



19 July 2023

Director
Payments Licensing Unit
Financial Systems Division
Treasury
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Dear Director

Payment System Modernisation (Licensing: Defining Payment Functions)

Blackhawk Network (Australia) Pty Ltd (**BHN**) welcomes the opportunity to respond to the Payment System Modernisation (Licensing: Defining Payment Functions) Consultation Paper (**Paper**).

The Blackhawk Network group is a leading prepaid payment network which supports the distribution of gift cards, prepaid telecom products and financial services products in over 28 countries, including Australia. A core business proposition of BHN is the development and distribution of prepaid stored value cards (**SVCS**), reward and incentive programs and disbursements for consumers and businesses across a number of channels, including grocery, mass merchants, petrol, convenience and restaurants. BHN currently distributes 22 million cards per annum in over 7,500 outlets in Australia and is a major participant in the third party gift card industry in Australia, whereby gift cards are sold in retail locations independent of the brand represented on the gift card.

We make the following submissions in response to questions 1 and 10 of the Paper.

Question 1: Are there any other principles that should be considered in developing the list of payment functions?

The Paper proposes that the regulatory perimeter for payments licenses operate by reference to seven specific payment functions. Among others, these include "*[s]ervices that enable payment instructions to be transferred (facilitation), provide the verification of customer credentials (authentication), payment authorisation, and/or processing of payment instructions*". Table 1 of the Paper indicates that this is intended to capture "*pass-through digital wallets, merchant acquirers, payment gateways and processors, and payment routing*".

BHN is concerned that, as currently drafted, this payment function could disproportionately and inappropriately affect market participants who are incidental in the payment facilitation chain, including those participants that are involved in the program management and distribution of gift cards, for example at physical retailers, as well as those who provide technology related to such products.

In our view, these participants should not be considered to be performing a payment function. We note that similar carveouts for 'technical service providers' and services related to limited use payment instruments have been applied in payment legislation in the European Union¹ and the United Kingdom², and submit that this is the correct approach in relation to these participants.

¹ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

² Schedule 1, Part 2(j) of the *The Payment Services Regulations 2017* (UK) in relation to 'technical service providers' and Schedule 1, Part 2(k) of the same act in relation to services related to limited use payment instruments

Where entities do squarely fall with a revised regulatory perimeter, BHN suggests that there be graduated regulatory obligations based on the level of risk posed by that particular entity in the context of the relevant payment function such that no additional obligations are imposed than are currently applicable. The criteria for risk assessments should be based on functional thresholds, rather than just simple dollar value-thresholds. In the context of SVCs, this criteria could involve the ability to withdraw or reload the value that might be stored in relation to the facility.

Question 10: Would the removal of the identified exclusions create unintended consequences?

BHN fully supports the proposal to move the conditional relief granted by the Australian Securities and Investments Commission (**ASIC**) under *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211* for providers of certain gift facilities into primary legislation or regulations. We agree that enshrining the licensing exception in this manner would provide sought-after comfort and stability to industry participants that rely on the exception, due to the comparative ease with which class orders can be repealed or remade.

BHN also supports the view outlined in the Paper that the justification for conditional relief would be "*less applicable to issuers of open-loop gift cards and open-loop loyalty schemes*" where those facilities do not currently fall within the conditional relief granted by ASIC. However, BHN wishes to emphasise that the features of gift card facilities in the Australian market, and how these gift cards are processed, vary and are more nuanced than suggested in the Paper (see in particular footnote 32), and that changes to the scope of the relief would not be without some complexity. We would be happy to discuss these differences further with Treasury.


BHN therefore submits the following principles should inform Treasury's consideration when assessing whether and how to make changes to these conditions:

- The more appropriate distinction between "*open-loop*" and "*closed-loop*" gift card facilities is that the prior category of gift cards are generally issued by a financial institution, are processed over formal debit and credit card networks or payment systems (eg, EFTPOS, MasterCard, VISA or American Express) and require a bank identification number (BIN) to do so. Closed loop cards typically involve a closed loop processor and redemption is only possible through one primary merchant, although we note this is not ubiquitous (see our next point below). The current conditional relief does not, however, hinge on these distinctions. Rather, the relief speaks to the functionality of the facility, such as the ability or inability to withdraw cash from the facility, or the ability or inability to reload funds. We consider this remains the appropriate approach to considering whether these facilities should be regulated, rather than an ambiguous distinction between open and closed loop.
- The ability to facilitate payments to multiple merchants outside of a formal scheme network should not, in and of itself, bring gift facilities into the scope of regulation. This is because the traditional "*open-loop*" and "*closed-loop*" distinctions are somewhat blurred in practice. For example, there are "*semi closed-loop*" facilities that can be used at a selected group of merchants as opposed to only one merchant. The existing conditional relief for gift facilities is currently broad enough to facilitate such semi closed loop products.
- Closed loop gift card facilities (including semi closed-loop products) and basic open loop gift card facilities are generally simple, easy to use and well-understood by retail consumers. BHN's experience is that the existing protection framework under the Australian Consumer Law already provide sufficient and adequate protection to consumers who experience problems or issues when they purchase or receive gift cards. In these circumstances, the cost of compliance that would result from the application of an additional regulatory or licencing regime seems grossly disproportionate to risks to these consumers.

In addition, BHN understands the intention outlined in the Paper to be that, if an entity does not have a licencing obligation pursuant to an exemption or relief such as that contemplated in relation to gift card facilities, such facility will not otherwise be considered a stored-value facility (SVF) under the new regime.

Thank you once again for the opportunity to provide feedback on the potential reform of the licensing for payment systems. Please don't hesitate to contact us with any questions.

Yours sincerely,

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Ricky Lopis

Principal Legal Counsel

Blackhawk Network (Australia) Pty Ltd