

2022–2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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TREASURY LAWS AMENDMENT (BETTER TARGETED SUPERANNUATION  
CONCESSIONS AND OTHER MEASURES) BILL 2023: AMENDMENTS OF THE  
PAYMENT SYSTEMS (REGULATION) ACT 1998

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EXPOSURE DRAFT EXPLANATORY MATERIALS

## **Consultation preamble**

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

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# ***Glossary***

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This Explanatory Memorandum uses the following abbreviations and acronyms.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ACCC	Australian Competition and Consumer Commission
AIA	<i>Acts Interpretation Act 1901</i>
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
Bill	Treasury Laws Amendment (2023 Measures No. 4) Bill 2023
BNPL	Buy now, pay later
PSRA	<i>Payment Systems (Regulation) Act 1998</i>
RBA	Reserve Bank of Australia
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>



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# **Chapter 1: Reforms to the Payment Systems (Regulation) Act 1998**

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## Outline of chapter

- 1.1 The Bill amends the PSRA to modernise the payments regulatory framework, ensuring it is fit-for-purpose and can address emerging risks related to payments.
- 1.2 In particular, the Bill expands the regulatory coverage of the PSRA by updating key definitions to ensure all entities that play a role in facilitating or enabling payments, including new entrants, are appropriately regulated.
- 1.3 The Bill also introduces new Ministerial powers that can be exercised in the national interest to ensure the Government can respond to payments issues beyond the existing remit of the RBA.
- 1.4 Finally, the Bill modernises the penalty regime in the PSRA by introducing civil penalty provisions and enforceable undertakings, and increasing existing maximum criminal penalties.

## Context of amendments

- 1.5 The RBA is the only entity provided with regulatory powers or functions under the PSRA. The RBA's powers under the PSRA in respect of payment systems and their participants include the ability to:
- designate a payment system;
  - impose an access regime on participants in a designated payment system;
  - determine standards to be complied with by participants in a designated payment system;
  - give directions to participants in designated payment systems to ensure compliance with an access regime or standard; and
  - arbitrate disputes between participants in a designated payment system.
- 1.6 Designation of a payment system does not, of itself, impose any obligations on a participant in the designated payment system. Obligations are imposed by the RBA on participants in a designated payment system through access regimes and standards on public interest grounds.
- 1.7 The final report of the Review of the Australian Payments System (Payment Systems Review) found that the RBA's existing regulatory powers under the PSRA may not adequately capture the full suite of systems and participants within the payments ecosystem. The Review also noted the limits to the RBA's powers under the public interest test. It recommended the creation of a Ministerial designation power based on the national interest, to ensure emerging payment issues which fall outside of the scope of public interest can be addressed.
- 1.8 The Review found that the existing definitions of 'payment system' and 'participant' in the PSRA were not sufficient to capture sections of the broader payments system ecosystem. This limitation could constrain the ability of the RBA to respond to risks to financial stability, efficiency or competition posed by new innovations in the payments ecosystem.
- 1.9 Similarly, the existing designation system was found to lack the flexibility to designate payment systems for reasons beyond financial stability, efficiency and competition. It also limited the ability of other agencies, and the Treasurer, to engage with, and coordinate, payments-related matters.

## Summary of new law

- 1.10 Schedule # to the Bill amends the PSRA to implement the relevant findings of the Payment Systems Review. These amendments will ensure the payments



regulatory framework is fit-for-purpose and can adequately address emerging risks and technologies in the payments ecosystem.

## Comparison of key features of new law and current law

**Table 1.1 Comparison of new law and current law**

<b>New law</b>	<b>Current law</b>
The definition of ‘payment system’ covers a broader set of arrangements, including payment systems that use non-monetary digital assets for payments or provide services that facilitate a payment being made, and ‘three party’ or ‘closed loop’ systems.	The definition of ‘payment system’ is limited to the circulation of money and can also be interpreted to be limited to multilateral arrangements in which there are multiple participants that operate under a common set of rules.
The definition of ‘participant’ captures all entities involved in the payments value chain, including entities with or without a direct relationship to a payment system.	The definition of ‘participant’ can be interpreted to be limited to entities that are formal members of a designated payment system that are subject to the rules governing the operation of the system.
The RBA can accept enforceable undertakings relating to matters in relation to which the RBA has a function or power under the PSRA, regulations or other legislative instrument made under the PSRA.	No equivalent.
In addition to the powers of the RBA, the Minister has the power to designate a payment system if the Minister considers that it is in the national interest to do so.	Only the RBA has the power to designate a payment system, only if it is in the public interest to do so, and perform regulatory powers and functions in relation to that designated payment system.
The Minister has the power to nominate an entity to perform regulatory powers and functions in relation to a designated payment system. The Minister may direct nominated regulators about the performance of functions and powers under the PSRA. The nominated regulator may impose an access regime on participants and determine standards to be complied with by	No equivalent.

<b>New law</b>	<b>Current law</b>
participants in a designated payment system.	
The PSRA contains a civil penalty framework that relies on the standard framework from the Regulatory Powers Act to the extent possible.	No equivalent.
The maximum penalties for certain criminal offences in the PSRA are increased to reflect the seriousness of the misconduct.	The maximum penalties for certain criminal offences in the PSRA do not reflect the seriousness of the misconduct.

## Detailed explanation of new law

### Reforms to definitions

#### Adjustments to definition of payment system and funds

1.11 Schedule # to the Bill repeals the current definition of ‘payment system’ in section 7 and substitutes it with a new definition to capture both bilateral and multilateral arrangements and ensure it is technology neutral.

