

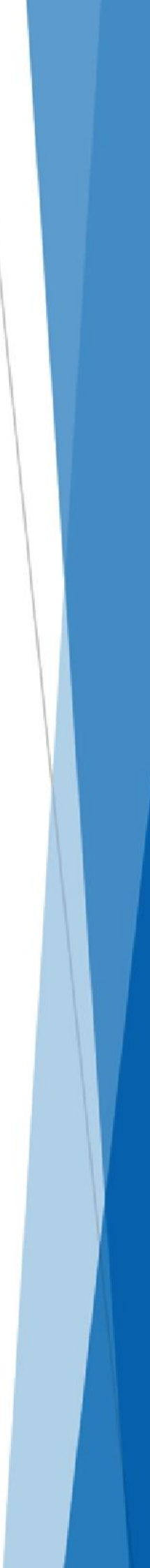


Australian Banking  
Association



## Submission: Amendments of the Payment Systems (Regulation) Act 1998

1 November 2023



## Introduction

The Australian Banking Association (**ABA**) thanks Treasury for the opportunity to provide a submission on the Exposure Draft Bill to amend the *Payment Systems (Regulation) Act 1998 (PSRA)*.

ABA strongly supports the intent of the legislation to modernise the payments regulatory framework to ensure that it is fit-for-purpose and can address emerging risks related to payments.

ABA also strongly supports the policy intent of the legislation in expanding the regulatory coverage of the PSRA to ensure that all entities that play a role in facilitating or enabling payments, including new entrants, can be subject to appropriate oversight from regulators including the Reserve Bank of Australia (**RBA**) if the relevant thresholds set out in legislation are met.

ABA provides additional commentary to help ensure the clarity of key concepts and provisions in legislation.

## Definition of participant

ABA agrees with the policy intention in amending the concept of 'participant' in the PSRA, noting the Government has expressed the intention that 'typical' merchants and persons that are not constitutional corporations will not be considered to be 'participants'.

ABA supports the Government's intention for the revised concept of participant to include entities that provide services and technologies that are related to the operation or administration of a payment system, or services and technologies that enable or facilitate customers and merchants to make payments, even where these services and technologies are not operated under or in accordance with the formal operating rules of a payment system.

ABA considers this expanded concept of participant more accurately reflects the diversity of entities that provide payments services today, and the more complex payments value chain that has resulted from innovations in technologies and business models.

To enhance the clarity of the scope of this revised term, ABA asks Treasury to consider referring to constitutional corporations that:

- provide services that enable or facilitate the administration or operation of a payment system; *[this is already in exposure draft bill, included here for completeness]*
- provides services that enable or facilitate consumers or merchants to make or receive payments;
- more specifically, services that facilitate or enable the exchange of messages, which could include payment instructions, authorisation messages and token keys, that form part of the process for consumers or merchants to make or receive payments.

The ABA proposes that the definition of participant could be further clarified by specifying one or more of the matters set out above.

The ABA also proposes that Treasury can clarify the policy intention as expressed in the explanatory memorandum to address any potential inconsistencies between paragraphs 1.20, 1.21 and 1.22.

## Definition of payment system

ABA agrees with the policy intention in amending the concept of 'payment system' in the PSRA. As for our commentary relating to participants, ABA considers this expanded concept of payment system more accurately reflects the range of arrangement or arrangements that participants, merchants and consumers can use to make a payment.

While these arrangements may be governed by operating rules, they may also take the form of commercial arrangements or contracts with consumers, and can use a range of technologies including technologies that also have other functions.

A revised concept of 'payment system' can help to ensure the PSRA can adapt to further developments in payments innovation.

To enhance the clarity of the scope of this revised term, ABA asks Treasury to consider referring to an arrangement or arrangements that:

- Enable or provide for the exchange of messages, which could include payment instructions, authorisation messages and token keys, that form part of the process for consumers or merchants to make or receive payments; or
- can be used by consumers to make or receive a payment.

ABA also asks Treasury to consider whether there is merit in specifying that the arrangement or arrangements can include technology.

#### Ability to address access to gatekeeper technology

ABA strongly supports the intention for the RBA to have clear powers to address a spectrum of issues that may affect access to payment systems. These are not limited to operating rules of a payment system about who is eligible to have direct access to a payment system, but extends to whether, and the terms and conditions on which, entities can access gatekeeper or 'must have' technologies or arrangements that are used by a growing proportion of consumers or businesses to make a payment.

ABA notes that the RBA would be expected to only exercise its powers to intervene under the PSRA, including to introduce an access regime pursuant to section 12 of the PSRA, if the relevant test set out under section 12(2) of the PSRA is met.

ABA further notes that the proposed amendments to the definition of 'payment system' would mean that the Reserve Bank's powers to impose an access regime can be applied to a broader range of arrangement or arrangements. ABA also notes that the drafting clarifications to the term 'payment system' would also help to clarify the scope of the RBA's powers to impose an access regime.

In addition, ABA suggests that the intention for the RBA to have the ability to regulate a 'gateway' or must have technologies provided by a participant be clarified. This could be done by specifying that (without limiting the existing access regime power) the RBA can make an access regime in relation to a participant where the participant provides a service, technology or other arrangement that:

- is used by consumers or businesses to make or receive a payment; or
- enables or facilitates consumers or businesses to make a payment, including by enabling or facilitating the transmission of messages that result in a payment.

#### Definitions referred to in the concept of a 'transfer of funds'

ABA notes the concept of a 'transfer of funds' refers to the definition of 'digital currency' within the meaning of A New Tax System (Goods and Services Tax) Act 1999. Noting the recommendation from the Farrell review that a consistent definition be used across financial services and payments legislation, ABA asks Treasury to consider ways to align the definition of 'funds' and 'digital currency' with existing or proposed payments and crypto legislation.

#### Ministerial powers

ABA seeks clarity about the use of regulatory powers by special regulators once they have been appointed by the Minister and the Minister has designated a payment system. In particular:



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- whether a special regulator, in deciding whether and how to exercise its powers in relation to the designated payment system, has the ability or flexibility to take into account the national interest considerations that were taken into account by the Minister; and
- when it would be appropriate for the Minister to appoint more than one special regulator in relation to one designated system, in light of the special regulators' powers to impose an access regime.

ABA also asks Treasury to consider providing clearer expectations for the two (or more) regulators to coordinate and to avoid duplicative or conflicting regulatory requirements being applied.

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### About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership