FinTech Australia

Reforms to the Payment Systems (Regulation) Act 1998 consultation paper response

July 2023

About this Submission

This document was created by FinTech Australia in consultation with its members (**Members**).

In developing this Submission, interested Members participated in roundtables and individual discussions to discuss key issues and provided feedback to inform our response to the consultation paper.

About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech sector, representing over 420 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.

Our vision is to make Australia one of the world's leading markets for fintech innovation and investment. This submission has been compiled by FinTech Australia and its Members in an effort to advance public debate and drive cultural, policy and regulatory change toward realising this vision, for the benefit of the Australian public.

FinTech Australia would like to recognise the support of our Policy Partners, who assist in the development of our submissions:

- Allens;
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- K&L Gates.

Responses to Questions

Defining the regulatory perimeter of payments licensing

FinTech Australia supports Treasury's proposal in its Reforms to the Payment Systems (Regulation) Act 1998 (Cth) consultation paper (**Paper**) Paper to remove purchased payment facilities (**PPFs**) under the *Payment Systems (Regulation) Act 1998* (Cth) (**PSRA**) and insert a single licensing framework for stored value facilities as proposed in Treasury's Payments System Modernisation (Licensing: Defining Payment Functions) consultation paper (**Licensing Consultation Paper**).

FinTech Australia and its Members are looking forward to providing a separate submission in relation to the Licensing Consultation Paper.

Expanding the regulatory perimeter of the PSRA

Question 1. Does the proposed approach to updating the definition of 'payment system' appropriately capture arrangements that are involved in facilitating or enabling payments?

We support widening the scope of people caught by the definition of "payment system" but suggest that "transfer of value" be limited to "transfer of monetary value".

Generally, Members support the proposed approach to update the definition of 'payment system'. Members agree that this more flexible approach better reflects our modern understanding of money, the role it plays in our economy, and the development of economic activities leveraging digital payment methods.[1] It will also allow the RBA to respond appropriately to financial stability, efficiency or competition risks posed by new innovations in the payments ecosystem.

That being said, while the proposed definition is sufficiently broad to capture our modern understanding of payment systems, we caution that capturing arrangements or series of arrangements for enabling or facilitating transfer of value, may be too broad. This may, for example, 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.

[1] Treasury, *Payments system review: From system to ecosystem*, June 2021, page 4.

Instead, Members propose that "transfer of value" be replaced with "transfer of monetary value". This terminology is reflects the definition of "payment" and "payment system" in the *Payments system review: From system to ecosystem* (**Payments System Review**)[2] being:

> *Payment: A transfer of monetary value between two or more parties.*
>
> *Payment system: The network of arrangements – instruments, procedures, rules, and technological infrastructures – that support the transfer of monetary value between consumers, businesses and other organisations.*[3]

Question 2. Does the proposed approach to updating the definition of 'participant' appropriately capture the full range of entities that currently and may in future play a role in the payments system?

We request greater clarity as to who might be a "participant".

Members support modernising the definition of participant but have some concerns that the proposed definition is ambiguous and requires further clarification. The current definition reflects a person who is "a participant in" or "an administrator of" the system. The proposal to expand this to a constitutional corporation which "operates, participates in or administers a payment system", "provides services to a payment system", or "provides services for the purposes of enabling or facilitating a transfer of value using a payment system"[4] far exceeds who is likely to be caught. At its broadest, this may include any entity, other than a merchant, who participates in the system.

Members have some concern with the proposed definition. To mitigate this, further guidance regarding the scope of "participant" would be helpful in ascertaining who is intended to be a "participant" caught by the regime.

Question 3. Should other considerations be taken into account in updating the definitions?

Please refer to our responses to questions 1 and 2.

[2] Treasury, *Payments system review: From system to ecosystem,* June 2021.
[3] Treasury, *Payments system review: From system to ecosystem,* June 2021, page 96.
[4] Treasury, *Reforms to the Payment Systems (Regulation) Act 1998 (Cth) consultation paper*, June 2023, page 8.

Ministerial powers

Question 4. Is the proposed 'national interest' test appropriate for achieving the policy outlined in this paper?

Most Members feel the national interest test is appropriate for achieving the desired policy outcomes, subject to clearly defining the scope of the 'national interest'.

National interest

There are a number of views as to how a 'national interest' test may operate in practice. This includes:

- Members support the principles of including a 'national interest' test. This aligns with other areas where the Minister may exercise their power such as a general 'national interest' test might benefit from alignment with other similar provisions, for example, in relation to decisions of the Foreign Investment Review Board (**FIRB**);
- while the power itself may be set out in legislation it would be beneficial for further guidance regarding the substance of and considerations relevant to designating a payment system to be provided; and
- clarify the scope through explanatory materials or other guidance that provides further colour regarding what is in the national interest and when something may meet that threshold.

