

November 1, 2023



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Dear Director

Reforms to the Payment Systems (Regulation) Act 1998: Response to exposure draft legislation

Apple Pty Limited (**Apple**) welcomes the opportunity to share its views on the exposure draft bill (**Draft Bill**) and draft explanatory materials (**Draft EM**) published on October 11, 2023, in relation to proposed reforms to the *Payment Systems (Regulation) Act 1998* (Cth) (**PSRA**).

Apple has previously provided its views to Treasury in relation to the proposed reforms to the PSRA in response to the June 2023 Treasury Consultation Paper. Apple refers to and adopts its submission to that Consultation Paper dated July 14, 2023 (**July Submission**) in this submission.

A. Executive summary

1. Apple believes that the Draft Bill as presented is not a proportionate nor evidence-based regulatory response for services that are simply a digital presentation of a physical card, like Apple Pay, given Apple Pay's indirect and limited role in payment systems and the lack of any material risk that has been identified as being caused by Apple Pay (as well as for the other reasons identified in the July Submission).
2. The Draft EM significantly expands the RBA's powers to conceivably regulate any stakeholder in the payments ecosystem, irrespective of the materiality or risk posed by the target of regulatory intervention. It does so without any attempt to define the scope of the proposed new regulatory perimeter or to place safeguards or triggers on the exercise of these powers to address the risk of unintended consequences. Instead, it introduces even more uncertainty and breadth by allowing a "special regulator" to stand in for, or in addition to, the RBA – even though the RBA is the only regulator with a statutory mandate to determine payments system policy.¹
3. The existing regulatory framework has allowed Apple to invest significant resources to develop the technical architecture that is now widely used by card issuers to offer its consumers a safer and more secure way to pay with their existing cards. That innovation has arisen in a highly competitive and dynamic environment where intellectual property rights are protected, and meeting consumer demands for privacy, security and functionality has been paramount. There is no demonstrated case for the changes to the PSRA proposed in the Draft Bill and the Draft EM.
4. Modifying the regulatory framework in the manner proposed would risk disincentivising innovation, distorting markets and failing to achieve the Federal Government's objective of

¹ Section 10B of the *Reserve Bank Act 1959* (Cth).

having payment systems that are trustworthy, accessible, innovative and efficient. Without further changes to add clarity to the scope and application of key provisions and to place necessary checks and balances on powers to impose access regimes and determine standards, industry participants will be unable to act with certainty and regulatory burdens imposed on participants may not be proportionate, appropriate and achieve a net public benefit. This would likely limit investments which would benefit consumers, merchants and issuers – investments which have flourished under the more certain and proportional regulatory framework that is currently in place.

5. The Draft EM makes clear the intent of the Draft Bill to capture Apple Pay as a participant, but does not reconcile this with the limited and indirect role played by Apple, nor does it identify the risk (whether financial, misconduct or otherwise) posed by Apple Pay that calls for such regulatory intervention.

6. Apple's view is that further changes are required in the following key areas:

(a) **Regulatory perimeter:** The proposed 'payment system' and 'participant' definitions are too broad and uncertain. The proposed 'payment system' definition captures far more than the intended 'three party' and 'closed loop' systems and is susceptible to capturing only a component of a system, having several payment systems relate to the same system or not relating to a system at all. The meaning of 'payment system' should capture 'systems' rather than 'arrangements' and the uncertainty regarding components of systems or effective duplication of payment systems should be removed. Similarly, the 'participant' definition captures far more than the "*entities involved in the payments value chain*" - it should only capture an entity if it has a sufficiently material level of involvement in the payments value chain and may impact whether the payment system is trustworthy, accessible, innovative or efficient.

(b) **Regulator powers:** The proposed checks and balances on the performance or exercise of the Minister's and the nominated special regulator's functions and powers are insufficient. There ought to be additional checks and balances on when and how powers can be exercised to ensure alignment with the Government's stated regulatory objectives, particularly if the regulatory perimeter is to be expanded as proposed. Such checks and balances could include limiting the contents of standards to what is necessary to achieve the regulatory objective and tightening the process for exercising powers, such as by requiring that:

- (i) prior to the exercise of powers, consideration is given to the incidental and practical implications of enforcing such powers and the relevant regulator is satisfied that there is a net public benefit to what is being proposed;
- (ii) the contents of any standards are confined to matters necessary to achieve the regulatory purpose of the standards;
- (iii) there is a mandatory and sufficiently robust consultation process prior to any exercise of power; and
- (iv) there is a right for affected participants to challenge any proposed exercise of power which adversely affects them (perhaps inadvertently) in a particular way (e.g. if the impact would be unduly harsh or unfair) and the ability for participants to apply for and obtain an exemption or other relief from certain obligations.

