



EXECUTIVE OFFICE

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Dear Director, Payments Licensing Unit,

Payments System Modernisation (Licensing: Defining Payment Functions) – Consultation Paper

The Australian Competition and Consumer Commission (**ACCC**) welcomes the opportunity to make a submission in response to the consultation paper on Payments System Modernisation (Licensing: Defining Payment Functions).

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading, and product safety for the benefit of consumers, business, and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies.

The ACCC engages with issues relating to the payments system in a range of different contexts, including through:

- enforcement work addressing anti-competitive conduct
- consumer protection actions combatting scams, including the ACCC's Scamwatch function and the new National Anti-Scam Centre
- authorisations and exemptions in the payments sector, such as the merger authorisation of BPAY, eftpos and NPPA
- various accreditation and compliance and enforcement roles associated with the Consumer Data Right (**CDR**) including its potential expansion to payment initiation, and
- collaborating with other financial regulators to enhance competition and consumer outcomes relating to financial services and the payments system.

The ACCC notes the importance of a well-functioning payments system to facilitate dynamic and innovative markets, and good consumer outcomes across the Australian economy. We support a modernised payments licensing framework which provides clear and consistent regulation, facilitates competitive access to payment systems, and sets regulatory obligations to appropriately mitigate risks.

As stated in the ACCC's submission to the Treasury's consultation paper on a strategic plan for the payments system (**Strategic Plan**), on 6 February 2023, we consider that facilitating and promoting competition is fundamental to the overarching goals of payment systems reform. Promoting competition is a key driver of efficiency, innovation, and accessibility. We

also remain of the view that consumer safeguards are critical and should be a fundamental part of the regulatory design process.

The ACCC considers that competition and consumer risks should be carefully considered across the full range of payment functions and reform processes. This includes instances where enforcement of existing competition and consumer laws alone may not be the best way to address certain conduct which may result in widespread, serious, or systemic harm and where regulatory design might facilitate competition or enhance consumer protections. In particular, consumer protections must be considered as an input to the design and development of regulatory frameworks, rather than after the framework has been designed and developed.

For example, the ACCC's fifth interim report in its Digital Platform Services Inquiry highlighted some of the conduct by larger digital platforms in respect of payment services facilitated through mobile and other devices, which may affect competition in the provision of payments services. The report recommended that mandatory service-specific codes of conduct should apply to designated digital platforms with the ability and incentive to engage in anti-competitive conduct.¹ To the extent that the Government adopts the ACCC's recommendations, there is the potential for some competition issues in relation to payments services in connection with digital platforms to be addressed through these service-specific codes.

ACCC responses to consultation questions

Questions 16 & 19: Risk characteristics of payment functions & Risk based regulation

The ACCC supports a risk-based approach to inform regulatory obligations across the payments system. In support of a system wide risk mitigation approach, the ACCC considers that risk assessment for each payment function should identify:

- risks for each payment function in relation to consumers, businesses, and the payments system (as part of the broader financial system). This would facilitate broader consideration of factors relating to competition, accessibility, and efficiency which might be addressed by the payments licensing framework.
- whether these risks can be adequately addressed through other existing or proposed regulations.
- what safeguards are required as part of the payments licensing framework (including any mandatory codes or industry standards).

With respect to the risk characteristics identified in the consultation paper, the ACCC notes that risks characterised as 'misconduct risks' are broad and may have a wide range of causes and effects. The ACCC submits that the impact of risks on consumers and businesses should be considered individually and in detail. It is likely that the nature of identified risks, including potential harm and appropriate safeguards, will differ between businesses and consumers, and they should not be considered as a single stakeholder group.

Question 17: Risks associated with each payment function

The ACCC makes the following observations on risks associated with payment initiation services, and licensing models in general, based on its experience with the CDR.

¹ ACCC, [Digital platform services inquiry - September 2022 interim report - Regulatory reform](#).

In relation to the CDR, the ACCC notes the core architecture has been specifically designed with strong protections around privacy and security.

The ACCC notes that there have been challenges with aspects of the CDR representative model, particularly around a limited ability for regulators to effectively monitor and take action against CDR representatives in the event of non-compliance with the CDR Rules and data standards. The ACCC is concerned that any licensing model which allows a payment service provider to be an authorised representative of a licensee, rather than holding a licence directly, may lead to similar strategic and regulatory issues and risk of consumer harm.

Further, as outlined in our 6 February submission, any measures to extend the CDR to enable action and payment initiation, must incorporate clear and robust safeguards.

The ACCC supports the finding of the Senate Economics Legislation Committee that ‘for the intended benefits of CDR action initiation to be realised, extensive consultation and consideration, road mapping and a measured rollout of action initiation will be required’.² We further note the recent Government announcement that a strategic assessment will be undertaken at the end of 2024 before further developments and expansions of the CDR—including into payment initiation—are undertaken.