*[Schedule #, item 4, section 7 of the PSRA]*

1.12 Differences between the current and new definitions are outlined in Table 1.2.

**Table 1.2 Comparison of new definition and current definition**

<b>New definition</b>	<b>Current definition</b>
<p>Payment system:</p> <p>(a) means an arrangement or series of arrangements under which transfers of funds are made; and</p> <p>(b) includes any instruments and procedures that relate to that arrangement or series of arrangements.</p>	<p>Payment system means a funds transfer system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system.</p>

1.13 The current definition of payment system limits a payment system to, among other things, a system that facilitates the circulation of money. This means that payment systems that facilitate payments in non-monetary digital assets or that provide services which facilitate a payment being made cannot be considered a payment system under the PSRA. The amendments extend this aspect of the

- definition to cover a broader set of arrangements by picking up the concept of transfers of funds.
- 1.14 The current definition is also potentially limited in its application to arrangements in which there are multiple participants that operate under a common set of rules.
- 1.15 The amendments update the definition so that it is clear that a payment system will encompass ‘three party’ or ‘closed loop’ systems. A closed loop system refers to a system that consists only of multiple bilateral arrangements between an entity and the payers and payees which use that system, with no interactions between the payers and payees. A three party system refers to where one entity – a card scheme – performs both the acquirer and issuer roles. For example, American Express and Diners Club both currently operate through a three party system. Both kinds of system will be capable of meeting the updated definition of ‘payment system’.
- 1.16 The Schedule also introduces a definition for the term ‘funds’. ‘Funds’ is an umbrella term that includes, but is not limited to, money and digital units of value (or unit of value), including digital currency (within the meaning of the *New Tax System (Goods and Services) Tax Act 1999*).  
*[Schedule #, item 2, section 7 of the PSRA]*

## Adjustments to definition of participant

- 1.17 The PSRA provides for the exercise of regulatory powers by the RBA in relation to a designated payment system. These powers allow for the making of access regimes and standards which apply to participants in the payment system.
- 1.18 Schedule # to the Bill repeals the current definition of ‘participant’ and substitutes it with a new definition to capture all entities that play a role in the payments value chain, including entities that have a role in facilitating or enabling payments that are made through a payment system.  
*[Schedule #, item 3, section 7 of the PSRA]*
- 1.19 Differences between the current and new definitions are outlined in Table 1.3.

**Table 1.3 Comparison of new definition and current definition**

<b>New definition</b>	<b>Current definition</b>
Participant in a payment system means: (a) a constitutional corporation that operates, administers or participates in a payment system; or	Participant in a payment system means: (a) a constitutional corporation that is a participant in the system in accordance with the rules governing the operation of the system; or

<b>New definition</b>	<b>Current definition</b>
(b) a constitutional corporation that provides services that enable or facilitate the operation or administration of, or participation in, a payment system.	(b) a constitutional corporation that is an administrator of the system.

- 1.20 The new definition ensures all entities involved in the payments value chain, including entities with or without a direct relationship to a payment system, are captured. This includes, for example, digital wallet services which facilitate payments by storing digital representations of payment cards.
- 1.21 This adjustment reflects that some entities that act as intermediaries between a person and a payment system, rather than only interacting with the payment system, may nevertheless play an important role in facilitating or enabling payments.
- 1.22 The new definition of participant would extend to BNPL products, digital wallet passthrough services (such as ApplePay and Google Wallet), cash in transit services and services that facilitate payment in crypto assets (such as payments stablecoins), where such entities provide services to existing payment systems (such as Visa or Mastercard schemes).
- 1.23 The new definition is not intended to capture merchants that sell goods and services unless they are a member of a payment system or provide payment services in their own right.
- 1.24 The new definition replicates the technology neutral framing of the current definition to capture new services that emerge with a role in the payment chain.

## Overviews and headings

- 1.25 In order to reflect the amendments to the PSRA, Schedule # to the Bill makes minor amendments to the headings and overviews of the relevant Divisions and Subdivisions to reflect the greater range of matters dealt with in those Divisions and Subdivisions.  
*[Schedule #, items 7, 8, 9, 10, 19, 20, 21, 22, 23, 24, 28 and 29 subparagraphs 6(3)(a) and 6(3)(b)-(e), subsection 6(3), note to subsection 6(3), section 7(1), paragraph 7(a), section 10(1), section 10(1A), section 10(2), paragraph 10(2)(a) and paragraphs 10(2)(b)-(d), Division 2 of Part 3 (heading), Division 3 of Part 3 (heading) and Subdivision A of Division 3 of Part 3 (heading)]*
- 1.26 The amendments also include a definition for functions and powers under the PSRA, which includes a function or power under the Regulatory Powers Act as it applies in relation to the PSRA.  
*[Schedule #, item 89, section 9A of the PSRA]*

## Reforms to the regulation of payment systems

### The role of the Minister

#### *Power to designate payment systems*

- 1.27 Schedule # to the Bill provides that the Minister may, by notifiable instrument, designate a payment system as a special designated payment system if the Minister considers that doing so is in the national interest. Minor amendments are also made to the heading and overview of this section, as well as the definition of ‘access regime’, to reflect this.  
**[Schedule #, items 10, 11, 15, 19, 20 and 27, section 7 and subsections 10(1A) and 11A(1) of the PSRA]**
- 1.28 In determining whether a particular action is in the national interest, the Minister may have regard to matters that the RBA would have regard to in relation to the public interest. However, if considering public interest factors, the Minister must first identify an additional matter, or additional matters, that the Minister considers relevant to determining whether the action is in the national interest that are not mandatory RBA matters. As such, public interest factors would not, by themselves, be sufficient to justify a decision to designate a payment system on national interest grounds.  
**[Schedule #, item 18, section 8A of the PSRA]**
- 1.29 The inclusion of a national interest test will allow the Minister to address payments issues that are beyond the RBA’s current powers to designate a payment system in the public interest. It is appropriate that the Minister be the decision maker in this instance as the Minister can make timely decisions on urgent issues and be privy to broader national security risks. The Minister is also able to engage other agencies where issues extend beyond the remit of a particular regulator.
- 1.30 The use of ‘national interest’ is a new concept in the PSRA. It is envisaged that when designating a payment system based on the national interest, the Minister may have regard to such factors as:
- national security;
  - consumer protection;
  - data-related issues;
  - innovation;
  - cyber security;
  - anti-money laundering and counter-terrorism financing;
  - crisis management; and