Treasurer's power

Beyond the definition, many Members support the Treasurer having the power to designate payment systems. Others express concern regarding this role. Members acknowledge and support the proposal that the Treasurer will not play an active role in regulation of, or have the power to give binding directions to, participants.

Others caution against the Minister having too great a power to intervene and suggest care should be exercised that such a power would not be used for political motivations. FinTech Australia notes that this may be managed through the scope of "national interest".

Overseas comparisons

Creating specific criteria of a "national interest". This aligns with the payment systems regimes in the UK and New Zealand, being as follows:

UK

- Section 44 of the UK's *Financial Services (Banking Reform) Act 2013* (UK) provides that the Treasury may make a designation order in respect of a payment system only if they are satisfied that any deficiencies in the design of the system, or any disruption of its operation, would be likely to have serious consequences for those who use, or are likely to use, the services provided by the system. Further, sub-section (2) provides a number of criteria that the Treasury must consider in relation to whether a designation order should be made. These criteria include:[5]
    - the number and value of the transactions that the system presently processes or is likely to process in the future;
    - the nature of the transactions that the system presently processes or is likely to process in the future;
    - whether those transactions or their equivalent could be handled by other payment systems; and
    - the relationship between the system and other payment systems;

New Zealand

- Section 12 of New Zealand's *Retail Payment Systems Act 2022* (NZ) sets out the criteria that the Commission must take into account when making a recommendation to the Minister that a retail payment network be designated. These criteria include:[6]
    - any features of the retail payment network, or any conduct of participants in the network, that reduce, or are likely to reduce, competition or efficiency;
    - the nature of the network, including the number, value, and nature of the transactions that the network currently processes or is likely to process in the future;
    - the *Financial Market Infrastructures Act 2021* (NZ) and any other regulatory requirements in other New Zealand laws that the Commission considers relevant.

[5] *Financial Services (Banking Reform) Act 2013* (UK) s 44(2).
[6] *Retail Payment Systems Act 2022* (NZ) s 12(2).

Question 5. Is the proposed approach to delineating the Treasurer's national interest powers clear and effective?

Members are broadly in support of clearly defining the scope of the national interest power to mitigate against uncertainty, particularly regarding matters that are both within the scope of the national interest power and public interest power.

Members have some concern that there may be overlap between the Treasurer's proposed national interest powers, and the RBA's existing power public interest power. In particular, each of the factors relevant to the public interest test are considered for the purposes of the national interest test too. As a result, the RBA's ability to exercise its powers appropriately and independently may be impacted. Any issues may be exacerbated were 'national interest' not clearly defined.

Question 6. To mitigate this, Members suggested the boundaries of the national interest power be clear. Please see our response to question 4 for further detail. Are there views or considerations on whether the Government should include a list of relevant considerations for the Treasurer to have regard to in the legislation, explanatory materials, or a separate policy document?

We support including a list of relevant considerations to clearly define the boundaries of the Treasurer's national interest power. Views are divided as to where any relevant considerations should be set out.

As discussed in our responses to questions 4 and 5, Members are equally split as to whether relevant considerations should be in legislation, explanatory materials or a separate policy document.

Some Members have concerns that relying on separate policy documents or explanatory materials may introduce uncertainty as it may be able to be more easily amended without significant oversight. These Members suggest that relevant considerations be included in legislation or a legislative instrument. Others are of the view that it may be necessary to have a more flexible approach. Enshrining such a list in legislation or even regulations may make it difficult for the 'national interest' considerations to keep pace with evolving technology and broader challenges.

Please see our response to question 4 for further details including submissions in relation to a similar approach taken in the UK and New Zealand payment systems regimes.

Question 7. Are there other considerations that have not been listed that should generally be considered in relation to 'national interest'?

Please see our response to questions 4, 5 and 6.

Question 8. Is the scope of the proposed Ministerial designation power effective and appropriate?

Please see our response to questions 4, 5 and 6.

Question 9. Is the Treasurer's proposed ability to allocate responsibility to regulators (within their mandate) other than the RBA appropriate?

We generally view this approach as appropriate.

Members consider that the Treasurer's proposed power to allocate responsibilities to regulators that are within the Treasury portfolio provides flexibility and an ability to quickly respond to market needs and stresses. Practically speaking, care should be taken that the primary responsibility of each regulator remains clear and that reallocations of responsibility across regulators do not cause undue delays, disruptions or uncertainty.

