Submission in relation to exposure draft legislation amending the

Payment Systems (Regulation) Act 1998

Google welcomes the release of the exposure draft legislation to update the *Payment Systems (Regulation) Act 1998* (Cth) ('PSRA') ('Exposure Draft'), following earlier consultation conducted by Treasury.

We have considered the provisions of the Exposure Draft and believe that the provisions should be strengthened through the following additional, minor revisions (addressed in further detail below)

Procedural fairness in decisions to designate

The Exposure Draft provides for two different mechanisms for the 'designation' of a 'payment system':

1. 'designation' by the Reserve Bank of Australia ('RBA') through a 'notifiable instrument', where the RBA considers that doing so is in the 'public interest'; and

2. 'special designation' by the Minister through a 'notifiable instrument', where the Minister considers that doing so is in the 'national interest'. The exercise of the Minister's designation is subject to a requirement to consult the RBA and to consider, among other things, the outcome of that consultation and whether there are any alternatives to 'special designation'.

The difference between 'designation' and 'special designation' arises because of the wider 'national interest' criterion which applies to any action by the Minister, together with the application of 'special regulators' to 'special designated payment systems'.

As indicated in our '*Response to Treasury consultation on proposed Reforms to the Payment Systems (Regulation) Act 1998*', we support imposing limitations on the Minister's powers and to provide guardrails on the exercise of such powers.

However we remain concerned that the draft legislation does not afford potentially affected parties with the opportunity to make submissions to the RBA or the Minister before a 'designation' determination is made. We recommend that 'special designation' occur by way of a legislative instrument. Further, there should be a specific requirement for the RBA or the Minister to provide a statement of reasons or other similar explanatory document.

We believe that these measures will promote transparency and natural justice in the exercise of powers under the PSRA, provide consistency in the 'designation' of 'payment systems', and allow for appropriate parliamentary scrutiny (through tabling and disallowance of legislative instruments) of decisions to 'designate' a 'payment system'. These are particularly important outcomes given the proposed broader

meaning of ‘participant’ in the PSRA and the significantly expanded scope of the Minister to ‘designate’ payments systems in the ‘national interest’.

While we acknowledge that a decision to ‘designate’ may not itself create any regulatory obligations on a participant, we support applying similar limitations and guardrails on the exercise of such powers by the RBA. In particular, we support:

1. prior to any decision to ‘designate’ that there be a requirement for:
    a. consultation by the RBA (which we expect would occur in practice);
    b. consideration by the RBA of whether there are alternatives to ‘designation’;
    c. consideration by the RBA of the outcome of consultation; and
2. ‘designation’ of a ‘payment system’ by the RBA to occur by way of a ‘legislative instrument’ rather than a ‘notifiable instrument’.

Right of review

Fundamental to transparency and procedural fairness in administrative decision-making is the ability of affected parties to seek administrative (merits) and judicial review of decisions. We recommend the inclusion of rights for administrative and judicial review of a decision by the RBA to ‘designate’ a ‘payment system’, a decision by the Minister to ‘specially designate’ a ‘payment system’, and a decision by the Reserve Bank (or a ‘special regulator’) to impose standards or an access regime.

Definition of ‘national interest’

We have previously provided extensive feedback in relation to how the ‘national interest’ test is to be applied to any decision by the Minister in relation to ‘special designation’, and the factors that comprise the ‘national interest’.We consider that the ‘national interest’ criterion is broad (having regard to the factors listed in the consultation paper) and will overlap with the ‘public interest’ test that already applies to any decision by the RBA to ‘designate’ a ‘payment system’.

We remain concerned about the legislative definition of what is a ‘matter in the national interest’ and the circumstances in which the Minister can ‘designate’ a payment system. While our understanding is that a ‘designation’ on ‘national interest’ grounds is intended as an extraordinary power limited only to circumstances that cannot be addressed via other means, we are concerned that this is not reflected in the current drafting and could be used or applied widely and with little reasoning.

In our view, as suggested in our previous submissions, ‘national interest’ should be defined in the PSRA, and the PSRA should include a list of specific thematic factors that form part of the ‘national interest’ to be supported by detailed policy guidance prepared by Treasury. The inclusion of thematic factors in the PSRA would support consistency in any decision making by the Minister (and successive ministers). This also reflects the approach taken in other jurisdictions, such as under the United Kingdom *Financial Services (Banking Reform) Act 2013* (UK) (‘UK Act’), which requires that HM Treasury consider, among other things:

1. the number and value of transactions that the system presently processes;

2. the nature of the transactions processed;

3. whether the transactions could be handled by another payment system; and

4. relationship with other payment systems.

In New Zealand, the *Financial Market Infrastructures Act 2021* ('NZ Act') requires the New Zealand Reserve Bank to have regard to a number of matters before making a recommendation to designate a system as an 'FMI' for financial stability purposes, including among other things:

1. the purpose and scope of the FMI;

2. the capability and capacity of the FMI's operators and the FMI:

3. the financial resources of the operators of the FMI; and

4. the importance of the FMI to the financial system.

Before making a designation notice that an 'FMI' is systemically important, the New Zealand Reserve Bank is required to be satisfied that the FMI is 'systemically important' having regard to additional factors listed in the NZ Act.

In addition, under the New Zealand *Retail Payment System Act 2022*, which regulates payment systems for competition and efficiency purposes, the Commerce Commission must consider:

1. any features of the retail payment network, or any conduct of participants in the network, that reduce, or are likely to reduce, competition or efficiency:

2. the nature of the network, including the number, value, and nature of the transactions that the network currently processes or is likely to process in the future:

3. the NZ Act and any other regulatory requirements in other New Zealand laws that the Commission considers relevant.

In our view, the UK Act and the NZ acts referred to above each provide a useful model for considering whether a particular 'payment system' will fall within the 'national interest' criterion. We recommend that whether it is in the 'national interest' to 'designate' a particular 'payment system' be considered by having regard to (amongst other things) the size and the systemic risk posed by the particular payment system.

We note that other legislation takes a similar size and systemic risk-based approach. For example, the *Security of Critical Infrastructure Act 2018* (Cth) defines whether a particular piece of infrastructure is 'critical infrastructure' by reference to the use of that asset, whether it can be substituted, and the scale of that infrastructure.

Joint regulator administration arrangements

The overlapping regulatory framework for payment service providers and 'payment systems' presents some complexity to the nomination of special regulators by the Minister. For example, a 'special designated payment system' may be subject to regulation by the RBA (assuming that an access regime has been put in place), the Australian Securities and Investments Commission ('**ASIC**') (assuming that it

holds an Australian financial services licence authorising it to provide non-cash payment facilities), the Australian Prudential Regulation Authority ('**APRA**') (assuming that its services include purchased payment facilities) and the Australian Transaction Reporting and Analysis Centre (assuming that its services involve 'designated services' or are remittance arrangements).

We expect that each of the above regulators are likely to be a 'special regulator' for the PSRA, or will be directly impacted by the activities of those 'special regulators'.

To facilitate greater regulatory certainty, we recommend that the Treasury consider the arrangements that can be implemented between the various regulators in respect to the PSRA. The recently enacted Financial Accountability Regime provides a model approach in the form of the joint administration agreement required to be entered into between ASIC and APRA.

We expect that the interaction between the RBA and ASIC will be particularly important given the proposed payments licensing framework.

Conclusion

We thank the Treasury for the opportunity to review and comment on the Exposure Draft. We look forward to continuing to support the Government's work on these reforms.

ENDS