- accessibility.
- 1.31 Before designating a special designated payment system, the Minister must consult with the RBA and each special regulator on the designation.  
***[Schedule #, item 27, paragraphs 11A(3)(a) of the PSRA]***
- 1.32 Additionally, the Minister must consider whether there are alternatives to the designation available under the PSRA or another Act as well as the outcome of consultation with the RBA and each special regulator. The Minister may also consider any other relevant matters. These matters provide appropriate safeguards around the use of the Minister’s national interest designation power to ensure that the power is exercised appropriately.  
***[Schedule #, item 27, paragraph 11A(3)(b) of the PSRA]***
- 1.33 For the avoidance of doubt, the amendments clarify that a payment system may be designated by the Minister in the national interest where it has been previously designated by the RBA on public interest grounds. The RBA may also designate a payment system that has been previously designated by the Minister. In which case a payment system will simultaneously be a designated payment system and a special designated payment system.  
***[Schedule #, items 8, 9 and 27, subsections 6(3) and 11A(2) of the PSRA]***
- 1.34 Prior to designating a payment system that is already a special designated payment system (the target payment system), the RBA must consult each nominated special regulator. Additionally, once the designation is made, the RBA must consult each nominated special regulator prior to performing a function or exercising a power in relation to the payment system. Nominated special regulators are required to engage in consultation before performing functions or exercising powers under the PSRA.  
***[Schedule #, item 26, section 11AA of the PSRA]***

### *Nomination of regulators*

- 1.35 The Minister is empowered to nominate special regulators in relation to special designated payment systems, and to provide directions about the performance of functions or exercise of powers by the special regulator under the PSRA or the Regulatory Powers Act to the extent it applies in relation to the PSRA.  
***[Schedule #, item 20, subsection 10(1A) of the PSRA]***
- 1.36 A special regulator is defined as an entity that is prescribed as a special regulator by the regulations. An entity must only be prescribed as a special regulator if the entity is a Commonwealth entity or a Commonwealth company (within the meaning of the *Public Governance, Performance and Accountability Act 2013*). It is likely that the RBA will be the most suitable special regulator to be nominated in relation to a special designated payment system in most circumstances. Other prescribed special regulators will likely include other Treasury portfolio entities such as ASIC, APRA and the ACCC.  
***[Schedule #, items 15 and 27, sections 7 and 11B of the PSRA]***

- 1.37 The Minister may nominate one or more special regulators in relation to a special designated payment system where the Minister considers that it would be in the national interest to do so. A nomination will be a legislative instrument.  
***[Schedule #, item 27, subsection 11C(1) of the PSRA]***
- 1.38 Before nominating a special regulator, the Minister must consult with the head of the regulator and consider the outcome of this consultation. A person is the head of a special regulator (including a special regulator that is a nominated special regulator) if the regulations prescribe the person as the head of that special regulator.  
***[Schedule #, items 13, 16 and 27, subsections 7(2) and 11C(4) of the PSRA]***
- 1.39 The Minister must also be satisfied the nomination is not inconsistent with the functions of the special regulator under the PSRA or any other Act and consider any other relevant matters before nominating a special regulator. Relevant matters could include whether the nominated special regulator has the appropriate expertise, knowledge and resources to carry out any functions, and the role of other regulators that may be relevant to the special designated payment system.  
***[Schedule #, item 27 subsection 11C(4) of the PSRA]***
- 1.40 Once nominated, a special regulator will be a nominated special regulator in relation to that special designated payment system and may perform a function or exercise a power of a nominated special regulator under the PSRA in relation to that special designated payment system. This means a nominated special regulator may impose an access regime, make standards, arbitrate disputes, and give directions to participants in relation to a special designated system. Amendments are made to the overview to reflect this change.  
***[Schedule #, items 13, 21, 22 and 27, sections 7 and subsections 10(2) and 11C(2) of the PSRA]***
- 1.41 Once nominated, a nominated special regulator may perform the functions, and exercise the powers, provided under the PSRA in relation to that special designated payment system. However, a nominated special regulator must not perform a function or exercise a power unless it is for the purpose of giving effect to a direction by the Minister, or if the Minister has given the nominated regulator a direction specifying matters that the nominated special regulator must consider when performing the function or exercising the power. If no directions to the nominated regulator are in force, the nominated special regulator must not perform any of the functions or exercise any of the powers in relation to its designated payment system.  
***[Schedule #, item 27, subsections 11CA(1) and (2) of the PSRA]***
- 1.42 In performing a function or exercising a power in relation to a special designated payment system, a nominated special regulator must comply with

any directions the Minister gives to the nominated special regulator.

***[Schedule #, item 27, subsection 11CA(3) of the PSRA]***

- 1.43 Before a nominated special regulator performs a function or exercises a power, the nominated special regulator must consult the RBA. Additionally, where there are multiple nominated special regulators in relation to a particular special designated payment system, each regulator must first consult the other regulators for the system.

