



Reforms to the *Payment Systems (Regulation) Act 1998*

Consultation paper

June 2023

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Consultation Process

Request for feedback and comments

The purpose of this consultation paper is to seek comments on the Government’s proposals to update the *Payment Systems (Regulation) Act 1998* (Cth). Interested parties are invited to comment on the policy issues and implementation considerations raised in this paper.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted. All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Closing date for submissions: 07 July 2023

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The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Reforms to the Payment System (Regulation) Act 1998

Introduction

The Government's Strategic Plan for Australia's Payments System recognises that the regulatory architecture governing payments needs to be updated to reflect the changing payments landscape.

This paper outlines proposals to update the *Payment Systems (Regulation) Act 1998* (PSRA) to ensure regulators and Government can address new risks related to payments as the provision of payments evolves and increases in complexity. The proposals are consistent with the recommendations of the June 2021 Review of the Payments System (the Review); see Annexure 1 for a list of all recommendations.¹ In summary, the Government's proposals to update the PSRA are:

- **Expanding the regulatory perimeter of the PSRA** by updating existing definitions of 'payments system' and 'participant' to ensure that all entities that play a role in facilitating or enabling payments, including new entrants, are appropriately regulated.
- **Introducing new Ministerial powers that can be exercised in the 'national interest'** to ensure Government can respond to issues beyond the remit of independent regulators.

This paper also sets out options to expand the regulatory tools available to regulators to effectively address new and emerging risks.

The Government has drawn on lessons and insights from regulatory developments in other jurisdictions as well as evidence from stakeholders in developing the proposed reforms. Input is specifically sought from stakeholders on whether the reforms are commensurate with the magnitude of the problems identified and whether there is potential for any unintended consequences not already identified, including with respect to regulatory benefits and costs of the proposed reforms.

The Payments System Review

The Review noted the importance of regulatory architecture balancing the principles of service, strategy, safety and simplicity. It clarified the separate but complementary roles and responsibilities of Government, regulators and industry bodies in promoting the objectives of regulation of the payments ecosystem, noting it is critical that the RBA maintains its role as the primary payment system regulator. However, updates to the PSRA are required to address the existing limitations outlined below.

Existing definitions in the PSRA may not capture new payment systems and participants

Retaining existing definitions could lead to an asymmetry in the regulation of new and incumbent participants in the payment system. The Review recommended expanding the definition of 'payment system' to broaden the RBA's ability to designate new and emerging payment systems under the PSRA, where it is in the 'public interest' as defined in the PSRA (Recommendation 6).

¹ Treasury (2021), [Review of the Australian Payments System – Final report](#), Treasury.

The RBA is precluded from addressing certain matters

Increasingly, payments system issues intersect with Australian national interest concerns that may require government intervention and oversight and where the RBA is unlikely to have the ability to directly address the issues alone. These include national security concerns and cyber-attacks.

The Review recommended the creation of a Ministerial power to designate payments systems and participants of designated payments systems where it is in the 'national interest' to do so. The designation power would involve the ability to direct regulators to develop regulatory rules and for the Treasurer to give binding directions to operators of, or participants in, payment systems. These powers are aimed at ensuring Government can intervene to address emerging payment issues of national significance (Recommendation 7).

Recommendations 6 and 7 also support the more general recommendation that, given the increased complexity of payments issues and the acceleration of financial innovation, enhanced leadership, vision and oversight is needed in the payments ecosystem, and that Government, through the Treasurer, is best placed to provide this leadership (Recommendation 2).

The Reserve Bank of Australia: the primary payments system regulator

The RBA is the primary payments system regulator, with the Bank's payments system policy determined by the Payments System Board (PSB).² The payments system mandate, powers and responsibilities of the Bank and the PSB are set out in various pieces of legislation.³

The RBA is the only entity provided with regulatory powers or functions under the PSRA. The RBA's mandate under the PSRA is to promote competition, efficiency and safety, and to control risk to maintain financial stability. The RBA maintains financial stability by identifying, assessing, and addressing sources of systemic risk, and enhancing the resilience of the financial system to future shocks.

The RBA's powers under the PSRA include the ability to:

- designate a payment system as being subject to its regulation;
- impose an access regime on participants in that system;
- determine standards to be complied with by participants in that system;
- give directions to comply with those regimes or standards; and
- arbitrate disputes between participants in that system.

Formal regulation is generally only used by the RBA when an industry-driven solution is unlikely to lead to a satisfactory outcome in the public interest. This is consistent with the intent of the PSRA, as set out in its accompanying Explanatory Memorandum. Further detail regarding the RBA's powers under the PSRA are detailed in Annexure 2.

² The PSB is comprised of up to eight members: the Governor, another representative of the RBA, a representative from the APRA, and up to five other members appointed by the Treasurer.

³ *Reserve Bank Act 1959*, *Payment Systems (Regulation) Act 1998*, *Payment Systems and Netting Act 1998*, Part 7.3 of the *Corporations Act 2001*, and the *Cheques Act 1986*.

Proposed Reforms

Expanding the regulatory perimeter of the PSRA

Updating existing definitions of ‘payment system’ and ‘participant’ would expand the regulatory coverage of the PSRA and ensure that all entities that play a role in facilitating or enabling payments, including new entrants, can be appropriately regulated if in the public interest or national interest.

