MinterEllison.

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Sally Etherington
Director
Payments Strategy and Policy Unit Financial System Division
Treasury
Langton Cres
Parkes ACT 2600

BY EMAIL: paymentsconsultation@trerasury.gov.au

Dear Ms Etherington

Submission on reforms to the *Payments System (Regulation) Act 1988* (Cth) – exposure draft legislation

1. Introduction

MinterEllison appreciates the opportunity to make a submission in relation to Treasury's release for consultation of the *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023: Amendment of the Payment Systems (Regulation) Act 1998* (Cth) (**Draft Legislation**).

MinterEllison is a leading Australian law firm. We advise major financial institutions, fintechs, payment providers, financial advice firms and other financial intermediaries in Australia and overseas.

The views expressed in our submission are ours alone and do not necessarily reflect the views of our clients.

We support the modernisation of Australia's payment systems regulation and agree that developments in the sector mean that there is a clear need for appropriate regulators to have the ability to subject a broader range of payment systems and participants to regulation. We therefore welcome the Draft Legislation on that basis.

We have set out our submissions on particular issues raised by the Draft Legislation below.

2. Definition of 'national interest'

The Draft Legislation proposes that the Minister will have the power to designate (and thereby regulate) a payment system if the Minister considers it is in the 'national interest' to do so.

The concept of ‘national interest’ is essentially undefined. The Minister is only required to identify a matter which is in the national interest but not one of the defined public interest criteria that form the basis for the power of the Reserve Bank of Australia (**RBA**) to designate payment systems. The factors that a Minister may consider are therefore very broad. We note that the draft Explanatory Memorandum (**EM**) outlines various matters the Minister may consider to be in the national interest, but this is not stated in the Draft Legislation.

We submit that the Draft Legislation should define the national interest factors that the Minister can consider. This could be the factors listed in the EM. To the extent there needs to the ability to consider additional factors, the Draft Legislation can include additional factors prescribed by regulation. This would

give the Minister the ability to add additional factors quickly but would also ensure that additional factors are subject to Parliamentary scrutiny (through the ability to disallow regulations).

We consider that our suggested approach would be more consistent with principles of accountable government and the separation of powers.

3. Consultation before designation

The Draft Legislation proposes that the Minister is required to consult with the RBA and other regulators before designating a payment system. However, there is no requirement to consult more broadly. This does not seem appropriate.

At the minimum, we would expect that the Minister should be required to consult with the party or parties responsible for any payment system which is to be designated by the Minister. This is consistent with current legislative approaches where a broad power is granted to a regulator. For example, the recently enacted product intervention powers require ASIC to do the following *before* exercising its powers:

- consult with persons who are reasonably likely to be affected by the proposed order;
- consult with APRA if the proposed order will apply to a body that is regulated by APRA; and
- comply with any other requirements as to consultation prescribed by the regulations.[1]

We submit this requirement should also apply not only to the Minister's designation power, but also to the RBA's designation power as part of the project to modernise the *Payment Systems (Regulation) Act 1998* (Cth) (**Act**). To the extent that there is a concern that designation may need to occur urgently, the Minister (and the RBA if applicable) could be given the power to make an interim designation with the ability to make it permanent after appropriate consultation.

Similar concerns arise in relation to other provisions of the Draft Legislation, including:

- the power of nominated special regulators to impose, make, vary or revoke access regimes or standards;[2] and
- the power of the Minister to give directions to a nominated special regulator.[3]

We submit that appropriate public consultation should be mandated before these powers are exercised.

4. Parliamentary oversight

The Draft Legislation grants the Minister a broad power to give directions to the special nominated regulator in relation to the performance of their functions or the exercise of their powers in relation to a payment system designated by the Minister. This power is only limited by the requirement to consult with the special nominated regulator (and their responsible Minister) and to act within the very expansive meaning of 'national interest'.

We note that, as stated in para 1.45 of the EM the effect of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth), Ministerial directions under the Act will not be subject to Parliamentary disallowance or sunsetting.

While we acknowledge there are a wide array of instances where national interest concerns may arise and the Minister should not be impeded in exercising their duties under the Act, it is unclear why this means Parliamentary oversight (disallowance) or sunsetting (requiring a revisiting of the direction over time to ensure it remains adequate and fit-for-purpose) is not necessary or appropriate. It does not seem appropriate for a Ministerial direction that is not acceptable to both Houses of Parliament should remain in effect.