***[Schedule #, item 27, subsection 11CA(4) of the PSRA]***

### *Ministerial directions*

- 1.44 Once a special regulator has been nominated, the Minister may give a direction to a nominated special regulator about the performance of functions or the exercise of powers under the PSRA or the Regulatory Powers Act by the nominated special regulator.

***[Schedule #, item 27, section 11E(1) of the PSRA]***

- 1.45 Directions by the Minister are a legislative instrument. However, sections 9 and 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015* provide that an instrument that is a direction by a Minister to any person or body are not subject to either disallowance or sunseting. It is appropriate that directions by the Minister are not subject to disallowance in this instance as directions are designed to ensure that the Minister's intended outcomes are complied with and appropriate outcomes in relation to the designated payment system are achieved. Given the potential serious circumstances where this power may be exercised, noting any designation or direction must be in the national interest, executive control over the instrument is intended. There are a number of safeguards in place to ensure directions are only made in appropriate circumstances, outlined below.

- 1.46 The Minister may give a direction to a nominated special regulator by giving a direction to all nominated special regulators.

***[Schedule #, item 27, subsection 11E(2) of the PSRA]***

- 1.47 Before giving the direction, the Minister must consult the head of the nominated special regulator, be satisfied that giving the direction is in the national interest and that it is consistent with the functions of the regulator under the PSRA and any other Act. If the Minister is not the responsible Minister for the nominated special regulator, the Minister must obtain written consent from the relevant responsible Minister prior to making a direction.

***[Schedule #, item 27, subsection 11E(3) of the PSRA]***

- 1.48 The direction comes into force on the day it was made unless another day is specified and continues in force until it is revoked. The nominated special regulator must comply with the direction. As the directions do not sunset, the directions continue in force until revoked by the Minister. The Minister may revoke the direction if at the time of revocation, the Minister considers that the



direction is no longer necessary or appropriate.

***[Schedule #, item 27 subsections 11E(4)-(5) of the PSRA]***

- 1.49 A direction may relate to a particular special designated payment system or may relate to a particular function or power that the nominated special regulator may perform or exercise under the PSRA or the Regulatory Powers Act as it applies in relation to the PSRA. If the direction relates to the exercise of particular functions or powers, the direction may specify the purpose for which the power or function must be exercised or the considerations the nominated special regulator must take into account before exercising them. Directions may also specify that certain powers or functions must not be performed or exercised by the nominated special regulator or must only be performed or exercised in specified circumstances. A direction must not relate to a particular entity in a designated payment system. The time limit for the direction must be specified for clarity.

***[Schedule #, item 27, subsection 11F of the PSRA]***

- 1.50 Providing the Minister with a broad power to make directions to nominated special regulators is appropriate in this instance as there may be a wide variety of circumstances where national interest concerns may arise. Additionally, different directions may be required based on the particular nominated special regulator. Requiring any direction to be in the national interest and consistent with any nominated regulator's functions, as well as requiring the Minister to consult the regulator, provide sufficient constraints and safeguards around the exercise of this directions power to ensure that it is only used in appropriate circumstances.

### *Reporting*

- 1.51 A nominated special regulator may be required to provide a report to the Minister on its performance as a nominated special regulator. The report may be on the nominated special regulator's performance of functions and exercise of powers under the PSRA or the Regulatory Powers Act as it applies in relation to the PSRA. The Minister may also require the report to include details as to the regulator's compliance with a direction given to the regulator by the Minister. The nominated regulator must comply with this request.

***[Schedule #, item 27, subsection 11G of the PSRA]***

### *Use and disclosure of information*

- 1.52 The RBA may use or disclose information or documents to a nominated special regulator for the purposes of the performance of functions or the exercise of powers under the PSRA, or the Regulatory Powers Act as it applies in relation to the PSRA, by either the nominated special regulator or the RBA.

***[Schedule #, item 27, subsection 11H(1) of the PSRA]***

- 1.53 Additionally, a nominated special regulator may use or disclose information or documents in relation to a special designated payment system to either the

RBA or another nominated special regulator in relation to a special designated payment system. The use or disclosure must be for the purposes of the performance of functions or the exercise of powers under the PSRA, or the Regulatory Powers Act as it applies in relation to the PSRA, by the RBA or the other nominated special regulator.

***[Schedule #, item 27, subsection 11H(2) of the PSRA]***

## Access Regimes

1.54 The Schedule makes a minor amendment to the definition of ‘access’ to ensure the definition refers to a ‘payment system’ rather than ‘system’. The definition of access regime is also updated to account for the introduction of special regulators.

***[Schedule #, items 1 and 5, section 7 of the PSRA]***

1.55 The Schedule updates the PSRA to empower the nominated special regulator to impose an access regime by legislative instrument.

***[Schedule #, item 31, subsection 12(1A) of the PSRA]***

1.56 If the RBA or nominated special regulator imposes or varies an access regime, the imposition or variation must be one the RBA or nominated special regulator considers appropriate. The amendments slightly broaden the scope of the RBA’s ability to impose the access regime by replacing the term ‘the participants’ to ‘participants’.

***[Schedule #, items 30, 31, 38, 39 and 40, subsections 12(1), 12(1A) and 14(1) of the PSRA]***

1.57 When considering if an imposition or variation is appropriate, the RBA or nominated special regulator must consider if it is in the public interest. The nominated special regulator must also consider any matters the Minister has directed it to consider in relation to the public interest or the special designated payment system. The Schedule also provides that the nominated special regulator must have regard to any other matters the RBA considers relevant.

