although the Consultation Paper suggests (at page 15) that this is likely to happen in practice.

31. The Committee submits that consultation should be mandatory before a payment system is designated, so that relevant factors will be taken into account by the Treasurer before a designation is made. This may include, for example, consultation with the person responsible for that payment system and/or other regulators regarding the potential designated payment system's existing regulatory obligations as part of considering the question of whether the PSRA is the appropriate framework to address an issue.

32. In the view of the Committee, it would be appropriate for the Treasurer to consult with a regulator before allocating responsibility to that regulator.

Information gathering and disclosure

> 12) *Would it be appropriate to enable the RBA to have greater information disclosure powers? What constraints or conditions should be applied as part of such a power?*

33. The Committee submits that, if a power to disclose information without the consent of the participant were granted, it would need to be used carefully. This is due to the potential for instability in the financial system that could result from disclosure of certain forms of non-compliance by a participant in the payment system.

34. In the view of the Committee, at a minimum, it would be essential to specify public interest criteria that must be satisfied before confidential or personal information might be disclosed.

Enforceable undertakings

> 13) *Is there merit in providing the RBA with the power to accept enforceable undertakings on a voluntary basis?*

35. In Committee members' experience, a power to accept enforceable undertakings can be highly effective in the context of breach or perceived breach of conduct obligations of a regulated entity. The Committee is of the view that, if a participant gave an enforceable undertaking after an issue had emerged, it would be likely to provide other participants with confidence in the system.

Penalties

> 14) *Would there be benefits in introducing a more graduated penalty regime into the PSRA?*

36. The Committee does not generally express views about the amount of a penalty to be imposed for a particular breach, whether criminal or civil, nor does it propose to do so in this case.

37. The Committee notes that a requirement of a standard or an access regime would involve a participant interpretating, and exercising judgement in relation to, a particular set of circumstances according to specified principles. For that reason, having regard to the probable nature of a "breach" of such a requirement, the Committee submits that a civil or criminal penalty is unlikely to be appropriate unless a participant has failed to:

    (a) apply a process reasonably designed to comply with the standard or the access regime requirement; or

    (b) comply with a direction properly given by the RBA.

Procedures to resolve differences of opinion between the Government and the RBA

15) *Is there an ongoing role for section 11 of the RBA Act with regards to payments system policy?*

38. In response to question 10 above, the Committee observed that, following designation of a payment system, giving specific directions to a regulator for implementation of policy seemed to be inconsistent with the notion that an allocation of responsibility is made to the regulator best placed to address the relevant matter.

39. The Committee submits that the retention of section 11 of the RBA Act for payment system policy appears to cut across the philosophy underpinning the idea of allocation of responsibility to the regulator that is considered best equipped to address the relevant matter. The Committee also notes that it is always open to a government to legislate for a change of policy on a particular matter if it is not satisfied with the approach taken by the RBA.

Other

16) *Are there any other changes to the PSRA that the Government should consider?*

40. Although it may become more relevant in relation to another separate consultation process—the Payments System Modernisation (Licensing: Defining Payment Functions) consultation paper also released by Treasury in June 2023—the Committee considers that certain conditions of approval of a holder of stored value should be stipulated in the relevant legislation.

41. In particular, consideration should be given to whether licensing or registration is appropriate in light of the risks posed by the relevant facility, which would include taking into account whether amounts held as stored value were:

    (a) guaranteed by an authorised deposit-taking institution regulated by the Australian Prudential Regulation Authority; or

    (b) held in trust in a regulated “client money” account.

Annexure A: About the Business Law Section of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council (**the Section**) furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee

- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committee meets quarterly to set objectives, policy and priorities for the Section.

The current members of the Section Executive are:

- Mr Philip Argy, Chairman
- Professor Pamela Hanrahan, Deputy Chair
- Mr Adrian Varrasso, Treasurer
- Mr Greg Rodgers, Immediate Past Chair
- Mr John Keeves
- Ms Rachel Webber
- Ms Caroline Coops
- Dr Elizabeth Boros
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.au.

The Section's website is www.lawcouncil.au/business-law.