

Financial Systems Division
Treasury
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By email only: paymentsconsultation@treasury.gov.au

Australian Payments Network (AusPayNet) welcomes the opportunity to respond to Treasury's consultation on Reforms to the *Payment Systems (Regulation) Act 1998* (PSRA).

AusPayNet is the industry association and self-regulatory body for the Australian payments industry. We manage and develop standards and guidelines governing payments in Australia. Our purpose is to create confidence in payments by setting enforceable industry standards for a safe, reliable and effective payments system; leading transformation in payments to drive efficiency, innovation and choice; and being the home for ecosystem collaboration and strategic insight. AusPayNet currently has more than 150 members including financial institutions, payment system operators, major retailers and financial technology companies.

Introduction

AusPayNet supports Treasury's work on ensuring that Australia has appropriate regulatory and governance frameworks to support the continued development and safety of the payments system. Updating the PSRA – which gives the Reserve Bank of Australia (RBA) powers to regulate payment systems and participants in line with its public interest mandate – is an important step in this process.

The Australian payments ecosystem is now more complex than when the current regulatory arrangements were put in place in the late 1990s, with many more entities in the payments value chain. While these developments have delivered many benefits for Australian consumers and businesses, some new risks and issues have also been introduced. At the same time, the scope of the RBA's existing powers under the PSRA has not kept pace with these developments. A review of the PSRA in line with the recommendations in the Payments System Review will help ensure that the RBA and the Government continue to have the necessary tools to address any emerging risks in the payments ecosystem and ensure a level playing field between providers of payment services.¹

This submission has been prepared by AusPayNet in consultation with its members. In developing this submission, interested members participated in a consultation process to discuss key issues and provide feedback to inform our response to the consultation paper. Any comments reflecting the views of AusPayNet Management only have been noted as such.

¹ Treasury (2021), [Payments system review: From system to ecosystem](#), June.

Expanding the regulatory perimeter of the PSRA

This section addresses consultation questions 1-3.

AusPayNet supports the proposed broadening of the definitions of ‘payment system’ and ‘participant’, subject to further refinement of the definitions during the legislative drafting process to ensure that the terms capture all entities involved in any parts of the payments value chain.

The RBA’s regulatory remit under the PSRA is limited by the existing definitions of ‘payment system’ and ‘participant’. Given the significant developments in the Australian payments ecosystem over the past decade, the existing definitions no longer adequately capture the full range of entities that play a role in facilitating or enabling payments. This can create an uneven playing field between different providers of payment services, and undermine the RBA’s ability to respond to emerging competition, efficiency and stability risks.

The proposed approach to the two definitions appears to be sufficiently broad to capture the range of entities involved in the payments value chain. We note Treasury’s intention that ‘participants’ under the PSRA would encompass a broader range of entities than ‘payment service providers’ (PSPs) subject to the new payments licensing regime (as proposed in a concurrent Treasury consultation). We suggest further clarifying the scope of operations of the two frameworks to ensure common understanding of the type of entities that would be captured under each of them. In AusPayNet’s view, all PSPs under the new licensing framework should be able to be captured as a payment system and/or a participant under the PSRA. There is also support for expanding the definition of ‘participant’ to include entities that provide services to a payment system or services to help enable or facilitate a transfer of value using a payment system.

AusPayNet also welcomes Treasury’s intention to retain the PSRA’s presumption in favour of self-regulation, which continues to serve Australia well. In particular, we support the statement in the consultation paper that “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’ [and] such a decision would typically only be made after considering whether non-regulatory solutions could address the relevant concerns.”

Ministerial powers

This section addresses consultation questions 4-11.

AusPayNet supports the introduction of a Ministerial designation power, subject to further clarity on the delineation between national and public interest and the inclusion of transparent processes and other safeguards governing the exercise of the power.

The purpose of the proposed Ministerial designation power is clearly set out in both the Payments System Review and Treasury’s consultation paper. Under the PSRA, the RBA’s mandate is focused on the ‘public interest’, which includes consideration of matters related to efficiency, competition, safety and the control of risk in the financial system. Given the increasing role that the payments system plays in the broader economy, it is important to ensure that matters beyond the remit of the RBA can

be appropriately addressed through regulation, where it is in the national interest to do so. A Ministerial designation power appears to be an appropriate mechanism for enabling this. As noted in the Payments System Review, this approach would also align with several peer jurisdictions, including the United Kingdom and Canada.

Nonetheless, many industry participants have raised concerns about the proposed Ministerial power, stemming from uncertainty about how the power could be used in practice. In particular, members have asked for greater clarity on matters such as:

- the delineation between national and public interest, including the precise scope of the RBA's powers (such as greater clarity on terms in the PSRA such as 'competition' and 'efficiency'), the factors that the Treasurer may have regard to in considering the national interest, and hence the circumstances in which the powers may be used;
- the scope of the Treasurer's power to give direction to regulators;
- the regulatory process to address any identified policy concerns in different scenarios; and
- the guardrails that would be put in place to govern the exercise of the power.