***[Schedule #, items 31, 32, 33, 34, 38, 39, 40, 41, 42 and 43, subsection 12(1A), subsection 12(2), paragraphs 12(2)(a) and (d), subsection 14(1), paragraphs 14(1)(a) and (d) and subsection 14(5) of the PSRA]***

1.58 When imposing an access regime, the RBA or nominated special regulator may specify participants or classes of participants to whom the access regime does or does not apply, or to provide that the access regime applies differently in relation to different participants or classes of participants. A legislative note is added referring to the application of subsection 33(3A) of the AIA.

***[Schedule #, item 35, subsection 12(3) of the PSRA]***

1.59 The nominated special regulator must provide a notification as soon as practicable after imposing or varying the access regime. If the special regulator does not provide this notification, this will not affect the validity of their access regime. A legislative note is added which clarifies that a part of an access

- regime may cease to be in force before the time when the whole access regime ceases to be in force.  
***[Schedule #, items 36, 37 and 43, subsections 12(5), note to subsection 12(5) and 14(5) of the PSRA]***
- 1.60 Unless a particular entity is specified, the Schedule uses the term ‘entity’ to refer to the nominated special regulator or RBA interchangeably when discussing when access regimes cease to be in force.  
***[Schedule #, items 45, 46, 48, 49, 51 and 52, subsection 15(1), paragraphs 15(1)(b) and (c), subsection 15(3), paragraph 15(3)(d) and subsection 15(5) of the PSRA]***
- 1.61 An access regime will cease to be in force if the entity revokes the access regime. The revocation can be made either on application of the participants in the designated payment system or on the entity’s own initiative. Schedule [#] to the Bill also clarifies that an access regime ceases to be in force if the payment system itself ceases to exist, or the payment system ceases to be a designated payment system or special designated payment system (as the case may be). If a payment system that is a designated and special designated payment system has multiple access regimes that are inconsistent with each other, a part of an access regime may cease to be in force before the time when the whole of the access regime ceases to be in force.  
***[Schedule #, items 44, 45, 46 and 47, subsection 15(1) and paragraphs 15(1)(b), (d) and (e) of the PSRA]***
- 1.62 The RBA may, by legislative instrument, revoke the access regime if it considers it appropriate to do so having regard to whether revoking the access regime would be in the public interest. If a nominated special regulator revokes the access regime, it may do so having regard to matters the Minister has directed the nominated special regulator to consider under a ministerial direction. The entity making the revocation may consider any other matters it considers relevant.  
***[Schedule #, items 48, 49, 50 and 51, section 15(3) and subparagraphs 15(3)(a)(i) and (ii) and paragraph 15(3)(d) of the PSRA]***
- 1.63 If the entity that imposed the special access regime revokes the access regime, it must provide notification under section 29 as soon as practicable.  
***[Schedule item 52, subsection 15(5) of the PSRA]***
- 1.64 Anything done by a participant in a designated or special designated payment system or both under an access regime and in accordance with the access regime is taken to be specified in, and specifically authorised by, the *Competition and Consumer Act 2010*.  
***[Schedule #, item 54, paragraph 15A(a) of the PSRA]***
- 1.65 If a particular payment system is a designated payment system and special designated payment system with inconsistent access regimes imposed by the RBA and a nominated special regulator, the access regime the RBA imposes

ceases to be in force to the extent it is inconsistent with the access regime the nominated special regulator imposes.

*[Schedule #, item 53, section 15AA of the PSRA]*

## **Enforcement of access regimes**

- 1.66 The Schedule amends the provisions concerning enforcement of access regimes to take into account the inclusion of special designated systems as well as designated payment systems.
- 1.67 A person may ask the entity that imposed the access regime for a special designated payment system to use their powers under section 21 to remedy a situation in which the person has been denied access to a designated or special designated payment system. In this vein, the person may ask the relevant entity to use its powers under section 21 if the person considers the denial of access constitutes or is wholly or partially attributable to a breach of a provision of an access regime by a participant.
- 1.68 If the person decides to apply to the Federal Court for an order, the person must notify the entity that imposed the access regime, whether it be the RBA or a nominated special regulator. After being notified, the RBA or nominated special regulator may apply to the Federal Court to be joined as a party to the proceedings for the order.  
*[Schedule #, items 55, 56 and 57, section 16 and subsections 17(1), (2) and (2A) of the PSRA]*

## **Standards**

- 1.69 Various changes are made ensuring the standards are system agnostic. This includes removing the term ‘designated systems’ from headings for standards-making powers.  
*[Schedule #, items 58 and 59, Division 4 Part 3 (heading), Section 18 of the PSRA]*
- 1.70 The Schedule allows for nominated special regulators in relation to a special designated payment system to, by legislative instrument, determine standards to be complied with by participants in that special designated system. A failure to comply with a standard is not an offence but may lead to the nominated special regulator giving a direction to a participant.  
*[Schedule #, item 60, subsection 18(1A) of the PSRA]*
- 1.71 Before determining such a standard, the nominated special regulator must have regard to any matters under a Ministerial direction in relation to the determination of standards. If the nominated special regulator revokes a standard, it must provide notification under section 29 as soon as practicable after the revocation. Item 26 in the table at section 10 of the *Legislation (Exemptions and Other Matters) Regulations 2015* provides that instruments made under section 18 of the PSRA are not subject to disallowance. Allowing

instruments made under these sections to be disallowable may cause significant commercial uncertainty and delay.

