

# **Commonwealth Treasury – Payments System Review Issues Paper**

Submission by Legal Aid Queensland

## Commonwealth Treasury – Payments System Review Issues Paper

### Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to Treasury's Payments System Review Issues Paper.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Civil Justice Services Unit provides advice and representation in relation to insurance, mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

It is important that consumer end users be at the heart of development of technology developments that contribute to Australia's economic future. The following consumer experiences of new technology should be at the forefront of any decision making process:

- (a) Many Australians experience digital exclusion which make it hard for them to access the internet and new technologies on a regular basis. It is important that as part of any new technology consumers have the option of engaging with it face to face or in the on-line environment.
- (b) Consumers are as equally vulnerable to harm from new, more technologically advanced payment products as they are from existing payment products. Currently, there are different levels of protection afforded to consumers when things go wrong. It is important that all products in the Payments systems market be regulated in a similar way to ensure that:
  - (i) consumers are protected to the same degree regardless of the product they choose; and
  - (ii) Consumers understand their rights when things go wrong.
- (c) A product that is new and innovative is still capable of causing harm to consumers and should be regulated like all other payment systems.
- (d) A new product or system does not improve market efficiency if the only function it performs is to add an unnecessary middleman to a transaction for consumers.

## Questions

### 1. Does the regulatory architecture appropriately facilitate the development of an overall vision, strategy and principles for the Australian payments system?

The current regulatory architecture does appropriately facilitate the development of an overall vision, strategy and principles for the Australian payments system because the current architecture strikes an appropriate balance between:

- (a) The protection of consumers from harmful products.
- (b) Allowing new entrants and products into the Australian Payments System.
- (c) Independent regulators that have clearly defined roles in the Payments System that are not duplicated.

### 2. How should our regulatory architecture be designed in order to balance the management of risk and efficiency in the payment system with the need for effectiveness for end-users?

LAQ notes the reference on page 7 of the Issues Paper to the fact that “the future of Australia’s regulatory architecture will need to facilitate effective coordination between regulators, industry and governments, and appropriately balance the management of risk and efficiency in the payments system...”

A focus on innovation is an important consideration but it cannot come with the side effect of consumer harm. Just because a technology is new does not automatically mean that it improves economic efficiency or leads to greater productivity. We submit that some new payment systems technology decreases economic efficiency because it adds an unnecessary middleman to a transaction.

Consumers seek:

- (a) Protection from harm when things go wrong regardless of the type of product and the technology it uses.
- (b) Technologies that make their life easier without adding another unnecessary step in the payment, sale and transaction process.
- (c) Proactive regulation that addresses problems with products before they cause great harm to consumers.
- (d) Regulation that ensures new products to the market have been tested in-line with regulation such as Design and Distribution obligations to ensure that they will not make a consumer’s financial situation worse.

### 3. What is the appropriate balance between self-regulation, formal regulation and government policy to ensure the payment system continues to work in the best interests of end-users?

We submit that the appropriate balance is a mixture of government policy, formal regulation and self-regulation.

Government policy and formal regulation provide a legal framework to the legal and societal expectations that society expects the payments system to meet. Self-regulation allows industry and the payments system to build the conduct standards set out in formal regulation.

The evidence of the Financial Services Royal Commission highlights that self-regulation on its own or self-regulation with minimal intervention from government:

- (a) Does not protect consumers; and
- (b) Leads to poor consumer outcomes that leaves them worse off.

#### **4. Are there gaps (or duplication) in the current architecture that need addressing to ensure the system continues to work in the best interests of end-users?**

LAQ submits that there is no duplication in the current architecture that needs addressing.

It is critical that consumers have access to affordable and accessible dispute resolution when things go wrong with payment systems regardless of the nature of the entity who is providing that system. Currently if a consumer has an issue with an electronic funds transfer where the entity providing the transfer is a bank, the consumer can access the Australian Financial Complaints Authority as the bank is required to belong to AFCA as a condition of its financial services licence,

Other entities such as *Paypal* are not required to be members of AFCA even where they are facilitating electronic funds transfer, though they have voluntarily joined AFCA. The problem is that entities like *Paypal* who have joined can withdraw their membership at any time.