Updating the ‘payment system’ definition

The existing definition of *payment system* is defined as ‘a funds transfer system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system’.⁴

Expanding coverage to both bilateral and multilateral arrangements

A key aspect of the current ‘payment system’ definition is that it covers a *‘funds transfer system that facilitates the circulation of money’*. This has generally been interpreted as a multilateral arrangement whereby there are multiple participants that operate under a common set of rules. There is uncertainty as to whether the existing definition is limited to multiparty arrangements or extends to ‘three party’ or ‘closed loop’ systems (with the latter referring to systems under which an entity enters multiple bilateral arrangements with payers and payees).

To resolve any ambiguity and ensure appropriate regulatory coverage, an updated definition could cover both bilateral and multilateral arrangements, including ‘three party’ and ‘closed loop’ systems. This is of particular importance as innovation and technological developments continue to create new services and business models within the payments ecosystem.

Expanding coverage beyond money

A further aspect of the existing definition that could be updated is the reference to *money*. Limiting a payment system to one which transfers money may exclude systems which use non-monetary digital assets for payments or bypass traditional payment infrastructure. A technology neutral approach that refers to ‘value’ rather than ‘money’ may provide flexibility to address payments in digital assets.

Options for updating definition of ‘Payment System’

A principle-based definition is preferred rather than a prescriptive approach that explicitly lists the types of systems covered by the PSRA, as a prescriptive list could become quickly outdated. The below options are intended to provide an indication of how the revised definitions could apply. The exact wording of any such definitions will be developed in the legislative drafting process.

⁴ Section 7 of the PSRA.

Box 1.1 Definition of 'Payment System'

Proposed approach	Existing definition
A revised definition could apply to an arrangement or series of arrangements for enabling or facilitating payment or transfer of value, or a class of payments or transfer of value, and includes any instruments and procedures that relate to the arrangement or series of arrangements.	A funds transfer system that <i>facilitates the circulation of money</i> , and includes any instruments and procedures that relate to the system. ⁵

The proposed approach focuses on the concepts of 'payments' and 'transfers of value'. The concepts are not intended to cover fundamentally different matters, with a 'payment' essentially being a form of 'transfer of value'. Rather, these concepts, together, are intended to expand the scope of the existing definition to cover a broader set of arrangements not limited to funds transfer systems that facilitate the circulation of money. The intended outcome is to bring within scope the full suite of arrangements involved in facilitating or enabling payments, including those that the current definition covers. This includes, for example, the ATM system, which is a funds transfer system designated by the RBA in 2008.

The proposed approach is also intended to support flexibility in designating a class of payment system, or a particular arrangement within a class. It is also intended to capture systems that involve the use of multiple payment classes or instruments, or that facilitate or enable payments through another system (coverage of this kind is explicitly referred to in the approach taken by the United Kingdom and addressed in the proposed changes to the 'participant' definition outlined in the next section). Similar approaches have been developed by other jurisdictions (for further details see Box 1.2).

Box 1.2 International Comparisons

Canada	<i>Canadian Payments Act 1985, Part 2 (Designated Payment Systems)</i>	payment system means a system or arrangement for the exchange of messages effecting, ordering, enabling or facilitating the making of payments or transfers of value.
United Kingdom	<i>Financial Services (Banking Reform) Act 2013</i>	payment system means a system which is operated by one or more persons in the course of business for the purpose of enabling persons to make transfers of funds, and includes a system which is designed to facilitate the transfer of funds using another payment system.
New Zealand	<i>Retail Payment System Act 2022</i>	retail payment means a payment by a consumer to a merchant for the supply of goods and services. retail payment network means the participants, arrangements, contracts, and rules that facilitate a class of retail payment.

⁵ Section 7 of the PSRA.

Updating the ‘participant’ definition

The PSRA should be capable of being applied to all entities that play a role in the payments value chain, including entities that facilitate or enable payments. Among other things, the current requirement for a participant to be ‘a participant in the system *in accordance with the rules governing the operation of the system*’ may imply that the PSRA has limited application in respect of entities that are not formal members of a designated payment system. Some entities that are not direct members of a payment system may nevertheless play an important role in facilitating or enabling payments. Increasingly, such entities have agreements with others in the payments chain, under which services are provided that directly facilitate or enable payments. Within the payments chain these services perform roles such as transferring, processing, and storing value, whether in digital or physical form.

This includes services such as digital wallets and cash in transit services, the providers of which have a material involvement in the payments value chain without necessarily being formal members of a particular system or systems.

The definition of ‘participant’ could be amended to include all entities that have a role in respect of facilitating or enabling payments that are made through a payment system. It is proposed that the expansion of the PSRA to capture digital wallets storing digital representations of payment cards or other payment devices will be captured through an updated definition of ‘participant’ in a payment system, not through an updated definition of ‘payment system’.

Box 1.3 Definition of ‘Participant’	
Proposed approach	Existing definition
<p>A revised definition of participant could apply to a constitutional corporation that operates, participates in or administers a payment system.</p> <p>It could also include a constitutional corporation that provides services to a payment system, or provides services for the purposes of enabling or facilitating a transfer of value using a payment system.</p>	<p>A participant in a payment system means:</p> <p>(a) a constitutional corporation that is a participant in the system in accordance with the rules governing the operation of the system; or</p> <p>(b) a constitutional corporation that is an administrator of the system.</p>

The proposed approach is:

- intended to cover all entities involved in the payments value chain, including entities with and without a direct relationship to a payment system (for example, infrastructure providers and service providers such as gateways and digital wallet services).
- not intended to capture typical merchants that sell goods and services, unless they are a member of a payment system or provide payment services in their own right.
- technology neutral and does not explicitly outline the operators and service providers captured, to increase the likelihood that the law covers future innovations, including if new services emerge with a role in a payments chain, or future issues with entities that are otherwise outside of the regulatory framework. It also mitigates the risk of regulatory arbitrage.

