FinTech Australia

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Via email: paymentsconsultation@treasury.gov.au

RE: Reforms to the Payment Systems (Regulation) Act 1998 – Exposure draft legislation

Thank you for the opportunity to provide feedback to the exposure draft consultation on reforms to the *Payment Systems (Regulation) Act 1998*.

About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech sector, representing over 400 fintech companies and startups across Australia. As part of this, we work with a range of businesses in Australia's fintech ecosystem, including fintechs engaging in payments, consumer and SME lending, wealthtech and neobanking, the consumer data right and the crypto, blockchain and Web3 space.

Response to Exposure Draft

FinTech Australia supports in principle these amendments, which will allow the RBA and Treasurer to regulate a broader range of payment systems and participants within them to create a more level playing field. The new definitions and broader regulatory perimeter will align Australia more closely with international regimes and reflect the changes to the payments landscape over the last two decades. However, we suggest that some of the definitions in the Exposure Draft be amended to more closely track the proposals in the Consultation Paper and align with similar international regimes. More broadly, the impact of these reforms will depend on how the RBA and Treasurer exercise their new powers.

The overarching focus in using these powers should be on supporting a more competitive, efficient and innovation enabling regulatory landscape for payments. Broadening the RBA's remit to consider a broader range of payment systems and participants will enable this and provide flexibility to adapt to a changing ecosystem.

While we welcome the additional clarity and guidance on how the public and national interest tests will apply in designating a payments system, some members remain concerned the tests have insufficient regard for the role of non-regulatory solutions, other regulations which already apply, and the impact of regulating networks with smaller number and value of transactions. Even without designation, the uncertainty created could reduce competition, consumer choice and discourage investment in Australia by smaller networks which may now be captured.

Expanding the regulatory perimeter

In our previous submission, members generally supported widening the scope of people caught by the definition of "payment system". However, we cautioned that the "transfer of value" part of the definition previously proposed may be too broad and may mean arrangements for the transfer of *anything* of value may be caught, such as traditional clearing and settlement facilities, the blockchain systems that underpin crypto assets and platforms that facilitate the transfer of land such as PEXA.

We are pleased to see the section 7 definition adjusted in the exposure draft to apply to the "transfer of funds" where "funds" is defined to include "money" and "digital units of value", and the additional clarification provided in the explanatory materials. However, members note that the definition of "digital units of value" should refer to the definition of "digital currency" as it appears in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and not the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) as this would align payments regulatory requirements as recommended in the Final Report of the Review of Australia's Payments System, which was agreed to by Government and noted in the consultation paper regarding these reforms.

Members also seek additional clarity on the definition of "payment system", particularly in relation to (b) as "instruments and procedures that relate to that arrangement or series of

arrangements" appears to be far broader than the stated intent. This may be by way of by including examples in the explanatory materials of instruments or procedures that relate to arrangement or series of arrangements.

We also appreciate the additional clarity provided in relation to who might be a "participant". We previously raised concerns that the proposed definition was ambiguous and at its broadest, this may include any entity, other than a merchant, who participates in the system. The explanatory materials now provide specific examples about what is intended to be captured by the extended definition, such as wallet passthrough services, and states that the new definition is generally not intended to capture merchants. It would also be helpful for the RBA and each special regulator to be given the power to make determinations that by undertaking a particular activity (defined in the determination) an entity will not be taken to be a "participant". Despite this, the outer limits of who may be captured remain unclear. Apart from merchants, it is still possible that many may be captured as participants who might be outside the intended scope. Members recommend considering whether this should be further narrowed to limit who may be a participant and thus may be able to be captured by these obligations.

FinTech Australia notes the new "participant" definition now includes BNPL products. Members suggest in applying requirements to BNPL products, regulators should be aware of existing and forthcoming BNPL specific regulations and ensure duplication and conflict is avoided.

FinTech Australia also notes that this would bring many digital wallet providers and other payments providers who may be captured under the revised licensing framework for stored value facilities and other payment facilitation service providers.

National Interest test

FinTech Australia previously provided feedback on the need for the national interest test to be guided by a clear list of relevant considerations.

We support the approach taken to clearly set these out in the explanatory memorandum as follows but would recommend that this be included in the legislation too:

- Consumer protection;
- Data-related issues;
- Innovation;
- Cyber security;
- Anti-money laundering and counter-terrorism financing;
- Crisis management; and
- Accessibility.

FinTech Australia recommends adding 'competition' as an additional factor considered in the national interest test. Competition is a key theme underpinning the Strategic Plan for the Payments System outlined by the Government earlier this year and should be a consideration when the Minister makes a designation and including this would more closely align this test with the 'competitive' and 'efficient' considerations currently included at section 8 of the PSRA.

Requiring specific criteria to be considered as part of the test also aligns with similar powers for the payments system regimes in the UK and New Zealand. However, we note these regimes go even further and require consideration of matters like the nature of the system, the number and value of the transactions the system processes and the relationship between the system and other payment systems.[1] Fairness and consistency for participants and proportionate regulatory outcomes for systems are also important considerations. We would recommend including similar considerations in the national interest test too.

We have also previously expressed concern about the overlap between the Treasurer's proposed national interest powers, and the RBA's existing public interest power. These factors were of interest as it saw members view that this is important for the purpose of

[1] See s44 of the *Financial Services (Banking Reform) Act 2013 (UK); s12 of the Retail Payment System Act (NZ).*

the national interest test as well as the result of the RBA's ability to exercise its power appropriately and independently which may be impacted.

We appreciate this has been addressed in part by the requirement that in exercising the power and providing a direction, the Minister must consult with RBA and each head of any nominated special regulator to 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. However, we recommend extending this consultation requirement to include concurrent consultation with industry on the exposure draft instrument. A designation is likely to have a significant regulatory impact on participants and public consultation and impact analysis would ensure the power is subject to appropriate guardrails and is an informed and transparent decision. Similar public consultation requirements have been enacted for new sectoral designations under the Consumer Data Right framework.[2] Under these requirements, the Minister must be satisfied before making a designation that Treasury has conducted consultation and analysis about the designation and published a report about that analysis and consultation.

We note that designation alone does not impose regulatory obligations and acknowledge any consultation requirements should be balanced with avoiding unnecessarily delays to designations which are clearly in the national interest.

Transitional arrangements

Although this legislation only establishes a framework and does not impose specific requirements, when this occurs under the new powers the relevant regulator should:

- complete an impact analysis; and
- ensure there is a sufficient transitional period to allow participants to build compliance capability.

[2] See s56AC of the Competition and Consumer Act 2010.

Enforceable undertakings

The draft legislation provides that a participant may withdraw or vary an enforceable undertaking with the RBA's consent. Members request guidance, either through the explanatory materials or from the RBA on the factors the RBA will consider when providing consent to withdraw an enforceable undertaking.

Payments licensing and future reforms to the PSRA

FinTech Australia appreciates this is the first tranche of draft legislation in the Government's ongoing payment reforms and look forward to further consultation on the new licensing and conduct framework.

We also note these amendments do not include the removal of purchased payment facilities (PPFs) from the PSRA but understand this will occur as part of the forthcoming licensing framework consultations and future draft legislation. Members would appreciate clarity on the sequencing and likely timing of this.