#### **5. How should the regulatory architecture be designed to best facilitate the coordination of participants and regulators to meet the requirements of end-users?**

LAQ submits that the current regulatory architecture is appropriate and has the potential to facilitate the coordination of participants and regulators. However, in LAQ's experience, the response of the current architecture to properly regulate new technology such as Buy Now Pay Later (BNPL) arrangements has been slow and as a result has not prevented consumer harm.

This lack of regulation such as no legislative or regulatory requirements on Buy Now Pay later providers to be a member of a free External Dispute Resolution Scheme or consider Financial Hardship, has seen consumers cost shift their financial hardship away from BNPL providers to regulated products such as personal loans, credit cards and mortgages. It remains important that while the opportunity to innovate is important consumers should be provided with the same protection and the same opportunity to complain when consumers find themselves in trouble.

LAQ supports consumers having access to a recognised external dispute resolution (EDR) scheme by requiring these new entrants to the market to be a member of an EDR Scheme. These external dispute resolution schemes should meet the DIST1 benchmarks before they are recognised. A summary of the benchmarks is set out below:

---

<sup>1</sup> Department of Industry, Science and Tourism (now known as Department of Industry Innovation and Science)

- Accessibility - The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
- Independence – The decision-making process and administration of the scheme are independent from scheme members.
- Fairness - The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.
- Accountability - The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.
- Efficiency – The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
- Effectiveness – The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.<sup>2</sup>

The Australian Financial Complaints Authority meets that benchmark for complaints brought to it by consumers of financial products.

**6. What are the required features of a future regulatory architecture to ensure it is well-placed to meet the needs of end-users in relation to emerging innovations in the payments system such as those discussed above? Are changes needed to existing structures, roles and mandates involved in the governance of the system?**

LAQ submits that no changes are required to existing structures, roles and mandates involved in the governance of the system. The current structure strikes an appropriate balance between consumers, new participants in the system and existing participants in the system.

**7. What regulatory architecture is needed to provide support and clarity for businesses – particularly new entrants – to invest and innovate in our payments system?**

LAQ has no submissions to make in response to this question.

**8. How can the regulatory architecture enable participants in the payments system to make better use of data to improve cross-border payments and other payments that benefit end users?**

LAQ supports the work of the RBA and industry on ISO 20022 standardisation in Australia.

**9. Given rapid changes to the system, what need is there for education for end-users (including consumers and businesses) about payments and who should provide that education?**

Before education of businesses and consumers about new products can be considered, the issue of access for the digitally excluded in Australia must be addressed. Rapid changes to the system will only be relevant for all Australian consumers if the system can be accessed by all consumers.

---

<sup>2</sup> Excerpt from the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, published by the then in 1997.

Furthermore, additional costs should not be imposed on consumers if they wish to use payment systems that are not convenient to the business. In particular consumers should not be charged extra to pay by cash.

Similarly we have experienced consumers being asked to pay extra if they do not pay by direct debit. Such a requirement often leads to financial hardship as consumers can be unaware how much a particular debit will be (for example in the case of a monthly telephone bill where the amount of the bill fluctuates)

Education about rapid changes to the Payments System is important for businesses and consumers. This training should not be delivered by the providers of any new products in the system and should instead be delivered by government because:

- (a) Not all new products are suitable for all users.
- (b) Past problems with financial services and payments systems have highlighted the inherent bias that all providers of products and systems have towards their own product.
- (c) A significant number of consumers find dealing with new technologies and systems difficult. It is important that these consumers be provided with independent training so that they are not left behind by the Payments System.

**10. How does Australia's regulatory architecture compare with that of other jurisdictions, particularly as it relates to the encouragement of innovation and competition?**

In our view Australia's regulatory model headed by the APRA/ASIC Twin Peaks Regulator model compares well with other jurisdiction and has not stifled the development of innovative and competitive payment systems products.