As with the proposed approach to the ‘payment system’ definition, being within scope of regulation does not mean a participant will be regulated. A decision to regulate a participant must be done on ‘public interest’ or on ‘national interest grounds’ (with respect to the RBA’s and new Ministerial

powers respectively), informed by an impact assessment; such a decision would typically only be made after considering whether non-regulatory solutions could address the relevant concerns. As can currently occur under the PSRA, different regulatory requirements could be imposed with respect to different types of participants. This would be done having regard to the relative roles, and attendant risks, that each type of participant has in respect of a particular system.

International comparisons

The expanded coverage of participant is broadly consistent with that provided for under the UK and New Zealand regimes. The UK framework defines three classes of participant: the operator of the payment system; providers of infrastructure to the system; and payment service providers.

The New Zealand framework adopts a similar classification, but consolidates participants into two categories, namely network operators and service providers, where the latter is defined quite broadly to include any entities that provide or facilitate payment services within the network.

Box 1.4 International Comparisons		
<p>United Kingdom</p>	<p><i>Financial Services (Banking Reform) Act 2013</i></p>	<p><i>The following persons are “participants” in a payment system—(a) the operator of the payment system; (b) any infrastructure provider; (c) any payment service provider.</i></p> <p>Operator, in relation to a payment system, means any person with responsibility under the system for managing or operating it; and any reference to the operation of a payment system includes a reference to its management.</p> <p>Infrastructure provider, in relation to a payment system, means any person who provides or controls any part of the infrastructure used for the purposes of operating the payment system.</p> <p>Payment service provider, in relation to a payment system, means any person who provides services to persons who are not participants in the system for the purposes of enabling the transfer of funds using the payment system.</p>
<p>New Zealand</p>	<p><i>Retail Payment System Act 2022</i></p>	<p>Participant, in relation to a retail payment network, means a person that is a network operator or any other service provider.</p> <p>Network operator or operator, in relation to a retail payment network, means any person that is or does 1 or more of the following: (a) is wholly or partly responsible to the participants (or any of them) for the network rules; (b) operates or manages the network or the core infrastructure of the network.</p> <p>Service provider, in relation to a retail payment network, means any person that provides or facilitates the provision of payment services in the network (for example, a payment or an infrastructure service provider), but does not include a merchant.</p>



Consultation Questions

Definition of 'payment system'

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

Definition of 'participant'

- 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?

Applicable to both proposed definitions

- 3) Should other considerations be taken into account in updating the definitions?

Ministerial powers

New Ministerial designation powers

The RBA's mandate relates to issues that are in the 'public interest', as defined by the PSRA (relevant factors are financial safety, efficiency, competition and controlling risk in the financial system). Accordingly, the RBA is precluded from addressing payments issues on 'national interest' grounds, for example, matters of national security or consumer protection issues.

The Review noted that these issues are currently beyond the RBA's mandate, powers, expertise and role. Furthermore, it noted that the '*...Treasurer should have the power to designate payment systems and participants of designated payment systems where it is in the 'national interest' to do so. The designation power [recommended by the Review] includes the power to direct regulators to develop regulatory rules and the power for the Treasurer to give binding directions to operators of, or participants in, payment systems.*'

The Review also noted a power to act in the 'national interest' should be vested in the Treasurer on the basis that they can:

- engage more openly with industry due to not playing a regulatory enforcement role;
- make timely decisions on urgent issues; and
- engage other agencies where issues extend beyond the remit of a particular regulator.

The Treasurer is also accountable to consumers, businesses and the Australian community generally, and can provide a broader platform through which the interests of these groups can be heard on core payments issues. Furthermore, the Treasurer, through their position in the Cabinet, is privy to briefings on national security risks that may require urgent action.

The new Ministerial delegation power proposed in this paper is consistent with recommendations of the Review, including that, given the increased complexity of payments issues and the acceleration of financial innovation, enhanced leadership, vision and oversight is needed in the payments ecosystem. The Government, through the Treasurer, is best placed to provide this (Recommendation 2). The Treasurer's ability to take an enhanced leadership role would be supported through new Ministerial powers (Recommendation 7). Introducing such a power is intended to provide the Treasurer with the ability to respond to new and emerging issues in the payments system that are not within the scope of the RBA's 'public interest' mandate.

However, there are key differences between the recommendations in the Review and the proposal. Specifically, the proposal to provide the Treasurer with national interest powers does not include a power for the Treasurer to give binding directions to operators of, or participants in, payment systems. The proposed approach does not involve the Treasurer playing an active regulatory role on the basis that regulators are best placed, with their knowledge and expertise, to develop directions and regulatory rules on payment systems and their participants.

How would Ministerial designation work?

The proposed Ministerial designation model mirrors the existing process that the RBA currently undertakes before setting standards or imposing an access regime on the participants in a payments system on 'public interest grounds'. It is envisaged that the Ministerial designation powers would enable the Treasurer to take the following actions on 'national interest' grounds:

- designate payment systems;
- allocate responsibility for addressing a particular policy issue concerning specific designated systems to the best-placed regulator; and

- issue certain directions to regulators.

