Law Council
OF AUSTRALIA

Business Law Section

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Ms Sally Etherington
Director
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The Treasury
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By email: paymentsconsultation@treasury.gov.au

Dear Ms Etherington

Reforms to the *Payment Systems (Regulation) Act 1998* (Cth)—exposure draft legislation

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) makes this submission to Treasury in response to the exposure draft legislation comprising *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023: Amendments of the Payment Systems (Regulation) Act 1988* (the **Draft Bill**) and the related draft Explanatory Memorandum (the **Draft EM**), which were released for comment on 11 October 2023.

2. The Committee notes that it has previously prepared a submission (**July Submission**) in response to the Treasury consultation paper on the topic *Reforms to the Payment Systems (Regulation) Act 1998*, which was released on 7 June 2023 (**June Consultation**).

3. The Committee welcomes and supports the initiative to update the *Payment Systems (Regulation) Act 1998* (Cth) (the **PSRA**) to reflect the evolving payments landscape.

4. Below, the Committee comments on the Draft Bill with a particular focus on aspects which, in the view of the Committee:

   (a) do not appear to achieve the policy intent stated in the Draft EM and/or the June Consultation; and/or

   (b) may have unintended effects that warrant careful examination.

5. The Committee continues to hold concerns about the proposed manner of expression of certain key concepts. The Committee also wishes to make some principles-based observations as to the importance of consultation and review in the exercise of regulatory discretion and ministerial discretion.

Key definitions

Definition of "payment system"

6. The Committee notes that the Draft Bill proposes a revised definition of "payment system" compared to that in the June Consultation. The Committee supports the focus on "funds" in place of "transfer of value" in the previous June Consultation version of the definition. The Committee notes that the definition of "funds" refers to the definition of "digital currency" as it appears in the *A New Tax System (Goods and Services tax) Act 1999* (Cth). To promote consistency across payments legislation, the Committee recommends that the provision should instead refer to, or adopt, the definition of "digital currency" in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

Definition of "participant"

7. The Draft EM at paragraph 1.20 and following expresses a view that the proposed definition of "participant" would ensure that all entities involved in the payments value chain, including entities without a direct relationship to the system and entities that act as intermediaries between a person and a payment system, were captured. Paragraph 1.23 states that the definition is not intended to capture merchants unless they are participants in their own right.

8. The Committee is concerned that the second limb of the proposed definition of "participant" would not achieve these objectives because it would *not* ensure that:

   (a) entities without a 'direct relationship' with a system would fall within the definition; or

   (b) merchants would *only* be captured if they were a member of a payment system or provide payment services in their own right.

9. The proposed definition requires a corporation to operate, administer or participate in a system, or to provide services that enable or facilitate the operation or administration of, or participation in, a system in order for the corporation to be captured. That would mean that the word 'participate' was the only nexus for entities that neither operate nor administer a system, nor provide services to an operator or administrator. In the Committee's view, reliance on 'participation' (and services to 'participants') alone may not achieve the stated policy objective.

10. The Committee considers that the word "participant" is inherently imprecise in terms of the boundaries between, for example, taking part; taking part indirectly; and providing services or support, functionality or intermediation. The Committee therefore submits that additional words are needed to ensure that the defined term includes and excludes the intended classes with more precision.

11. The Committee submits that one way to clearly exclude those merchants that are not themselves participating in a system or providing payment services would be to expressly exclude such an entity; or to provide for a mechanism for the Reserve Bank or a special regulator to make determinations of classes of persons that are taken not to be participants, including those constitutional corporations that are in substance acting as merchants or payers.

12. The Committee repeats the point it made in the July Submission: "a constitutional corporation that provides services that enable or facilitate the operation or administration of, or participation in, a payment system" widens the definition so that almost *any* provider of services to the operator of a payment system could be classified as a participant, no matter how trivial or generic their role. For example, if the operator of a payment system uses off-the-shelf word processing software or off-the-shelf network routers, would this mean that the providers of those products were also "participants"?

9. The Committee recognises, however, that:

   (a) if a constitutional corporation falls within the definition, that does not in and of itself mean the corporation is or will be regulated; and

   (b) the breadth of the proposed definition may be necessary to respond to risks posed by developments in the payments ecosystem in the future.

Potential conflicts between access regimes, standards and directions

10. The Committee is concerned about the potential implications of proposed new sections 15AA, 18AA and 21A.

11. Proposed section 15AA contemplates that a "special access regime" made by a nominated special regulator on the basis of a Ministerial direction given in the national interest may be inconsistent with a "normal access regime" imposed by the Reserve Bank in the public interest (as defined in section 8). The same applies to a "normal standard" and a "special standard" (which section 18AA contemplates may be in conflict) and a "normal direction" and a "special direction" (which section 21A contemplates may be in conflict). The special access regime, special standard or special direction would override the normal regime, normal standard or normal direction, as applicable, which "ceases to be in force", to the extent of the inconsistency.

