

1 November 2023

By email only: paymentsconsultation@treasury.gov.au

Australian Payments Network (AusPayNet) welcomes the opportunity to provide feedback on the exposure draft legislation for the updated *Payment Systems (Regulation) Act 1998* (PSRA).

AusPayNet is the industry association and self-regulatory body for the Australian payments industry. We manage and develop standards and guidelines governing payments in Australia. Our purpose is to create confidence in payments by setting enforceable industry standards for a safe, reliable and effective payments system; leading transformation in payments to drive efficiency, innovation and choice; and being the home for ecosystem collaboration and strategic insight. AusPayNet currently has more than 150 members including financial institutions, payment system operators, major retailers and financial technology companies.¹

Introduction

AusPayNet supports Treasury's work on ensuring that Australia has appropriate regulatory and governance frameworks to support the continued development and safety of the payments system. Updating the PSRA to ensure that all entities that play a role in enabling or facilitating payments can be regulated in line with the public and national interest is an important step in this process.

The feedback below builds on our submission to Treasury's initial consultation on reforms to the PSRA in July. We note that the exposure draft reflects the key policy changes that had been proposed in the consultation paper, namely the expansion of the regulatory remit under the PSRA and the introduction of a Ministerial designation power. These policy proposals were broadly supported by AusPayNet in our earlier submission. The comments below provide additional feedback on how these policy intentions have been translated into the proposed legislation.

Regulatory perimeter and powers

As noted in our earlier submission, AusPayNet supports broadening the key PSRA definitions of 'payment system' and 'participant' to capture all entities involved in any part of the payments value

¹ This submission has been prepared by AusPayNet in consultation with its members. In developing this submission, interested members participated in a consultation process to discuss key issues and provide feedback to inform our response to the consultation.

chain. When taken together, the two definitions in the draft legislation appear to be sufficiently broad to meet this policy intention, being that all entities that play a role in facilitating or enabling payments in the Australian payments ecosystem should be captured by at least one of the two terms.

However, some members have expressed concerns that the definition of 'payment system' in the draft legislation is narrower than had been proposed in the original consultation paper (and only slightly broader than the existing definition). This is primarily due to the removal of the phrase '*enabling or facilitating*' payment or transfer of value. While these terms are included in the proposed definition of 'participant', both the RBA's and the proposed Ministerial designation powers only apply to payment systems. This is important because a participant can only be subject to regulation under the PSRA if the payment system they participate in or provide services to meets the definition of a 'payment system' and is designated as such under the Act. As had been outlined in the earlier consultation paper, the aim of the broader definition of 'payment system' was 'to capture systems that involve the use of multiple payment classes or instruments, or that facilitate or enable payments through another system'. Furthermore, the Canadian and United Kingdom regimes both explicitly capture arrangements that enable or facilitate the transfer of funds as a 'payment system'. There may be benefit in aligning the Australian regime more closely with those in our partner jurisdictions.

AusPayNet also notes that item 35 of the exposure draft would enable access regimes to be applied differently across different participants or classes of participants. With the new definition of 'participant' encompassing a much broader range of entities, we encourage Treasury to consider whether a similar provision should apply in the case of standards.

In line with our earlier submission, AusPayNet expects that the introduction of a civil penalty regime and the ability for the RBA to accept court-enforceable undertakings will help encourage greater compliance with regulatory obligations under the PSRA.

Ministerial designation power

AusPayNet's earlier submission expressed support for the introduction of a Ministerial designation power, subject to further clarity on how the power may be used in practice and the inclusion of transparent processes and other safeguards governing the exercise of the power. These concerns appear to have been largely addressed in the draft legislation and explanatory materials.

We understand the need to retain a degree of flexibility in defining 'national interest', to ensure that the power can be used to respond to new and emerging issues and in extraordinary circumstances. On that basis, the explanatory material provides appropriate clarity on the factors that the Treasurer may have regard to in considering the national interest without imposing any legal limitations.

The inclusion of consultation requirements prior to designating a payment system in the national interest or giving directions to regulators provides some useful guardrails for the use of the Ministerial designation power. The consultation requirements should also help minimise potential conflicts or overlap between access regimes or standards set by the RBA and any 'nominated special regulators', particularly when complemented by existing regulatory coordination mechanisms, such as the Inter-Agency Payments Forum.

We have noted that there are no industry consultation requirements or any other transparency or other accountability mechanisms for the use of the Ministerial designation power. We acknowledge that national interest powers may need to be exercised in response to sensitive and/or urgent matters, where decisions would need to be made quickly and transparency may not be appropriate. It may therefore be unsuitable to include provisions for such processes in the legislation. Nonetheless, in the event that the power is used, we encourage the Minister to consider an appropriate level of transparency, in line with the approach followed by the RBA.

Other matters

AusPayNet noted two additional matters in the exposure draft related to the authorisation of conduct for the purposes of the *Competition and Consumer Act 2010*:

- Section 18A currently only provides authorisation for the setting or charging of interchange fees under a related standard. Since future standards set by the RBA or a nominated special regulator may cover matters beyond interchange fees, it would provide greater ability and flexibility to regulators if section 18A is broadened to include any other conduct by participants in accordance with any standards set under the PSRA.
- The proposed section 25A(6) provides that anything done by a participant in accordance with a written undertaking would be authorised conduct. Even though any such undertaking would need to be accepted by the RBA, no limits are imposed on the content of the undertaking, and the preparation of the undertaking may not be subject to robust testing and broad consultation. There may also be undertakings where automatic exemptions under the *Competition and Consumer Act 2010* are not appropriate. We therefore encourage Treasury to consider catering for such scenarios and, where it is desirable for an exemption to apply, include additional safeguards before granting such protection to a participant that has entered into an undertaking. This could, for example, include a requirement for the RBA to consult with the Australian Competition and Consumer Commission prior to accepting a written undertaking under the PSRA.

AusPayNet appreciates the opportunity to respond to Treasury's consultation on the PSRA reforms exposure draft legislation. This is a critical step in updating the payments regulatory framework to ensure that it can continue to support the ongoing development and safety of the Australian payments ecosystem for the benefit of all end-users. AusPayNet looks forward to continuing our engagement with Treasury as it progresses its work on the payments system reforms over the coming months.

Yours sincerely,



Andy White
Chief Executive Officer
Australian Payments Network