For the Treasurer to take any of these actions, the Treasurer must first determine that designation of a payment system is in the ‘national interest’ and undertake specified steps that are preconditions to the exercise of the power. These would include appropriate safeguards and consultation requirements prior to exercise of the power, as well as oversight, review and reporting requirements.

It is proposed that the Treasurer be required to undertake the following processes when exercising the proposed powers:

- **Determine that use of PSRA powers is appropriate:** in forming this view, the Treasurer should consider the existence and scope of other regulatory frameworks that could be used to address a particular issue.
- **Engage the prospective regulator(s):** the Treasurer should consider the capability, mandate, and views of the prospective regulator(s) who would be allocated responsibility for developing rules to address the issue.
- **Consultation requirements:** the Treasurer should consult with parties affected by any decision.

These proposed requirements are set out in further detail below.

National interest

There is no definition of ‘national interest’ in the PSRA. The concept would need to be introduced in a manner consistent with the purpose of the proposed Ministerial designation power.

Most circumstances where national interest is referenced in Australian legislation do not include a specific definition of the term. In some cases, limited or implicit definitions are provided that include factors that can, or must, be considered in applying a national interest test. For example, the *Foreign Acquisitions and Takeovers Act 1975* does not provide a definition of ‘national interest’. Instead, criteria that the Government has regard to is provided in a separate policy document, with explanations of each criterion. This includes national security, competition, other Australian Government policies (including tax), economic and community impact and character of an investor.

It is envisaged that in making a decision based on the national interest under the PSRA, the Treasurer would have regard to a range of factors including, but not limited to, the following:

- national security
- consumer protection
- data-related issues
- innovation
- cyber security
- anti-money laundering and counter-terrorism financing
- crisis management
- accessibility

Factors of this kind could be outlined either in the legislation, its explanatory material, or in a separate policy document.

Relationship between the RBA’s public interest and Treasurer’s national interest powers

This proposal is aimed at preserving the RBA’s independence with respect to matters wholly in the ‘public interest’ and appropriately gives the Minister with portfolio responsibility for payments policy powers with respect to matters in the national interest. The new powers for the Treasurer are not intended to operate to empower the Treasurer to stand in the shoes of the RBA and remake a decision of the RBA made wholly on public interest grounds.

The power is intended to complement the RBA's existing public interest powers and address the regulatory gap identified in the Review. This means that in determining whether action is warranted in the 'national interest', the Treasurer can have regard to factors that are relevant to the 'public interest' test, raising the prospect of an overlap between the powers of the Treasurer and the RBA.

While the Treasurer may have regard to issues relevant to the 'public interest' test, none of those factors, together or alone, would be necessary or sufficient to trigger the national interest powers conferred on the Treasurer. It is also the case that the 'national interest' is a higher threshold than the 'public interest'. Matters beyond competition, efficiency, or financial safety considerations and controlling risk to maintain financial stability, which the RBA could address under the existing public interest test, would be required to support a valid exercise of the national interest power. Given this higher threshold, decisions taken in the national interest would take priority over decisions based on public interest.

The specific payment system issue to be addressed will determine which factors should be considered and whether the determinative factors are exclusively within the RBA's mandate or extend into the broader remit of the Treasurer under a modernised PSRA. For example, acting to ensure Australians have access to a particular method of payment (for example, cash) may involve consideration of factors within the RBA's mandate as well as factors which extend into the Treasurer's national interest mandate.

The PSRA is the appropriate framework to address an issue

As a precondition of exercising the designation power, the Treasurer should be satisfied that exercising their powers under the PSRA is an appropriate method for addressing a particular payments system issue. For example, it may be appropriate to utilise the proposed powers to address issues arising in respect of new or emerging payment systems that pose a national security risk that cannot be addressed sufficiently under other legislation (such as the Department of Home Affairs's critical infrastructure framework) and that are outside the scope of the RBA's public interest mandate.⁶

In forming this view, it is expected that the Treasurer would be able to have regard to any relevant advice from Treasury regulators in deciding whether to designate a payment system.

The Treasurer would also be expected to have regard to any other matter or information the Treasurer considers relevant, for example, if other Government Ministers need to be involved in a coordinated response to address the issue (such as the Defence or the Foreign Affairs Ministers).

Designating payment systems

The proposed Ministerial designation power would allow the Treasurer to designate a 'payment system' for regulatory oversight. As with the RBA's current designation power, a Ministerial designation would not of itself impose obligations on a 'payment system' or its 'participants', but would indicate it is in the 'national interest' to regulate a system and its participants.

It is proposed that, in exercising the power to allocate responsibilities to regulators, the Treasurer would only be able to take actions and allocate responsibilities that engage powers under the PSRA.

⁶ *Security of Critical Infrastructure Act 2018* (the SOCI Act). The RBA has been designated as the relevant Commonwealth regulator for the risk management program obligations of the operators of critical payment systems under the SOCI Act.

The Treasurer would not be precluded from taking actions on any systems designated by the RBA.

Engaging regulators

This paper proposes that the Treasurer has the power to allocate responsibility to one or more Treasury regulators, and to direct such regulators to implement a particular policy position on an issue or matter (including in relation to a specific participant in a designated payment system).

To achieve this, the PSRA could be amended to allow the Treasurer to allocate responsibilities under the PSRA to the RBA or another Treasury portfolio regulator. It is proposed that responsibility be given to those regulators for whom that responsibility would be aligned and consistent with their mandate. In certain circumstances, it may be appropriate for multiple regulators to be allocated responsibility. The Treasurer would need to specify relative roles and responsibilities to ensure clear policy outcomes.