Question 10. Is the scope of the Treasurer's power to direct Treasury portfolio regulators (ACCC, ASIC, RBA) to implement a policy position appropriate?

We consider that this is appropriate but highlight that such a power should be clearly defined and exercised with caution.

The scope of the national interest power should be clearly defined. This should include ensuring that the roles of each regulator are properly considered when allocating responsibility to them. We note that once a designation has been made and powers allocated, the Treasurer should not have an ongoing role regarding the regulation of such a payment system.

Several Members consider that such a power may give the Treasurer the ability to re-align a regulator with the policy outcomes of the regime without requiring legislative intervention. However, such a power could also be used negatively to pursue particular participants or sectors of the market.

One Member has suggested during consultation that the Treasurer should be given the power to give binding directions.

Another factor to consider is that whether the 'national interest' for designation falls within the Treasurer's portfolio and the oversight of those regulators. Under the proposal, when making a decision the Treasurer may consider a number of matters which are outside their portfolio, such as cybersecurity. To the extent that the 'national interests' of concern are within the purview of another portfolio, it may be necessary to consider whether designation by the Treasurer would result in the appropriate oversight and obligations being placed on the designated payment system. Perhaps consultation with other ministers may be necessary to facilitate imposition of appropriate regulatory obligations?

Question 11. Is the proposed consultation approach sufficient for both Ministerial designations and directions?

Members generally support requiring the Treasurer consult prior to the designation of a payment system, as well as before allocating responsibilities to regulators.

One Member is of the view that Treasury should not be required to consult when designating a payment system as designation alone does not impose regulatory obligations. However, most are of the view that it is counterintuitive to designate a payment system without consultation with the relevant people.

One Member goes even further and suggests a public consultation process prior to designation may be beneficial as it would provide greater transparency as to how the national interest power may be exercised to designate a payments system and allow for public oversight and input from industry participants, if appropriate.

Further reforms for testing

Question 12. Would it be appropriate to enable the RBA to have greater information disclosure powers? What constraints or conditions should be applied as part of such a power?

Members do not support the proposal that the RBA have the power to disclose information without consent.

Members currently rely on the secrecy requirements in part 6 of the *Reserve Bank Act 1959* (Cth) as a tool to share material which may be commercially sensitive but necessary given the RBA's position. Disclosure of such material without consent may have significant consequences for those businesses. Members are of the view that allowing disclosure without consent may discourage

businesses from sharing information with the RBA which would be to the detriment of those businesses and the RBA.

Question 13. Is there merit in providing the RBA with the power to accept enforceable undertakings on a voluntary basis?

Members do not express any concerns with the proposal to align the powers of the RBA to accept enforceable undertakings on a voluntary basis with those already available to APRA, ACCC and ASIC.

However, industry would benefit from clarity as to how enforceable undertakings will be dealt with.

Question 14. Would there be benefits in introducing a more graduated penalty regime into the PSRA?

We broadly support a graduated penalty regime, as well as the inclusion of civil penalties.

Such a graduated approach allows penalties to reflect the facts and circumstances of a particular breach, and be proportionate to the harm. For example, where a participant has self-reported and remediated the breach, including by uplifting controls and processes, it is appropriate that a response including any penalties are able to reflect that.

Question 15. Given the arrangements in place and the proposed ministerial designation power is there an ongoing role for section 11 of the RBA Act or should it be removed? In what circumstances would section 11 of the RBA Act be the most appropriate mechanism to resolve differences of opinion between the Government and the RBA on payments system policy?

Members do not express a view regarding section 11 in general but note the importance of preserving the independence of the RBA and support measures which prevent payments policy from being politicised.

Question 16. Are there any other changes to the PSRA that the Government should consider?

We support including common access requirements for payment systems as part of the payments licence as recommended in the Final Report of the Payments System Review, and its proposal in the Paper. Facilitating access to payment systems levels the playing field and facilitates greater competition in the payments landscape.

Members are pleased that the RBA has been developing common access requirements in consultation with payment system operators, PSPs and other financial regulators. This should streamline and expand access to payment systems that have traditionally only been available to particular market participants, such as banks. Members recognise that system-specific requirements, such as in relation to technical connectivity or operational procedures, may need to be administered by payment system operators. If these practical matters can be met, there should be no reason to prevent access.

Conclusion

FinTech Australia thanks Treasury for the opportunity to provide their views on such an important suite of issues. We greatly appreciate the work that Treasury has put into the Paper and past consultations. We look forward to engaging in the future on further payments industry consultations.