FinTech Australia

Payments System Modernisation (Licensing: Defining Payment Functions) consultation paper response

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About this Submission

This document was created by FinTech Australia in consultation with its members (**Members**).

In developing this Submission, interested members participated in roundtables and individual discussions to discuss key issues and provided feedback to inform our response to the consultation paper.

About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech sector, representing over 450 fintech companies and startups across Australia. As part of this, we work with a range of businesses in Australia's fintech ecosystem, including fintechs engaging in payments, consumer and SME lending, wealthtech and neobanking, the consumer data right and the crypto, blockchain and Web3 space.

Our vision is to make Australia one of the world's leading markets for fintech innovation and investment. This submission has been compiled by FinTech Australia and its members in an effort to advance public debate and drive cultural, policy and regulatory change toward realising this vision, for the benefit of the Australian public.

FinTech Australia would like to recognise the support of our Policy Partners, who assist in the development of our submissions:

- Allens;
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- Hamilton Locke;
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- K&L Gates.

Summary

FinTech Australia strongly supports the proposal to streamline licensing for payment service providers and provide a clear path forward for participants across the payments ecosystem. The focus on risks and principles is key to ensuring that the payments regulation creates a level playing field across the fintechs, traditional financial service providers and technology service providers alike.

However, Members note that the success of these proposals will be determined by the applicable scope of any licence and nature of regulatory obligations.

FinTech Australia and its Members look forward to continuing to engage as these proposals develop during upcoming consultations.

Questions

Principles underlying the list of payment functions

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

FinTech Australia supports the principles identified. FinTech Australia notes that these principles reflect the recommendations set out in the *Payments System Review: From system to ecosystem*, June 2021 demonstrating that the current proposals are intended to, and do, build upon the significant work that has been undertaken over at least the last several years, if not the last half-decade, to reform our payments system. More broadly, these principles are helpful in framing the intention of the reform proposals.

However, FinTech Australia would suggest one additional principle

> "considering the users of the payments ecosystem, including consumers, businesses and government."

This principle of "service" was identified in Recommendation 1 of the Payments System Review and agreed to in the Government Response. In particular, the Government noted:

> "The regulatory architecture should serve the consumers and businesses that rely on the payments ecosystem for their day-to-day activities and be guided by the principles of strategy, safety and simplicity."[1]

FinTech Australia does not consider that this additional principle would significantly impact the proposed reforms but would ensure that the distinct needs of different types of users are consciously taken into account. Beyond the current reform proposals, it will be necessary to consider different types of users when developing the obligations and disclosure requirements, including when tailoring requirements to provide services to retail and wholesale clients.

FinTech Australia Members do note that whilst for the most part these principles are reflected in the proposals, on occasion, some of the detail in the Payments System Modernisation (Licensing: Defining Payment Functions) Consultation paper (**Paper**) may not achieve all stated principles. Comments throughout this submission address this in further detail.

Incorporating payments functions into law

Question 2. Is the list of payment functions comprehensive, or should other functions be included?

FinTech Australia is of the view that the list of payment functions is comprehensive and includes all applicable payment functions. However, further clarity regarding how the functions may be translated into regulation is necessary.

Many of the functions outlined in the Paper overlap and are provided by participants simultaneously. For example, a payment initiation service may also be considered to be providing payment facilitation services. This gives rise to difficulties determining the boundaries of each of the payment functions. Without clarification, were different licence conditions or obligations imposed on payment functions as currently defined, the resultant regulatory regime may be confusing and overly burdensome.

To assist payment facilitation service providers to understand the application of the new regime, further guidance may be included in a regulatory guide such as by including examples which may assist businesses in determining how to apply the regime. This will be considered further once the new licensing regime is determined.

More broadly, Members support the risk based approach to developing the list of payments functions. However, the proposed definitions of payment functions do not fully align with the varying nature of risks inherent in those functions. For example, payment facilitation covers a broad

[1] *Transforming Australia's Payments System,* Government Response, December 2021, https://treasury.gov.au/sites/default/files/2021-12/p2021-231824_1.pdf at p.6.

range of different activities from a systemic, operational and consumer perspective. The risk profile of each changes based on the particular service, meaning that requiring all to hold the same licence or comply with the same obligations may not be effective in managing risk. Members suggest that payment functions be aligned with an assessment of the regulatory obligations. Please see our response to questions 16, 17, 18 and 19 for further detail.

If it would be of assistance, FinTech Australia Members would be very happy to discuss these payment function categories further with Treasury.