To ensure that the views of regulators are considered in forming a view about consistency with a mandate, the Treasurer could be required to consult with the head of a particular regulator before deciding to allocate responsibility to them. Such an approach would be consistent with the conditions for issuing directions to APRA and ASIC under the general directions powers applicable to them.⁷

It is proposed that the allocation of responsibility by the Treasurer could only be made to Treasury portfolio regulators. However, there may be some instances where issues of national interest sit outside the expertise of a Treasury portfolio regulator. As part of the direction, the Treasurer could require a regulator to work with an agency or regulator outside the Treasury portfolio, subject to formal agreement from the relevant Minister.

Directions to regulators and the powers of regulators under the PSRA

It is proposed that the Treasurer will have a power to direct a Treasury regulator to undertake certain actions under the PSRA. Directions could be general in nature, whereby an issue or matter of national interest is identified with the most appropriate agency or regulator, or could be more specific, directing regulators to implement a particular policy position that is intended to address the issue for which a system was designated on national interest grounds. These approaches recognise that regulators may be best placed, and more efficient at developing regulatory rules or standards due to their technical expertise and experience on relevant issues.

In considering the appropriate protections, limitations and safeguards to be imposed on the exercise of the power, it is proposed that directions made under the PSRA to a regulator would only be made concerning PSRA powers and would not affect or involve the use of powers in other regulatory frameworks.

It is also proposed 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 (whether under the PSRA or in relation to any other regulatory framework).

Consultation requirements

As a matter of practice, the RBA consults with participants in a payment system before the RBA designates a payment system. However, there is no formal requirement to consult on designation of a

⁷ Section 12 of the APRA Act and section 12 of the ASIC Act.

payment system because designation does not, of itself, impose any regulatory obligations. In contrast, access regimes and standards impose regulatory obligations through a legislative instrument and are subject to appropriate consultation.

For the same reasons, a specific consultation requirement is not proposed in respect of a decision by the Treasurer to designate a payment system. It is expected that the Treasurer would consult as appropriate with affected parties, including industry and regulators, before a designation decision.

However, as noted above, it is proposed that the Treasurer would be required to consult with a regulator before allocating responsibilities under the PSRA to that regulator.

A decision to issue a direction to a regulator should also be subject to appropriate consultation requirements. This is on the basis that a direction will compel a regulator to take particular actions under the PSRA which will result in regulatory obligations being imposed on participants. It is proposed that directions be issued by the Treasurer through a legislative instrument, subject to the general requirement applicable to legislative instruments to ensure appropriate consultation with affected parties.

In addition, an express requirement to consult with the relevant regulator could be included as a precondition for issuing a direction. If a direction requires a Treasury portfolio regulator to work with an agency or regulator outside of the Treasury portfolio, formal agreement from the relevant Minister would be required.

Consequential amendments to the supervisory framework: powers for regulators

To support the proposals outlined above, appropriate consequential amendments to the supervisory frameworks will be needed to ensure that regulators have sufficient powers to support and give effect to Ministerial directions. Consequential amendments will also be needed to make sure appropriate protections are maintained for regulators and people who are subject to a Ministerial direction.

Further reforms are outlined below in the section 'Other reforms for testing'.



Consultation Questions

Definition of 'national interest'

- 4) Is the proposed 'national interest' test appropriate for achieving the policy as outlined?
- 5) Is the proposed approach to delineating the Treasurer's national interest powers clear and effective?
- 6) 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?
- 7) Are there other considerations that have not been listed that should generally be considered in relation to the 'national interest'?

Designating payment systems

- 8) Is the scope of the proposed Ministerial designation power effective and appropriate?

Engaging the Regulators

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

Directions to Regulators

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

Consultation requirements

- 11) Is the proposed consultation approach sufficient for both Ministerial designations and directions?

Further reforms for testing

In addition to the above reforms, the Government welcomes stakeholders' views on other changes to the PSRA that could be considered, in line with the policy objective of ensuring the regulatory architecture governing payment systems under the PSRA is appropriate and effective.

Scope of powers to impose regulatory obligations

The PSRA currently empowers the RBA to impose regulatory obligations through an access regime or a standard. Access regimes are generally used to determine conditions under which payment system access is to be provided. To date, standards have been imposed in respect of relatively specific technical issues – for example, to set requirements or limitations on the charging of particular fees.

There is a policy case for regulatory obligations to be applied in a broader manner than has historically been the case under the existing standards making power. For example, there could be a public

interest case for regulatory obligations being imposed on broader conduct or operating procedures (for example, a general obligation about publishing interoperability information). One option for broader application would be to clarify the scope of the existing standard power, or to introduce a different directions power that could be used to impose more general regulatory obligations.

Information gathering and public disclosure

Adequate information gathering powers are an important and necessary part of a regulator's toolkit. Without these powers, regulators may not have complete and accurate information to assess issues, or to effectively monitor and investigate compliance.

Currently, the RBA has information gathering powers under section 26 of the PSRA. This power relevantly applies to participants in a payment system. A participant commits an offence if it refuses or fails to comply with a requirement under this section. The scope of this power reflects the regulatory perimeter of the PSRA. The proposed changes to the payment system and participant definitions would expand this regulatory perimeter.