12. The Committee is concerned that, if this situation should ever occur, it could require a large number of private sector entities to ascertain the areas of inconsistency and determine for themselves:

   (a) which parts of the normal access regime, normal standard or normal direction remain in operation, and which have ceased to operate;

   (b) whether/how the interpretation of the parts of the normal access regime, normal standard or normal direction that remain is affected as a result of the cessation;

   (c) the legality of actions taken under the inconsistent provision; and

   (d) how the "net" obligations that remain in force will affect them.

   The Committee is of the view that this uncertainty ought to be avoided by ensuring that impacted entities have a reasonable ability to understand what law affects them and how.

13. The Committee therefore submits that Treasury should consider adopting measures to reduce the likelihood of inconsistencies arising, including, for example:

    (a) limiting the Ministerial discretion to national interest factors *other than* public interest matters, thereby reducing the potential for there to be two access regimes or standards that cover the same subject matter which are inconsistent; and

    (b) introducing a requirement for the Minister to consult the Reserve Bank (where the Reserve Bank is not the nominated special regulator) before giving a direction.

14. The Committee further observes that subsection 15AA(2) provides that the normal access regime ceases to be in force to the extent of any inconsistency. It is unclear to the Committee whether the normal access regime is intended to come back into force if the special access regime is disallowed, expires, or is modified so as to no longer be inconsistent with the normal access regime. Clarification on this point would be welcomed.

Ministerial direction

15. In its July Submission the Committee expressed some concern as to Ministerial powers to give directions that are specific and mandatory, on the basis that giving a direction to a regulator to implement a particular policy appears to be potentially inconsistent with the reasoning supporting a power to allocate responsibility to the relevant regulator. This is because a power to allocate responsibility to a regulator is justified on the basis that the expertise on a relevant subject is likely to reside with the relevant regulator.

16. The June Consultation stated that "the Treasurer would be precluded from directing a Treasury regulator on enforcement of regulatory rules, specific implementation mechanisms or directing operators of payment systems or participants directly …"

17. However, the Committee notes that the Draft Bill reflects only the third of these (in proposed subsection 11F(3)) and does not limit the Ministerial direction power so as to prevent it from extending to enforcement (it does the opposite, referring to the exercise of powers under the *Regulatory Powers (Standard Provisions) Act 2014*)) or specific implementation mechanisms.

18. The Draft EM states that the proposed amendments to the PSRA are designed to ensure that emerging risks and technologies can be addressed. One risk that the Committee believes could arise in the future is that the proposed direction making power contemplated by sections 11E and 11F could potentially be subject to abuse if a future Minister sought to use the power in a way that favoured (or disadvantaged) particular entities or types of entity, in support of political objectives.

19. Further, the Committee notes that the proposed Ministerial directions power is very broad and could be used to achieve regulation, or removal of regulation, of such materiality that industry and the public might justifiably expect the full parliamentary legislative process to apply, or for relevant actions to be undertaken by a regulator fully independent of Government and political processes.

20. While a Ministerial direction must be made by legislative instrument, and is therefore subject to disallowance, the Committee considers that the potential for disallowance may not in all circumstances be sufficient protection for regulators and affected industry participants. The Committee notes that there is at least one recent example of a legislative instrument being brought into effect during the lengthy summer break in Parliamentary sitting schedules, and implementing a policy that was not able to be implemented by legislation. The instrument had effect for several months before being disallowed when the Senate resumed.

21. The Committee would in any event recommend that, in circumstances where the Reserve Bank is not the relevant nominated special regulator, formal consultation with the Reserve Bank should also be required, with a view to reducing potential inconsistency between the regulatory action the Minister proposes to direct (a 'special action') and a regulatory action taken, or proposed to be taken, by the Reserve Bank (a 'normal action').

Regulatory certainty and cooperation

22. The Committee notes that the Draft Bill contemplates a number of regulators potentially having powers and functions in respect to payment systems in the future. The Committee believes that those regulators and industry would be assisted by the introduction of a mechanism in the Draft Bill for a 'joint administration agreement' between the regulators (and other agencies of government, such as Treasury). The Committee notes that there is currently a similar mechanism in the *Financial Accountability Regime Act 2023* (Cth), and considers that having a 'joint administration agreement' between the regulations for this purpose would also enhance the co-operation already evident from the Council of Financial Regulators.

23. If Treasury has any questions or would like to further discuss with any matters raised in this submission with the Committee, please do not hesitate to contact Pip Bell, Chair of the Committee (committeechairfsc@gmail.com).

Yours faithfully

Philip Argy
Chairman
Business Law Section