B. Expansion of the regulatory perimeter goes too far and lacks certainty

7. There is no demonstrated need to expand the regulatory perimeter in the manner proposed (and, in any event, the expanded 'payment system' and 'participant' definitions in the Draft Bill are too broad and lack certainty).

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8. Vigorous and dynamic innovation to date has occurred under the existing regulatory framework. In the case of Apple Pay, significant investment has been encouraged by regulatory certainty and an absence of unnecessary regulatory intervention. This has resulted in the development of the technical architecture that is now widely adopted, easy to use, private, safe and secure.

Meaning of 'payment system'

9. Defining a 'payment system' by reference to an '*arrangement or series of arrangements*' (rather than a 'system') has the effect of capturing more than the 'three party' and 'closed loop' systems the expanded definition is intended to capture. The terms of the proposed definition make it likely that:
- (a) in relation to 'systems' (as that term is ordinarily understood), a 'payment system' (and therefore a 'designated payment system' or 'special designated payment system') could be comprised entirely by what is only a small component part of the system to which it relates and, conversely, there may be several 'payment systems' (and therefore 'designated payment systems' or 'special designated payment systems') which, in fact, relate to a single system; and
 - (b) where there is no system (as that term is ordinarily understood) or anything resembling a system, there may nevertheless be a 'payment system'. Even without the concept of a complete end-to-end system for the transfer of funds, individual functions or agreements between parties with any connection to the transfer of funds may immediately become subject to obligations under the PSRA.
10. This would immediately create uncertainty. For example, for the purposes of the proposed subsections 26(1) and (1A), it would be impossible to identify the perimeter of every payment system in relation to which the RBA or a nominated special regulator may require a participant to give information.
11. Further, in designating a payment system, the RBA or Minister would have considerable discretion in defining the perimeter of the 'payment system' that will be subject to regulation, meaning that the size and shape of 'designated payment systems' (or 'special designated payment systems') may vary significantly. This would have an adverse impact on the appropriateness and effectiveness of the provisions that are intended to constrain the exercise of powers by regulators.
12. The proposed definition should be amended so that it:
- (a) captures 'systems' (or schemes or end-to-end processes) rather than 'arrangements'; and
 - (b) removes the possibility that components of systems may be a 'payment system' or that a single system may relate to several different 'payment systems'.

Meaning of 'participant'

13. The proposed 'participant' definition is intended 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.² However, the definition is broad enough to capture entities not involved in the payments value chain and with only incidental and insignificant connections with a payment system. An entity should only be regulated as a participant if it has a direct or otherwise material role in the payments value chain.

² Paragraph 1.18 of the Draft EM.

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14. Expanding the definition in this way increases the risk that an entity with immaterial involvement in relation to a transfer of funds is captured as a participant and becomes subject to onerous and disproportionate regulatory obligations.
15. Apple therefore submits that the proposed definition should be amended (or alternatively, the RBA's power to impose standards on participants should be amended) so that it only captures an entity if it:
 - (a) has a sufficiently material level of involvement in the payments value chain; and
 - (b) is involved in an activity or provides a critical service which may impact whether the payment system is trustworthy, accessible, innovative or efficient.

C. The proposed checks and balances on the exercise of powers are insufficient

16. Apple's view is that the proposed checks and balances on the performance or exercise of the Minister's and the nominated special regulator's functions and powers are insufficient to ensure that those powers are only used where it is appropriate to do so and with due regard being given to potentially adverse impacts on participants. Additional checks and balances ought to be added to ensure there is appropriate alignment with regulatory objectives and that due regard is had to all relevant matters before powers are exercised.

Gap in checks and balances on the power of a special regulator when imposing or varying an access regime and determining standards

17. The Draft Bill provides that:
 - (a) the Minister may only designate a payment system as a special designated payment system, nominate one or more special regulators and give a direction under subsection 11E(1) to the nominated special regulator if the Minister considers that doing so is in the national interest; and
 - (b) under subsection 11E(1), the Minister may (but is not required to) specify particular matters that a nominated special regulator must take into account before imposing an access regime or determining standards for the special designated payment system.
18. However, the Draft Bill does not identify any specific matters that must be taken into account and the Minister is not compelled to direct the nominated special regulator to have regard to whether any proposed access regime or standards would be in the public interest, national interest or achieve a net public benefit. This means that the nominated special regulator could be empowered to impose an access regime or determine standards without having any regard to such matters.
19. The proposals would give the nominated special regulator a broad power which:
 - (a) would not be constrained in the same way as the RBA's power, given it is proposed that the RBA must continue to apply a public interest test when imposing or varying an access regime or determining standards; and
 - (b) in relation to access regimes, is not consistent with the description of the power in the Draft EM which (at paragraph 1.57) provides that, when considering if an imposition or variation is appropriate, "*the RBA or nominated special regulator must consider if it is in the public interest*" and that 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 baseline requirement to have regard to whether the imposition or variation is in the public interest is not reflected in the Draft Bill.