Question 3. Should all payment functions be treated as financial products under the corporations legislation or should some be treated as a financial service?

Members do not agree that all payment functions should be financial products, nor that all should be financial services. Instead, it will be necessary to consider how the payment functions map to the definitions of financial product and financial service under the *Corporations Act 2001* (Cth) (**Corporations Act**).

As they are currently drafted, the payment facilitation services appear to be financial services, not financial products. Were these to be financial products, it may be difficult to identify who might provide the financial service and indeed what financial service was provided. Were these financial services, then it may be difficult to identify the financial product. Particularly in relation to payment facilitation services, the payment may well be "money" which should not be classified as a financial product. To do so is likely to have significant unintended consequences across the economy.

Members consider whether current financial product/financial services distinction may remain appropriate for SVFs, including payments stablecoins or if it might be more appropriate to implement a new category of 'functions'. Like the current structure, each person carrying on a business of providing a payment function may be carrying on a financial services business. This needs to be considered in more detail. Members also noted that any change to the regulatory framework would likely increase the burden on the regulator, ASIC. See response to question 24 below for further detail.

Beyond this, Members also questioned whether the Australian financial services licence (**AFSL**) is an appropriate framework for licensing payment service providers. They suggested considering whether a new form of license for payments. See response to question 20 below for further detail.

Stored-value facilities (SVFs)

SVF Definition

Members agree with the definition of a traditional stored value facility. However, Members note that in some circumstances, a facility in which funds are held for longer than 2 days may still be a payment facilitation service and not an SVF. Members suggest the threshold be changed to:

(1) 2 business days; or

(2) within the time reasonably required to complete the transaction subject to any constraints imposed by law.

This reflects the current exemption in regulation 7.1.07G of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**) for electronic funds transfers, and accounts for issues which arise due to time difference or systems operations outside business hours.

Standard SVF v major SVF

Members agree with the proposal that SVFs that hold over a certain amount be subject to additional obligations, but suggested considering the following aspects of the definition:

- while most Members were comfortable with the suggested $50 million threshold, some suggested higher thresholds of $100 million and $250 million;
- the proposed major SVF definition requires a person hold more than $1,000 per customer for greater than 31 days. A Member suggested that this limb does not align with the principle of same risk, same obligations as companies may develop structures to take advantage of these exemptions from being a major SVF. The Member suggested removing these limbs from the requirement to be a Major SVF and relying solely on the value held threshold;
- if a person is only a SVF if funds are held for over 31 days, Members request some degree of flexibility to account for inadvertent technical breach. If not, a person may well be in breach when holding for 32 days, in circumstances where the incremental risk to clients is minimal; and
- an additional exemption from being a major SVF where either:
    - funds are guaranteed by a bank or government agency. This would reflect the exemption under the declaration under section 25 of the *Payments Systems (Regulation) Act 1998* (Cth) (**PSRA**) dated 4 March 2004;

- the number of people to whom payments may be made using such a facility does not exceed 50 persons. [2]

More broadly, Members were concerned by regulatory duplication when subject to oversight by APRA. In particular, there was concern that it may prevent streamlining of licensing obligations and may give rise to potentially incompatible obligations imposed by each regulator. To mitigate this, additional suggestions are:

- if major SVFs were to be regulated by both ASIC and APRA, that ongoing data reporting be streamlined through the joint development of common data standards, taxonomies and definitions; and
- further clarity be provided on the transition between a standard SVF and major SVF, including whether there will be a buffer or intermediate level in which a standard SVF could apply for a major SVF licence or authorisation without needing to pause operations or be in breach.

Question 4. Does the term 'payment stablecoins' accurately describe the types of stablecoins this paper seeks to capture for regulation or are there other terms that may be more appropriate?

FinTech Australia Members support the proposed definition in principal but recommend the definition of payment stablecoin be clarified as follows:

a) a payment stablecoin should represent a claim of the customer on the issuer;

b) a payment stablecoin should be redeemed for Australian dollars or foreign currency, and not just fiat currency. This reflects other, equivalent laws and would capture foreign currency which is backed by commodities;

c) the requirement that a payment stablecoin require "active marketing or selling in Australia" is unclear and may cause confusion. Instead, consider whether some "carrying on business" test for licensing might be appropriate;

d) sub-paragraph (b) defines a payment stablecoin by reference to being issued by a 'payment stablecoin issuer' so may need to be amended or removed; and

e) stablecoins backed by assets other than Australian or foreign currency may maintain a stable value relative to Australian or foreign currency. If the customer is able to redeem the stablecoin for Australian dollars or foreign currency should this be a payment stablecoin? If so, we expect that in practice it would be impossible or impractical to provide such a

[2] *Declaration No. 2, 2006 regarding Purchased Payment Facilities',* The Reserve Bank of Australia, 27 April 2006.

stablecoin in a compliant manner were there obligations to hold a certain amount of cash or cash equivalents.