***[Schedule #, items 60 and 62, subsections 18(1B) and 18(6) of the PSRA]***

- 1.72 If a particular payment system is a designated and special designated payment system with standards imposed by the RBA and nominated special regulator that are inconsistent, the standards the RBA imposed cease to be in force to the extent they are inconsistent with those the nominated special regulator imposed.

***[Schedule #, item 63, section 18AA of the PSRA]***

- 1.73 A standard made by the RBA in relation to a designated payment system continues to be in force until it is revoked or ceases to be in force because it conflicts with a standard made by the nominated special regulator.

***[Schedule #, item 61, paragraph 18(2)(b) of the PSRA]***

## Arbitration of disputes

- 1.74 The provisions concerning arbitration of disputes are amended to reflect the introduction of special designated payment systems. The heading to Division 5 omits the phrase ‘relating to designated systems’ to achieve this effect. The Schedule also ensures that disputes between participants in a special designated payment systems for which there is an access regime are disputes to which Division 5 applies.

***[Schedule #, items 64, 65 and 66, Division 5 of Part 3 (Heading) and paragraph 19(a)-(b) of the PSRA]***

- 1.75 The RBA may arrange for a dispute to which Division 5 applies and that includes a special designated payment system for which there is an access regime, to be settled by arbitration. The RBA may only do so if the dispute relates to compliance with the access regime.

***[Schedule #, items 67 and 68, subsection 20(1) and paragraph 20(1)(c) of the PSRA]***

- 1.76 A nominated special regulator in relation to a special designated payment system may arrange for a dispute relating to an access regime for the special designated payment system to be settled by arbitration in accordance with the PSRA. The nominated special regulator must only do so if it imposed the access regime, it has had regard to any matters the nominated special regulator has been directed by the Minister to consider in relation to the arbitration, and the parties to the dispute agree to the nominated special regulator arranging the arbitration. The nominated special regulator may act on its own initiative or in response to a request from one or more of the parties to the dispute in arranging the arbitration.

***[Schedule #, item 69, subsection 20(1A) of the PSRA]***

- 1.77 If the case concerns a designated payment system, the Governor of the RBA, or a person appointed in writing by the Governor, must conduct the arbitration. If the case concerns a special designated system, the head of the nominated special regulator, or a person appointed in writing by the head of the nominated special regulator, must conduct the arbitration.  
***[Schedule #, item 70, subsection 20(2) of the PSRA]***

## Directions to participants

- 1.78 The RBA or nominated special regulator may give participants directions in accordance with the PSRA.  
***[Schedule #, item 71, Division 6 of Part 3 (Heading) of the PSRA]***
- 1.79 The RBA may give a direction to a participant in a designated payment system if the RBA considers the participant failed to comply with the standard the RBA has determined or an access regime the RBA has imposed.  
***[Schedule #, item 72, paragraphs 21(1)(a) and (b) of the PSRA]***
- 1.80 A nominated special regulator in relation to a special designated payment system may give a direction to a participant in the special designated payment system if the nominated special regulator considers the participant has failed to comply with a standard determined by the nominated special regulator, or the participant has failed to comply with an access regime imposed by the nominated special regulator. The direction is to require the participant to take a specified action or to refrain from specified action, as the RBA or nominated special regulator consider appropriate having regard to the failure.  
***[Schedule # items 73 and 74, subsections 21(1A) and 21(2) of the PSRA]***
- 1.81 If a payment system is a designated and special designated payment system with directions from the RBA and nominated special regulator that conflict, the RBA's direction ceases to be in force to the extent it is inconsistent with the nominated special regulator's direction. A direction from the RBA will continue to be in force until it is revoked or ceases to be in force because of a conflict.  
***[Schedule #, items 75 and 76, paragraph 21(8)(b) and section 21A of the PSRA]***
- 1.82 The RBA may require a participant in a designated payment system or a special designated payment system to give the RBA information relating to the payment system and its participants. In light of enabling a nominated special regulator to direct participants in accordance with the PSRA, the nominated special regulator may require participants in a payment system to provide information relating to the payment system and its participants.  
***[Schedule #, items 77, 78 and 79, section 26 (heading) and subsections 26(1) and 26(1A) of the PSRA]***
- 1.83 The nominated special regulator must take reasonable steps to ensure the participants in the payment system concerned are informed if the nominated

special regulator imposes or varies an access regime, or determines or varies a standard. The nominated special regulator must also take reasonable steps to ensure any participants in the special designated payment system concerned are informed if the nominated special regulator revokes a standard or access regime.

***[Schedule #, items 80, 81 and 82, subsections 29(1),(2) and (3) of the PSRA]***

- 1.84 The RBA's delegation powers are highlighted by an amendment to the heading of the section empowering it to delegate its functions. The Schedule also confirms that the RBA may delegate under the Regulator Powers Act as it applies in relation to the PSRA. The RBA or Governor may delegate any or all of its functions or powers under the PSRA other than its functions or powers as a nominated special regulator. This does not limit the RBA or Governor from delegating powers in accordance with another Act.

***[Schedule #, items 83, 84, 85 and 86, section 31 (at the end of the heading) and subsections 31(1), (2) and (4) of the PSRA]***

- 1.85 Nominated special regulators in relation to special designated payment systems may, by written instrument, delegate all or any of their functions or powers under the PSRA or Regulatory Powers Act to the head of the nominated special regulator or a person prescribed as an eligible delegate in the regulations.

***[Schedule #, item 87, subsection 31A(1) of the PSRA]***

- 1.86 In turn, the head of a nominated special regulator in relation to a special designated payment system may, in writing, delegate all or any of the head's functions or powers under the PSRA to a person prescribed as an eligible delegate in the regulations.