[1] *Corporations Act 2001* (Cth), s 1023F.
[2] Proposed changes to ss 12(2), 14(1), 15(3) and 18 of the Act.
[3] Proposed s 11E(1) of the Act.

5. Clarification on the meaning of 'participant'

We support the Draft Legislation's proposal to broaden the definition of 'participant' with the intention to capture a broader range of entities that play a role in facilitating or enabling payments to be made through a payments system. We do, however, question the application of the proposed changes to the definition to some of the examples used in the EM to illustrate the broadening of the definition.

Paragraph 1.22 of the EM states that the new definition of 'participant' in the Draft Legislation would capture BNPL products, digital wallet passthrough services and cash in transit services and we comment on each below.

BNPL

It is unclear to us how a BNPL product would be a 'participant' in a payment system as that term is proposed to be defined in the Act.

BNPL providers provide credit to customers by paying for the product acquired by the customer and the BNPL product is the facility through which this occurs. The BNPL provider uses a payment system to pay the supplier of the product and customers use a payment system to pay the BNPL provider. However, use of a payment system does not fall within the proposed definition of 'participant'. We acknowledge that a BNPL product could be viewed as a payment system and BNPL providers would then be a participant. However, if this is what is meant by the EM, it should be clarified.

Digital Wallet services

Digital wallet services such as ApplePay facilitate the *use* of a payment system (such as Visa). Again, we would not expect the term 'participate' to encompass 'use'. If the intent is to capture entities that enable the use of a payment system, such as digital wallet services, this should be made clear in the definition of 'participant' in the Draft Legislation. Alternatively, if it is intended that such services should be regarded as payment systems capable of designation, this should be clarified in the EM.

Cash in transit services

It is unclear how the amended definition of 'participant' in the Draft Legislation would capture cash in transit services. As cash in transit services facilitate the physical delivery of cash (which is not and could not be a designated payment system), we cannot see how these services would be captured by the expanded definition (of a 'participant').

6. Appropriate regulator of payment systems designated by the Minister

We understand the purpose of the Draft Legislation is to implement recommendations of the 2021 Farrell Review into the regulatory architecture of Australia's payments systems (**Farrell Review**). The key reason the Farrell Review recommended vesting designation powers in the Treasurer was that the RBA's designation power is confined to considerations limited to the defined term 'public interest' and therefore the RBA is not an appropriate entity to respond to issues in relation to, for example, national security and consumer protection.[4]

In light of the above, the comment in para 1.36 of the EM that the RBA is likely to be the most suitable regulator to be nominated in relation to a payment system designated by the Minister (under national interest grounds) is somewhat incongruous. It seems unusual to us that an entity deemed to not be appropriate for holding the power to designate payment systems on national interest or consumer protection grounds would be the appropriate body to regulate such systems. We would expect, for example, that ASIC or the ACCC may likely be the most appropriate regulator to oversee any payment system designed to address consumer protection concerns.

7. Broad delegation of power to the Minister

We question whether such a broad delegation of power by the Parliament to the Minister is necessary or appropriate. We certainly support regulators being given broad powers to regulate industries for which they have responsibility. Our support for this notion is set out in our report on streamlining regulation relating to the Australian Law Reform Commission (**ALRC**) Review of the Legislative Framework for

[4] The Australian Government, the Treasury, *Payment systems review: From system to ecosystem* (Farrell Review), June 2021, p 54.

Corporations and Financial Services Regulation.[5] That report sets out key legislative design principles which we believe should form the basis of financial services regulation. In our view, it is appropriate for Parliament to establish the principles for such regulation and that bodies, such as the Minister, with wide law-making powers should be subject to appropriate oversight.

Please let us know if you have any questions about any of our submissions regarding the Draft Legislation. We would be very happy to meet with you to discuss the issues we have raised if appropriate.

Yours sincerely
MinterEllison

Richard Batten
Partner

Prayas Pradhan
Senior Associate

Partner: Richard Batten T: +61 2 9921 4712 M: +61 402 098 068
richard.batten@minterellison.com

[5] Our report was lodged with the ALRC by IAG as part of its submission on ALRC Interim Report B in December 2022.