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20. Apple's view is that the nominated special regulator ought to be required to consider and be satisfied of matters specified in a direction from the Minister *in addition to* the matters which the RBA is required to consider and be satisfied of prior to imposing or varying access regimes or determining standards. This is particularly important given it is proposed that access regimes and standards imposed or determined by a nominated special regulator will prevail to the extent of any inconsistency.

Requirement to be satisfied of a net public benefit

21. The proposed expansion of the regulatory perimeter and powers for the RBA, Minister and any nominated special regulator increases the risk that the exercise of powers will adversely impact individual participants and impose regulatory burdens on participants that are not commensurate with the regulatory benefit that is being sought. To counterbalance that increased risk, Apple believes that it would be appropriate to include an additional requirement to ensure that any anticipated positive impact of a change is appropriately weighed against potentially harmful consequences for participants and the public more generally.
22. Section 8 of the PSRA identifies that the public interest test requires regard to be had to the desirability of payment systems being financially safe for use by participants, efficient, competitive and not materially causing or contributing to increased risk in the financial system. However, there is no requirement for proportionality or for regard to be had to other significant matters which are relevant. In particular, the proposed changes in the Draft Bill would increase the risk that there may be significant adverse effects on the rights and obligations of individual participants, so it would be appropriate to consider those adverse effects and what impact they may have on industry participation and innovation.
23. Apple's view is that there ought to be a requirement added to the effect that the RBA or nominated special regulator must be satisfied that there will be a net public benefit derived from the imposition or variation of any proposed access regime or determination of any standards. The benefits of adopting a net public benefit test were stated in our July Submission.

Mandating consideration of additional matters

24. The additional complexity added by the expansion of the PSRA and uncertainty added by the expanded regulatory perimeter (as described above) means there are further matters which ought to be considered prior to the exercise of powers. These include:
- (a) consistency with any existing obligations arising for participants under standards determined by the RBA or a nominated special regulator, including in relation to any other payment system;
 - (b) the regulatory costs and impact on participants; and
 - (c) whether the proposed action may have an adverse impact on innovation in the payment industry in Australia (including relative to other jurisdictions).
25. The accumulation of obligations for participants across multiple designated payment systems and special designated payment systems creates inefficiencies and unnecessary regulatory burdens if there are conflicting or inconsistent obligations, or if the costs of compliance are disproportionately high given the regulatory benefit to be achieved when the aggregate effect of all obligations applicable are considered together.
26. Any additional regulatory burden that is imposed on participants in Australia and not replicated in other jurisdictions can disincentivise participation. Over time, this can dissuade innovation or put Australia at a disadvantage when considering innovation globally.

Confining the subject matter of standards

27. There is no proposed limitation on the subject matter of any standard that may be determined by the RBA or a nominated special regulator.

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28. The lack of appropriate subject matter checks and balances on the standard-making power in the Draft Bill is inconsistent with the position adopted in jurisdictions with comparable regimes, including under the *Retail Payment System Act 2022* (NZ) (**NZ Act**) in New Zealand where the Commerce Commission can issue network standards to impose requirements on participants in designated networks, and the *Payment Services Act 2019* (Singapore) (**Singapore Act**) in Singapore where the Monetary Authority of Singapore (**MAS**) can impose conditions or restrictions on participants, operators or settlement institutions of designated payment systems. Both of those jurisdictions impose subject matter limitations. For example:
- (a) under the NZ Act, a network standard may only deal with, or otherwise relate to, specified matters, e.g. in relation to information disclosures, pricing for payment services applicable to all participants and gaining access to a network; and
 - (b) under the Singapore Act, the MAS may only impose conditions or restrictions relating to a limited set of specified matters, including the activities that the operator or settlement institution of the designated payment system may undertake, the standards to be maintained by the operator or settlement institution of the designated payment system and the requirement for the operator or settlement institution of the designated payment system to operate as a corporation.
29. Apple's view is that the contents and subject matter of standards ought to be limited:
- (a) by reference to what is necessary to achieve the purpose of the standard;
 - (b) to enable consistency by ensuring that any standards do not relate only to or affect only a particular participant (as an expansion of the proposed limitation on the contents of a direction given by the Minister under subsection 11F(3)); and
 - (c) to align with the rigour of the process for introducing them, i.e. there should be a scalable process so that more rigorous checks and balances are included where there is a greater potential for the contents of standards to have a significant adverse effect on one or more participants.