The ACCC notes that if payments were to be declared as an action type in the future, there will be overlap between the CDR framework and the payments system. For example, the regulatory obligations for ‘Payment initiation services’ and ‘Payment facilitation, authentication, authorisation and processing services’, as defined in the consultation paper, could apply to Accredited Action Initiators engaging in the CDR ecosystem.

As such, if payment initiation is introduced to CDR, it will be essential for there to be alignment of the regulatory requirements for payments licensees and CDR participants engaging in payment initiation, alongside addressing shortcomings in the representative model. Any reforms to the payment system that interact with CDR must be considered under a principles-based approach that places competition, consumer protection and information security at the forefront.

Question 18: Mitigation of risks

The ACCC notes that the Treasury intends to conduct a subsequent consultation process focusing specifically on the regulatory obligations that should be imposed under the licensing framework. Further detail on the development and proposed use of industry standards to mitigate particular risks would be welcome.

At this stage, our comments are confined to the approach to consumer safeguards. The ACCC notes that the first recommendation of the Review of the Australian Payments System³ is that ‘Consumers and businesses should be at the centre of policy design and implementation’. The review report states that the ‘regulatory architecture should serve the consumers and businesses that rely on the payments ecosystem for their day-to-day activities’ and that includes ‘taking their perspective at every step of policy development and implementation’.

² Senate Economics Legislative Committee, *Inquiry into the Treasury Laws Amendment (Consumer Data Right) Bill 2022* (2023), [2.60].

³ Treasury, *Payments System Review*, Treasury, June 2021, p.xi.

This is consistent with the ACCC's 6 February submission, which stated:

The key priority of 'promoting a safe and resilient payments system' can only be achieved with comprehensive and robust consumer safeguards. These are essential to building and maintaining trust in the payments system.

While the evolving payments landscape provides many opportunities for businesses and consumers, there are also increased risks. These risks are not limited to instances of scams or fraud, but extend to the full range of harms to consumers in their use of the payments system from misleading, false, unfair, manipulative, and other unlawful conduct. Moreover, the ACCC considers that consideration should also be given to whether systems and processes are designed to ensure consumers are able to make fully informed decisions, particularly as payments evolve in a digital economy.

Comprehensive consumer protections to address these risks must be a part of the regulatory design process and should be reflected in key priorities and supporting initiatives. For example, the ACCC considers that clear and robust safeguards must be put in place before the CDR is expanded to action initiation.

The ACCC submits that further consideration needs to be given to how the design of the payments licensing framework will support robust consumer safeguards. A consumer-centric approach must consider consumer protection in detail, as an input to designing and developing the framework, rather than considering these issues once the framework has been established.

The consultation paper correctly identifies some risks to consumers, including from a lack of information which can make them 'vulnerable to financial losses arising from fraud and scams, privacy breaches, and insolvency of, or misconduct by, the PSP.' The ACCC notes that consumer harm can also arise from a failure to facilitate informed decision making, without any misconduct, and where a bank has information about a scam or fraud but fails to take steps to act on that information to protect consumers. We reiterate our view that the regulatory design process should consider the full range of consumer risks and harms and note that it should be informed by consumer experience and well-developed insights into consumer behaviour.

For example, we note that the consultation paper refers generally to future consumer protection measures, which may include a revised and mandated ePayments code. Among other things, the Code covers mistaken payments by consumers, which might be a result of incorrectly entering payee details, or a scam. It was revised in 2022 to exclude mistaken payments made as a result of scams, meaning that obligations on banks such as to investigate a report of a mistaken payment and take certain steps to attempt retrieval of funds do not apply to consumers who are the victims of a scam.

We understand that some measures which might reduce instances of mistaken payments, are being progressed through initiatives within the payments system, including by encouraging providers to transition consumer-facing payments onto the NPP, which will enable confirmation of payee. This is a substantial undertaking, and in the meantime, the risk of harm to consumers is being borne by them, particularly in the case of scam victims. More immediate and mandatory protections should be considered alongside these initiatives within the payments system, such as a reimbursement model and a payee/account name check during the payment process. We consider this would also strengthen incentives for payment system providers to invest in technology and processes to better protect their customers from scams.

It may be possible to appropriately incorporate these protections into a payments license via a mandatory industry code. Regardless, substantive obligations on businesses to take positive steps to protect both individuals and the integrity of the payments system should be considered alongside other core obligations. The Government's Roadmap for Australia's

Payments System notes that consultation on introducing supporting regulations for, among other things, mandating the ePayments code is intended to take place in 2025-26. If this process is to be used to incorporate protections for businesses and consumers into payments licenses, it should not wait for consultation to start in 2025-26 and needs to be progressed urgently.

The ACCC welcomes the opportunity to engage on these issues across regulatory processes as part of the whole-of-government approach to tackling scams, including through the National Anti-Scam Centre. We support the commitment in the Strategic Plan to consider 'options to bolster consumer protections in the process of developing the new payments licensing framework' as a complement to the Government's broader scams agenda.

Yours sincerely

A handwritten signature in cursive script that reads "Gina Cass-Gottlieb".

Gina Cass-Gottlieb
Chair