The secrecy requirements of Part 6 of the *Reserve Bank Act 1959* (RBA Act) apply to information provided to the RBA under section 26 of the PSRA. This means that the RBA is generally required to obtain consent from a participant before any identifying information about the participant can be publicly disclosed (section 79A), unless one of the other exceptions in section 79A apply.

Greater ability to publicly disclose information could be used by the RBA to encourage compliance with policy objectives as part of a more graduated regulatory toolkit (for example, as an alternative to mandating obligations). One option is to introduce a mechanism for participant information to be publicly disclosed without requiring consent from the participant to support the RBA's existing public interest-based powers (similar to APRA's power under section 57 of the APRA Act). Appropriate notification requirements and thresholds related to the 'public interest' would need to be satisfied.

Enforceable undertakings

The RBA currently obtains voluntary undertakings from organisations to institute business practices that are consistent with the RBA's public interest mandate. For example, some organisations have provided written undertakings to the RBA in relation to matters covered under standards determined under section 18 of the PSRA. These undertakings are listed on the RBA's website.

Voluntary undertakings can be withdrawn and there is currently no formal framework for court enforcement of the terms of a voluntary undertaking in the event of a breach. Given the interconnected nature of payments, and the fact that participants often rely on the actions and approaches taken by one another, there may be merit in providing greater certainty about how undertakings will be dealt with. For example, the RBA could be empowered to accept court-enforceable voluntary undertakings from payment system participants. Such a power would enable a written agreement between a participant and the RBA to be enforceable against the participant in court. Conditions for terminating an agreement would be provided for in the agreement – for example, the undertaking could remain in force for an explicit period before expiring.

An ability for the RBA to accept court enforceable undertakings would not replace the existing practice of accepting voluntary undertakings.

Such an approach would be consistent with powers already available to APRA, ACCC and ASIC, who are able to obtain court enforceable undertakings.⁸ A number of other Commonwealth regimes include enforceable undertakings, such as the *Fair Work Act 2009*, *Privacy Act 1988* (Privacy Act) and the *My Health Records Act 2012*.

Penalties

There is also an opportunity to consider the case for reforming the existing PSRA penalties framework to better support enforcement and compliance.⁹

The PSRA currently has a criminal penalty framework for non-compliance, based on directions to comply with regulations imposed by the RBA. Penalties apply for failure to comply with directions to rectify breaches of compliance with a standard or access regime and failure to comply with requirements to provide the RBA with information related to the payments system and its participants.

The current criminal penalties for contraventions of the PSRA are low relative to penalties in other similar frameworks – if prosecuted, a body corporate can be fined a maximum of 250 penalty units, which is currently \$68,750. Although the maximum penalty is relatively low, the use of criminal penalties is generally reserved for actions that require significant deterrence and punishment. The nature of non-compliance with existing standards or access regimes under the PSRA is generally not of a kind that is serious enough to warrant criminal sanctions. To date, criminal penalties for contraventions of the PSRA have not been imposed.

Other Commonwealth legislation contains more graduated penalty regime with a range of civil and criminal penalty provisions. Such regimes are aimed at deterring conduct that ranges from less serious to the most egregious offences. One option is to update the PSRA penalty framework to include both a civil and criminal penalty provisions with appropriately calibrated penalties. The PSRA could also be updated to permit the imposition of penalties for breaches of standards and access regimes, rather than only for failure to comply with a direction to rectify such breaches (under section 21).

The effect of expanding the definitions of participant and payments system proposed in this paper would mean that the RBA's existing information gathering powers will cover a broader range of entities. One option is to insert new civil penalties to enforce compliance with these obligations.

Repealing procedures to resolve differences of opinion between the Government and the RBA

Section 11 of the RBA Act provides a mechanism for resolving differences of opinion between the Government and the RBA's Boards about whether a policy determined by the relevant Board is directed to the greatest advantage of the people of Australia. See **Annexure 4** for the text of the section.

⁸ Section 18A of the *Banking Act 1959*; section 126 of the *Insurance Act 1973* and section 262A of the *Superannuation Industry (Supervision) Act 1993*; section 87B of the CCA; sections 93A and 93AA of the ASIC Act.

⁹ Note: *A Guide to Framing Commonwealth Offences*⁹ assists Australian Government departments draft criminal offences, infringement notices and enforcement provisions that are intended to become part of Commonwealth law.

Both the Reserve Bank Board, which is responsible for the RBA's monetary and banking policy, and the Payments System Board, which is responsible for the RBA's payments system policy, are covered by section 11.

Review of the RBA

The Government has conducted an independent review of the RBA and the operation of monetary policy to ensure the Reserve Bank has the best frameworks, objectives, processes and expertise.¹⁰ The review recommended the RBA should continue to have operational independence for monetary policy and the Government should remove the power of the Treasurer to overrule the Reserve Bank Board's decisions. This power was found to detract from the independent operation of monetary policy. The Government has agreed in-principle with all the Review's recommendations and will now work with the RBA, the Parliament, and other stakeholders to implement them.¹¹ This includes implementing the recommendation to repeal the procedures in section 11 in relation to the Reserve Bank Board's decisions.

The RBA review considered the operation of section 11 in the context of monetary policy. Payments policy was outside the scope of the terms of reference for that review.

Proposed ministerial designation power provides a mechanism for the Government to clarify the application of payments ecosystem regulation

With respect to the role of section 11 in relation to payments policy, the proposed reforms introducing a Ministerial designation power will provide for circumstances under which the Government, through the Treasurer, is intended to intervene in respect of payments policy under the PSRA.