Given these concerns, AusPayNet supports the inclusion of robust transparency and accountability mechanisms and other safeguards to instil public and industry confidence in such a power. This includes retaining responsibility for addressing policy issues of national interest with the relevant regulators rather than the Government, and ensuring that any decision by the Treasurer to issue a direction to a regulator would be subject to appropriate consultation with the industry and the relevant regulators.

We understand the need to retain some degree of flexibility in defining 'national interest', though we note that there are other areas of regulatory oversight where national interest powers exist and a degree of clarity has been developed to make their use clear and consistent (such as the guiding principles for developing conditions in the national interest under the *Foreign Acquisitions and Takeovers Act 1975*).² We encourage Treasury to provide further clarity on the matters noted above as part of developing the legislative framework for any Ministerial designation power. To retain an appropriate level of flexibility, such details could be outlined in explanatory material or a policy document accompanying the legislation.

Scope of RBA powers

This section addresses consultation questions 12-15.

The RBA's existing powers under the PSRA are largely limited to setting standards and access regimes for participants in designated systems, with limited ability to impose penalties for non-compliance. This is a narrower regulatory toolkit than is generally available to other financial system regulators. There may be little benefit in expanding the regulatory perimeter under the PSRA if the RBA would

² Foreign Investment Review Board (2021), [Protecting the National Interest: Guiding Principles for Developing Conditions](#), 9 July.

continue to be constrained in its ability to effectively respond to industry developments and deliver on its policy objectives within that broader remit. A graduated civil penalty regime (consistent with penalty regimes in other legislation, such as the *Competition and Consumer Act 2010*) and the acceptance of court-enforceable undertakings in particular could go a long way towards encouraging greater compliance with regulatory obligations.

Many of our members have, however, expressed significant concerns over the proposed public information disclosure power. It is generally accepted that information-*gathering* powers are important for providing regulators with access to accurate information for assessing policy issues and monitoring compliance. However, institution-level data could often be commercially sensitive, particularly information on pricing. Publishing such information could have unintended consequences (including for competition), and there would generally be alternative regulatory mechanisms available that could achieve the relevant policy aims or encourage compliance just as effectively. If such a power were to be introduced, strong guardrails around the use of the power should be set in consultation with industry participants.

A few members also noted concerns around the introduction of civil penalty provisions for breaches of standards and access regimes, due to the potential duplication of penalties across the RBA, payment schemes and any standards-setting bodies. If a civil penalty regime were to be introduced in the PSRA, there would need to be clear delineation between the various enforcement regimes to avoid duplication of penalties (perhaps via memoranda of understanding or a similar mechanism). Some members also suggested that any penalties should be an action of last resort, with other regulatory tools being utilised first. We understand, however, that this would depend on the range of tools that will ultimately be available to the RBA. One way to address this concern may be for the RBA to publish guidance on their approach to enforcement once the regulatory toolkit under the PSRA is finalised.

Other changes to the PSRA

This section addresses consultation question 16.

The Payments System Review recommended that the RBA be given the powers to:

- authorise and oversee industry standard-setting bodies, given that mandatory industry standards will be an integral component of the forthcoming PSP licensing framework; and
- develop common access requirements in consultation with the operators of payment systems, as part of the new PSP licensing framework, to facilitate access for licensees to those systems.

Since the PSRA provides the legislative foundation for the RBA's powers with respect to the Australian payments ecosystem, Treasury could consider establishing both of these additional powers as part of the current review of the Act (with suitable caveats to note that the exercise of these powers would be linked to the establishment of the PSP licensing framework). Together, these additional changes would enable some of the proposed rights and obligations associated with the PSP licensing framework to take effect as soon as the framework is established, rather than requiring an additional round of legislative amendments.

Reflecting the ongoing rapid pace of change in the payments ecosystem, some members have also recommended more frequent reviews of the PSRA to ensure that the definitions and framework remain fit for purpose. This could align, for example, with the timing of the RBA's periodic reviews of its regulatory settings for the retail payments system.

Conclusion

AusPayNet appreciates the opportunity to respond to Treasury's consultation on PSRA reforms. This is a critical step in updating the payments regulatory framework to ensure that it can continue to support the ongoing development and safety of the Australian payments ecosystem for the benefit of all end users. AusPayNet looks forward to continuing its engagement with Treasury as it progresses its work on the payments system reforms over the coming months.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Andy White', written over a horizontal line.

Andy White
Chief Executive Officer
Australian Payments Network