Further, Members query whether the definition would apply to payment stablecoins under different structures, such as a stablecoin issued by a bank to an eligible customer within a closed or controlled loop. We also query the economic consequences of a payment stablecoin becoming so widely adopted such that it circulates like money. It may be worth considering whether access requirements are required, as well as whether every person who deals in a payment stablecoin may be considered to be providing a financial service and an exemption from licensing is required.

Question 5. Does the proposed definition of 'payment stablecoins' adequately distinguish itself from other stablecoin arrangements?

Members are comfortable that the proposed definition of 'payment stablecoins' is adequately distinguished from other stablecoin arrangements, subject to our comments in our response to question 4.

As noted in the Paper, stablecoin arrangements that are not capable of being redeemed for fiat currency are typically collateralised by other assets, such as crypto assets, commodities, or other deliverable assets. As these types of stablecoin arrangements may be less suited to facilitating payments or storing value, it may be more appropriate to regulate these like other crypto assets.

Where these types of stablecoin arrangement do become stable enough to be used for payments or stored value, it may be appropriate to designate it as a payment system under the PSRA.

Question 6. Is regulation as an SVF an appropriate framework for the regulation of payment stablecoin issuers? If not, why? What would be an appropriate alternative?

Members generally consider that the SVF framework is appropriate for the regulation of payment stablecoin issuers. Members recognise the importance of creating a regime that imposes obligations based on same risk same regulation. This extends to including stablecoins as a type of SVF, especially where money is made available. It also includes holding money or assets on behalf of clients either under the existing client money regime, or another suitable regime and any capital adequacy requirements. Whether this is appropriate should be subject to further consultation.

That being said, any obligations must be workable for issuers to manage in relation to stablecoins as well as other crypto assets.

Members note that practical compliance will be complex. Some of this complexity has already been considered in the context of the token mapping consultation. This reflects the unique features, benefits, and risks of distributed ledger technology. Consideration as to how the payments licensing, AFSL and AML/CTF regimes interact may be necessary, including harmonising the regimes where appropriate.

See our response to questions 15 onwards regarding the regulatory regime more broadly.

Finally, Members also cautioned against delaying implementing the broader payments reforms due to consideration of the complexities involved with payments stablecoins.

Payment facilitation services (PFSs)

Question 7. Does the list of proposed payment functions adequately capture the range of payment services offered in Australia currently and into the future that should be regulated under a payments licensing regime?

Members consider the range of payment functions set out in the Paper reflects the breadth of functions within the payments ecosystem. However, Members caution against regulating all under Chapter 7 of the Corporations Act and support the notion that different regulatory obligations may be imposed where this better mitigates against the risks posed by the payment function.

Members also note there may be significant overlap between the identified payment functions, such as between the "issuance of payment instruments", "payment initiation services" and "payment facilitation, authentication and processing services" categories. Whilst Members appreciate the level of detail provided, further clarity regarding how this might translate into one or multiple financial products, or authorisations under an AFSL is necessary. Some specific comments include:

- care should be taken to ensure that in providing sufficient detail, the laws do not become too prescriptive. This may cause challenges adapting to new technological advancements; and
- clarity and transparency regarding when a person is both in and out of the regime should be considered. The payment facilitation, authentication, authorisation, and processing services in particular are too broad and may need to be split.

Members acknowledge that this is likely to form part of the next phase of consultation and look forward to contributing to this discussion. See response to question 24 below in relation to authorisations.

Further detail in relation to each payment facilitation service is set out below.