Mandating a consultation process involving affected stakeholders

30. The Draft Bill proposes to require consultation between:
- (a) the Minister and the head of the regulator before the former nominates a special regulator;³
 - (b) the Minister and the RBA as well as each special regulator before the former designates a special designated payment system;⁴
 - (c) the RBA and each nominated special regulator before the former designates a payment system that is already a special designated payment system;⁵
 - (d) the RBA and each nominated special regulator before the former performs a function or exercises a power under the PSRA in relation to a payment system that is both a designated payment system and a special designated payment system;⁶

³ Sections 8(2) and 11C(4) of the Draft Bill.

⁴ Section 11A(3)(a) of the Draft Bill.

⁵ Section 11AA(1) of the Draft Bill.

⁶ Section 11AA(3) of the Draft Bill.

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- (e) the nominated special regulator and the RBA before the former performs a function or exercises a power;⁷ and
 - (f) the nominated special regulator and each other nominated special regulator in relation to a special designated payment system before the former performs a function or exercises a power.⁸
31. However, it is not proposed that there will be any mandatory engagement with other potentially affected stakeholders, including participants whose rights may be adversely affected or who may become subject to significant obligations.
32. Apple's view is that such engagement ought to be mandatory where there is likely to be any adverse impact on a participant to ensure that there is:
- (a) an opportunity for any potentially unforeseen consequences of a proposed change or alternative solutions to be considered;
 - (b) an appropriate period of time allowed prior to the introduction of any changes affecting participants, based on their feedback regarding changes required to achieve compliance; and
 - (c) greater transparency and accountability in relation to decision-making by the RBA or a special regulator in circumstances where they have been given broad powers.
33. Mandating an effective consultation period would be consistent with the approach taken in other jurisdictions with comparable regimes. For example, in New Zealand the Commerce Commission must:
- (a) make a proposed standard publicly available and consult affected persons, or persons that the Commission considers to be representatives of affected persons, about the proposed standard (including providing the Commission's reasons for issuing the proposed standard); and
 - (b) after issuing a network standard, the Commerce Commission must make the standard, and the Commission's reasons for issuing the standard, publicly available.

Exemptions and relief for certain affected participants

34. The expanded regulatory perimeter means there is an increased likelihood that a broad pool of participants will become subject to an access regime or standards and that, due to their particular circumstances or the disproportionate impact that the access regime or standards have on them, particular participants or classes of participants ought to be exempt or benefit from some form of regulatory relief.
35. Apple's view is that, ideally in conjunction with any consultation process that considers a proposed change, affected participants should have an opportunity to consider the potential impact on them of any proposed change and access a clear framework within which those participants are able to:
- (a) challenge the proposed exercise of power more broadly, or specific application to them. For example, that may be on the basis that the impact is unduly burdensome or unfair or that there is no net regulatory benefit in requiring the participant to comply with what is proposed; and

⁷ Section 11CA(4) of the Draft Bill.

⁸ Section 11CA(4) of the Draft Bill.

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- (b) seek and obtain an exemption or relief from certain or all of the proposed requirements, including conditional exemptions or relief if appropriate.

36. Such a framework ought to be added in connection with the proposed changes.

D. Conclusion

37. In conclusion, Apple submits that:

- (a) there is no demonstrated need to expand the regulatory perimeter in the manner proposed and, in any event, the expanded 'payment system' and 'participant' definitions in the Draft Bill are too broad and lack certainty;
- (b) the added breadth and uncertainty, if adopted, give rise to a greater need for guard rails to be placed around the exercise of broad regulatory powers - however, that is not reflected in the guard rails that have been proposed;
- (c) to ensure that regulatory objectives are achieved, further changes are required to:
 - (i) clarify the regulatory perimeter, including by ensuring that a 'payment system' is, in fact, a system;
 - (ii) ensure that a nominated special regulator must consider at least the matters the RBA must consider when imposing an access regime or determining standards;
 - (iii) requiring that regulators must only exercise a power when satisfied that there is a net public benefit when doing so;
 - (iv) requiring regulators to consider additional relevant matters, including those that arise from their previous actions;
 - (v) limiting the subject matter and contents of standards to be imposed;
 - (vi) mandating a consultation process; and
 - (vii) providing a framework through which affected participants can, with certainty, seek an exemption or other relief from some or all requirements arising from any proposed access regime or standards.

38. If Treasury has any questions to ask Apple in relation to any topics raised in this submission or otherwise related to the proposed reforms, Apple would be happy to assist.