While the proposed Ministerial designation power is not intended to address differences of opinion between the Government and the RBA about the RBA's exercise of power on public interest grounds, it will enable the Government to determine policy which is in the national interest of Australians considering factors that fall outside the scope of the RBA's mandate.

This consultation paper seeks feedback on whether section 11 of the RBA Act remains appropriate with regards to payments system policy, and specifically on what circumstances it could be an appropriate mechanism to resolve differences of opinion between the Government and the RBA on payments system policy.



Consultation Questions

Information gathering and disclosure

- 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?

Enforceable undertakings

¹⁰ See Review of the Reserve Bank of Australia (2023) [Final Report: An RBA fit for the Future](#).

¹¹ Ministers Treasury Portfolio (2023) [Review of the Reserve Bank of Australia](#).

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

Penalties

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

Procedures to resolve differences of opinion between the Government and the RBA

- 15) Is there an ongoing role for section 11 of the RBA Act with regards to payments system policy?

Other

- 16) Are there any other changes to the PSRA that the Government should consider?

Annexure 1: List of Recommendations from the Payments System Review

Recommendation 1 – Consumers and businesses should be at the centre of policy design and implementation

The regulatory architecture should serve the consumers and businesses that rely on the payments ecosystem for their day-to-day activities. A principle of Service means considering these users of the payments ecosystem and taking their perspective at every step of policy development and implementation.

It also means recognising the important distinctions between the needs of consumers and businesses.

To support outcomes for consumers and businesses, the regulatory architecture should support three other key principles:

- Strategy that prepares the ecosystem for future innovation and addresses challenges in a holistic manner
- Safety to protect the businesses and consumers that use the payments ecosystem, and
- Simplicity to ensure consumers and business can understand their rights and obligations, and to reduce regulatory barriers to entry for new firms offering new services to consumers and businesses.

Recommendation 2 – Leadership of the payments ecosystem

Given the increased complexity of payments issues and the acceleration of financial innovation, enhanced leadership, vision and oversight is needed in the payments ecosystem. The government, through the Treasurer, is best placed to provide this

Recommendation 3 – A strategic plan for the payments ecosystem

The government should develop a strategic plan for the payments ecosystem in collaboration with regulators, industry, and representatives of consumers and businesses.

The plan should provide certainty on policy priorities and strategic directions for the payments ecosystem, while being adaptable to future challenges and opportunities.

Recommendation 4 – Enhance Treasury’s payments policy function

The Treasury’s payments policy function should be enhanced to support the Treasurer’s enhanced leadership role, including in relation to the strategic plan for the payments ecosystem. Treasury should be strengthened with the necessary skills, capabilities and resources to perform this function effectively.

Recommendation 5 – Establish a payments industry convenor

The Treasurer should appoint a payments industry convenor. Supported by Treasury, the payments industry convenor should collaborate with regulators and industry to develop the strategic plan, identify key issues, coordinate responses, and provide strategic advice to the Treasurer on payments-related matters.

The payments industry convenor should help the Treasury function in facilitating communication and coordination in relation to strategic priorities of the payments ecosystem.

Recommendation 6 – Expand definition of payment system in the PSRA

The RBA should be better positioned to regulate new and emerging payment systems that are part of the changing and growing payments ecosystem.

Expanding the definition of a payment system will broaden the RBA's ability to designate new and emerging payment systems under the Payment Systems (Regulation) Act 1998 (PSRA), where it is in the public interest as defined in the PSRA.

Recommendation 7 – Introduce a Ministerial designation power

The Treasurer should have the power to designate payment systems and participants of designated payment systems where it is in the national interest to do so. The designation power includes the power to direct regulators to develop regulatory rules and the power for the Treasurer to give binding directions to operators of, or participants in, payment systems.

Recommendation 8 – Introduce a list of payment functions that require regulation

A defined list of payment functions that require regulation should be developed. This should be used consistently across all payments regulation. The list should be able to change to ensure it remains fit-for-purpose as technological advancements gather pace.

Recommendation 9 – Introduce a single, tiered payments licensing framework

A single, payments licensing framework in line with a defined list of payment functions should be introduced.

There should be separate authorisations for the provision of payments facilitation services and the provision of stored-value facilities, and two tiers of authorisations based on the scale of the activity performed by the payment service provider.

Applicants should be able to apply for this payments licence solely through ASIC, without the need to go through multiple regulators.

ASIC should coordinate on behalf of licence applicants with other relevant regulators. Ongoing obligations under different authorisations under the licence should remain with the regulators responsible for overseeing those obligations.

Recommendation 10 – Mandate the ePayments Code for payments licensees

The ePayments Code should be mandated for all holders of the payments licence. Accordingly, the ePayments Code should be brought into regulation

Recommendation 11 – The single payments licensing framework should facilitate transparent access to payment systems

The common access requirements for payment systems should form part of the payments licence to facilitate access for licensees to those systems.

The RBA should develop common access requirements in consultation with the operators of payment systems.

Recommendation 12 – Align industry standards

Compliance with technical standards set by authorised industry bodies should be mandatory for payments licence holders. These standards should be aligned with broader payments policy objectives, with the RBA providing authorisation and oversight of industry standard-setting bodies.

Recommendation 13 – Better align regulator approaches and regulatory requirements

The enhanced Treasury function should take steps to improve coordination between payments regulators, and the alignment of payments regulatory requirements, including with respect to AML/CTF issues.