***[Schedule #, item 87, subsection 31A(2) of the PSRA]***

- 1.87 Before delegating a function or power to a person, the delegator must consider if the office or position is sufficiently senior for the person to perform the function or exercise the power if the power or function is to be delegated to a person occupying, holding or performing the duties of a specified office or position. Otherwise, the delegator must consider if the person has appropriate qualifications or expertise to perform the function or exercise the power.

***[Schedule #, item 87, subsection 31A(3) of the PSRA]***

- 1.88 The delegate must comply with any directions of the delegator when exercising delegated powers. However, this does not limit any other powers a person has been delegated under other Acts.

***[Schedule #, item 87, subsections 31A(4) and (5) of the PSRA]***

- 1.89 The RBA or nominated special regulator may revoke directions by notice in writing if it considers the directions are no longer necessary or appropriate. If the participant does, or fails to do an act and doing or failing to do so results in a contravention of a direction, the moment at which the person contravenes the direction arises when the participant is still a participant in the payment system

and the payment system is still a designated or special designated payment system.

*[Schedule #, item 94, subsections 21(7) and (8) of the PSRA]*

## Regulator roles

### **RBA**

#### *Power to designate payment systems*

1.90 The amendment clarifies that the RBA's power to designate payment systems includes the power to designate payment systems in a class of payment systems.

*[Schedule #, item 5, subsection 11(1) of the PSRA]*

1.91 Subsections 33(3A) and (3AB) of the AIA provide that where an Act confers a power to make an instrument with respect to particular matters, the power shall be construed as including a power to make an instrument with respect to or by reference to a particular class or particular classes of those matters.

1.92 The primary effect of this amendment is to explicitly allow the RBA to, for example, designate credit cards as a class of payment system instead of needing to designate each individual credit card payment system.

#### *Enforceable undertakings*

1.93 Schedule # to the Bill creates a framework for accepting and enforcing undertakings in relation to a contravention.

*[Schedule #, item 106, section 25A of the PSRA]*

1.94 The policy intention is for the RBA to be able to enter into enforceable undertakings with a participant prior to an access regime being imposed under section 12 of the PSRA or a standard being made under section 18 of the PSRA.

1.95 The RBA may accept a written undertaking given by a participant in a payment system in connection with a matter in relation to which the RBA has a function or power under the PSRA, the regulations or another legislative instrument made under the PSRA. This includes a matter in relation to standards made under section 18 of the PSRA and access regimes imposed under section 12 of the PSRA.

*[Schedule #, item 106, subsection 25A(1) of the PSRA]*

1.96 The RBA may only accept an undertaking if doing so would be consistent with the RBA's payments system policy (within the meaning of the *Reserve Bank Act 1959*). This provision has been included for avoidance of doubt. Paragraph 10B(3)(b) of the *Reserve Bank Act 1959* already requires the Payments System Board to ensure the RBA's powers under the PSRA are exercised consistently with principles such as promoting the efficiency of the



payment system and competition in the market for payment services.

***[Schedule #, item 106, subsection 25A(2) of the PSRA]***

1.97 The participant may withdraw or vary an undertaking at any time, but only with the RBA's consent.

***[Schedule #, item 106, subsection 25A(3) of the PSRA]***

1.98 The RBA may apply to the Court for an order if the RBA considers the participant who gave the undertaking has breached any terms of the undertaking.

***[Schedule #, item 106, subsection 25A(4) of the PSRA]***

1.99 The Federal Court, Federal Circuit and Family Court of Australia, or the court of a State or Territory that has jurisdiction are the relevant courts an application can be made to. The definition of 'Court' in subsection 25A(7) of the PSRA has the same meaning as it does in the *Superannuation Industry (Supervision) Act 1993*. New Part 4 of the PSRA gives a relevant court power to make orders where there is a breach of an enforceable undertaking.

***[Schedule #, item 106, subsections 25A(5) and (7) of the PSRA]***

1.100 If the Court is satisfied that a participant has breached a term of an undertaking the Court may make:

- an order directing the participant to comply with the term of the undertaking;
- an order directing the participant to pay to the Commonwealth an amount up to the amount of any financial benefit that the participant has obtained directly or indirectly and that is reasonably attributable to the breach;
- any order that the Court considers appropriate directing the participant to compensate any other person who has suffered loss or damage as a result of the breach; or
- any other order that the Court considers appropriate.

***[Schedule #, item 106, subsection 25A(5) of the PSRA]***

1.101 The RBA currently obtains voluntary undertakings in relation to standards determined under section 18 of the PSRA. By creating a framework in the primary law for court enforcement of the terms of an undertaking in the event of a breach, the amendments provide greater certainty for entities that receive services from participants who have entered into an enforceable undertaking.