Recommendation 14 – Educating consumers and businesses

Improved payments capability should be a goal of the refresh of the National Financial Capability Strategy.

Regulators should work with industry to coordinate the development of a business education programme in relation to payments, to ensure they understand their options and are empowered with choice.

Recommendation 15 – Leverage the position of government as a large customer of the payments ecosystem to support broader objectives

Governments should use the payment systems that best serve the needs of Australians.

The government should leverage its position as a large user of the payment ecosystem to support broader payments policy objectives.

Annexure 2: RBA's powers under the PSRA

Designating payment systems

Part 3, Division 2 of the PSRA authorises the RBA to designate a payment system where it considers doing so to be in the public interest. Designation of a payment system does not, of itself, impose any obligations on a participant in the system.

Once designated, the RBA can:

- impose an access regime on the *participants* in that designated payment system.¹²
- set standards that must be complied with by *participants* in designated payment systems.¹³ Any such standards may be varied or revoked by the RBA.

RBA directions

Part 3, Division 6 of the PSRA allows the RBA to give directions to a participant in a designated payment system who fails to comply with an applicable standard or access regime. Such directions may require the participant to take a specified action, or refrain from a specified action as the RBA considers appropriate. Such a direction is to be consistent with any applicable access regime or standard. Failure to comply with a direction constitutes a criminal offence punishable by up to 50 penalty units.

A person denied access to a designated payment system may request that the RBA issue a direction to a participant to remedy the situation on the basis that the denial of access is a breach of a provision of an access regime by the participant.¹⁴ A person may also apply to the Federal Court for an order directing the participant to comply with the relevant provision of an access regime, to compensate the person for loss of damage, or make any other order that the Court considers appropriate.¹⁵

Other PSRA powers

The PSRA also provides for the arbitration of disputes relating to designated payment systems, the regulation of (non-ADI) purchased payment facilities, and other miscellaneous matters (for example, information gathering powers and notification requirements).

Section 26 of the PSRA allows the RBA to gather information from participants in a payment system. In contrast to the conditions for imposing an access regime or setting standards, it is not necessary for the RBA to designate a payment system before seeking information from its participants. A failure to comply with a request for information is a criminal offence punishable by up to 200 penalty units.

¹² Section 12 of the PSRA.

¹³ Section 18 of the PSRA.

¹⁴ Section 17 of the PSRA.

¹⁵ Section 17 of the PSRA.

Annexure 3: List of Consultation Questions

- 1) Does the proposed approach to updating the definition of 'payment system' appropriately capture arrangements that are involved in facilitating or enabling payments?
- 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?
- 3) Should other considerations be taken into account in updating the definitions?
- 4) Is the proposed 'national interest' test appropriate for achieving the policy outlined in this paper?
- 5) Is the proposed approach to delineating the Treasurer's national interest powers clear and effective?
- 6) 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?
- 7) Are there other considerations that have not been listed that should generally be considered in relation to 'national interest'?
- 8) Is the scope of the proposed Ministerial designation power effective and appropriate?
- 9) Is the Treasurer's proposed ability to allocate responsibility to regulators (within their mandate) other than the RBA appropriate?
- 10) Is the scope of the Treasurer's power to direct Treasury portfolio regulators (ACCC, ASIC, RBA) to implement a policy position appropriate?
- 11) Is the proposed consultation approach sufficient for both Ministerial designations and directions?
- 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?
- 13) Is there merit in providing the RBA with the power to accept enforceable undertakings on a voluntary basis?
- 14) Would there be benefits in introducing a more graduated penalty regime into the PSRA?
- 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?
- 16) Are there any other changes to the PSRA that the Government should consider?

Annexure 4: Section 11 of the RBA Act

Differences of opinion with Government on questions of policy

(1) The Government is to be informed of the Bank's policy as follows:

- (a) the Reserve Bank Board is to inform the Government, from time to time, of the Bank's monetary and banking policy;
- (b) the Payments System Board is to inform the Government, from time to time, of the Bank's payments system policy.

(2) In the event of a difference of opinion between the Government and one of the Boards (the relevant Board) about whether a policy determined by the relevant Board is directed to the greatest advantage of the people of Australia, the Treasurer and the relevant Board shall endeavour to reach agreement.

(3) If the Treasurer and the relevant Board are unable to reach agreement, the relevant Board shall forthwith furnish to the Treasurer a statement in relation to the matter in respect of which the difference of opinion has arisen.

(4) The Treasurer may then submit a recommendation to the Governor-General, and the Governor-General, acting with the advice of the Federal Executive Council, may, by order, determine the policy to be adopted by the Bank.

(5) The Treasurer shall inform the relevant Board of the policy so determined and shall, at the same time, inform the relevant Board that the Government accepts responsibility for the adoption by the Bank of that policy and will take such action (if any) within its powers as the Government considers to be necessary by reason of the adoption of that policy.

(6) The relevant Board shall thereupon ensure that effect is given to the policy determined by the order and shall, if the order so requires, continue to ensure that effect is given to that policy while the order remains in operation.

(7) The Treasurer shall cause to be laid before each House of the Parliament, within 15 sitting days of that House after the Treasurer has informed the relevant Board of the policy determined under subsection (4):

- (a) a copy of the order determining the policy;
- (b) a statement by the Government in relation to the matter in respect of which the difference of opinion arose; and
- (c) a copy of the statement furnished to the Treasurer by the relevant Board under subsection (3).