## Criminal and civil penalties

### Increases to maximum penalties for certain criminal offences

- 1.102 Schedule # to the Bill repeals the existing offence provisions for failure to comply with a direction and failure to give the RBA information and replaces them with new provisions covering both criminal and civil penalties. The Schedule also updates the numbering and adds minor legislative notes to aid interpretation for new provisions.  
***[Schedule #, items 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103 and 104, subsections 21(6), (7), (8), (9), (10) and (11), subsection 26(1)(note), subsection 26(3), subsection 26(3)(penalty), subsection 26(3)(notes 1, 2, and 3), subsection 26(3A) and (3B), subsection 26(4) subsection 26(4)(note 1 and note 2), and section 26A of the PSRA]***
- 1.103 The Schedule inserts definitions for civil penalty provision, contravene and the Regulatory Powers Act. The Schedule also provides that a person contravening a conduct provision in the PSRA commits an offence or is liable to a civil penalty. For the purposes of the PSRA and the Regulatory Powers Act to the extent it relates to the PSRA, a reference to a contravention of an offence provision or a civil penalty provision includes a reference to a contravention of the conduct provision.  
***[Schedule #, items 88 and 89, sections 7 and 9B of the PSRA]***
- 1.104 The new provisions are substantially the same as the repealed ones, with updates to reflect the introduction of a civil penalty regime. Maximum penalties provide a court with guidance on how to punish criminal behaviour. They restrict the court's sentencing discretion as the court is unable to order a penalty in excess of the prescribed maximum penalty. The maximum penalty is generally reserved only for the most egregious cases.
- 1.105 The existing maximum penalty for failure to comply with a direction does not currently reflect the seriousness of that offence. The maximum penalty has been increased to reflect the seriousness, and to deter and punish such behaviour as appropriate. The increased penalty is consistent with penalties for similar offences in other frameworks. The criminal penalty for failure to give the RBA information (or other offences in the PSRA) have not changed.

**Table 1.4 Offence where the maximum penalty has been increased**

<b>Location of offence provision</b>	<b>Current penalty</b>	<b>New penalty</b>	<b>Brief description</b>
Section 21	50 penalty units per day of non-compliance  If the penalty is for a body corporate – 250 penalty units per day of non-compliance	100 penalty units per day of non-compliance  If the penalty is for a body corporate – 500 penalty units per day of non-compliance	Failure to comply with a direction to participants

[Schedule #, item 94, subsections 21(7), (8), (9) and (11) of the PSRA]

## Civil penalty regime

- 1.106 Schedule # to the Bill introduces a civil penalty regime for a number of provisions in the PSRA.
- 1.107 The inclusion of civil penalties will reduce the regulator’s reliance on criminal penalties. The provisions will allow the relevant regulator to take enforcement action that is commensurate with the seriousness of a person’s breach of the PSRA.
- 1.108 The civil penalty regime has been introduced for the following existing provisions.

**Table 1.5 New civil penalty provisions**

<b>Provision</b>	<b>Brief description</b>	<b>Civil penalty</b>
Section 21	Failure to comply with a direction to participants	100 penalty units per day of non-compliance  If the penalty is for a body corporate – 500 penalty units per day of non-compliance
Section 26	Failure to give RBA information	200 penalty units per day of non-compliance

		If the penalty is for a body corporate – 1,000 penalty units per day of non-compliance
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***[Schedule #, items 94, 100, 101, 102 and 103, subsections 21(10) and (11), subsection 26(3B), and subsection 26(4) (note 1 and note 2) of the PSRA]***

- 1.109 The civil penalty provisions will be enforced under Part 4 of the Regulatory Powers Act.  
***[Schedule #, item 104, subsection 26A(1) of the PSRA]***
- 1.110 For the purposes of the PSRA, the relevant regulator is the authorised applicant empowered to exercise the powers under Part 4 of the Regulatory Powers Act.  
***[Schedule #, item 104, subsection 26A(2) of the PSRA]***
- 1.111 The Federal Court of Australia, the Federal Circuit and Family Court of Australia, and a court of a State or Territory that has jurisdiction are the relevant courts in relation to provisions of the PSRA that are enforceable under Part 4 of the Regulatory Powers Act. Part 4 of the Regulatory Powers Act gives a relevant court power to make orders where there is a contravention of a civil penalty provision.  
***[Schedule #, item 104, subsection 26A(3) of the PSRA]***
- 1.112 Part 4 of the Regulatory Powers Act, as it applies to provisions in the PSRA, extends to external Territories.  
***[Schedule #, item 104, subsection 26A(4) of the PSRA]***
- 1.113 The amendments apply in relation to the commission of an offence or contravention of a civil penalty provision if the conduct constituting the offence or contravention of the provision occurs wholly on or after the commencement of this Part.  
***[Schedule #, item 105]***

## Consequential amendments

- 1.114 Schedule # ensures that a special designated payment system for the purpose of the PSRA is not to be treated as a financial product under the ASIC Act or the Corporations Act. This ensures consistency for the application of these frameworks.  
***[Schedule #, items 108 and 113, paragraph 12BAA(8)(e) of the ASIC Act and paragraph 765A(1)(j) of the Corporations Act]***
- 1.115 To ensure consistency when regulating payment systems, the amendments to the definitions are also extended to the Competition and Consumer Act. These include the insertion of payment system standard, the repeal of the definition of RBA standard and substituting the term RBA with the term ‘payment system’ to ensure consistent applications to the payment systems framework.

***[Schedule #, items 109, 110, 111 and 112, section 55A, subparagraph 55B(2)(a)(i) and paragraph 55(2)(b) of the Competition and Consumer Act]***

- 1.116 Schedule # also ensures that a special designated payment system the Minister has designated may be treated as a specialist credit card institution as being a financial entity and not an ADI under the ITAA 97.

***[Schedule #, item 114, paragraph 820-588(3)(a) of the ITAA]***

## Commencement, application, and transitional provisions

- 1.117 Schedule # to the Bill commences on the day after Royal Assent.

### *Enforceable undertakings*

- 1.118 The amendments made by new Part 4 of the PSRA apply to undertakings made on or after the commencement of that Part.

***[Schedule #, item 107]***

### *Designated systems*

- 1.119 Schedule # to the Bill includes a savings provision to ensure that the amendments relating to payment systems do not alter the effect of payment systems already designated under section 11 of the PSRA before the commencement of the Schedule. It has no practical effect for designated systems as the amendments in this Schedule preserve the status quo.

***[Schedule #, items 6, subsection 11(1) of the PSRA]***