Payment function	Potential entities	Comment
Issuance of payment instruments *Issuers of a payment instrument that is unique to a customer and can be used to make a transaction or provide instructions on their account or facility.*	Issuers of payment instruments (such as cheques and digital and physical cards). This includes Buy Now Pay Later providers that issue a virtual card. Issuers of a set of procedures/credentials (such as a PIN, password, biometric data) to initiate a payment instruction order.	See comments in response to question 3 above in relation to the division between financial products and services. See also the below comments regarding exemptions, in particular, in relation to payments debited to credit facilities and single payee exemption. **BNPL** Transactions through such an instrument are debited to the customer's credit facility attached to their BNPL account, which to date has fallen within an exemption. These are not intended to be SVFs as "credit facilities that store value are not included in this function because SVFs are concerned with customers' own money that they have transferred as opposed to credit".[3] Members submit that this should extend to virtual cards, such as those issued by BNPL providers. **Infrastructure** Under the proposed definition, there is a risk that physical infrastructure, such as a letter or electronic messages, such as an email, which provide procedures/credentials may of themselves be caught, particularly if a SVF is a financial product and not a financial service. These should be able to continue to rely on the existing exemption for physical infrastructure in section 765A(1)(x) of the Corporations Act.

[3] Paper, p.12.

		Instead, Members are of the view that the provision of services in relation to the payment, rather than the pin which facilitates access to money in an account or SVF, should be captured.
Payment initiation services *Services that allow the instruction of a payment transaction at the request of the customer (payer or payee) with respect to a payment account or facility held at another PSP, or from some other source of value or a credit facility.*	Services that allow a customer to request a payment transaction be initiated. Examples include recurring payment services and third-party payment initiation services.	Members understand the scope of this proposal. Particularly given the link to the consumer data right, Members support aligning 'payment initiation services' with action initiator accreditation to ensure there is no duplication of 'licensing' and regulator responsibilities. However, Members request further clarity regarding who is intended to be captured as who may be providing the initiation service is quite broad. In particular, we submit that: • this be limited to the provider of the facility through which a payment initiation service is provided (such as a recurring payment service) rather than a person who receives payments through such a facility; • who is caught be considered in light of all circumstances, including who a consumer believes they are paying and who they understand is causing that payment to occur. We note that this may overlap with payment facilitation services. This should include how each payment facilitation service should be considered; and • this may not reflect the risks of payment aggregation. Payment aggregation involves collecting or receiving funds from payers into an intermediary account controlled by a

		third party provider on behalf of the payee which are subsequently on-settled to the payee (i.e. the payer's intended recipient) at a later time (which could be same day or later). The risks associated with this service grow with the total value and volume of the funds collected or received. The risk is also dependant on other factors such as the type of payments being made, if the payment is in advance or arrears for goods or services and the type of payee (eg high-risk merchant categories etc). So too might it be necessary to consider who may be caught were this to be a financial product, as the scope of people who may be considered to be arranging to deal or providing general financial product advice in relation to such a function may be wide. Yet few risks would be posed to others in these circumstances.
Payment facilitation, authentication, authorisation and processing services *Services that enable payment instructions to be transferred (facilitation), provide the verification of customer credentials (authentication), payment authorisation, and/or processing of payment instructions.*	Pass-through digital wallets, merchant acquirers, card issuers, payment gateways and processors, and payment routing.	"Payment facilitation, authentication, authorisation and processing services" may be too broad to be captured in one category and include too many different types of payment functions where each pose different risks. For example, "payment facilitation" could capture payment gateways which simply pass on payment instructions from a merchant to a payment processor. The risks associated with such a payment function centre around operational risk arising from the security of the gateway's technology to safely and securely pass on the instruction. On the other end of the spectrum, there is "payment processing" which

		could capture a payment processor processing PayTo transactions through the NPP. The risks associated with such a payment function are not just operational but may be systemic too as they include risks associated with the payments infrastructure itself.
Payments clearing and settlement services *Services for clearing or settlement of payment obligations or for the exchange of payment messages for the purposes of clearing or settlement of payment obligations, including clearing and/or settling account to account payments.*	Payments clearing and/or settlement providers.	Members have highlighted that payment settlement providers need clarity on the definition of "clearing and settlement", as that could imply, for example, that settlement of FX trades for over the counter FX transactions are captured.
Money transfer services *Services that send or receive money overseas or within Australia for a customer, including through the creation of a payment account or without a payment account.*	Remittance service providers and domestic money transfer providers.	Where there is a split payment there is no clear definition as to whether that is classified as remittance. Members support suggestions in the Paper that "[r]emittance dealers would have the option of becoming an authorised representative of a licensee (as would other PSPs), rather than holding a licence directly. This may be particularly attractive to smaller remittance service providers."[4] In many cases, the key risk mitigated, being AML/CTF, is already regulated in other jurisdictions such as the UK, EU, Canada and Singapore.

[4] Paper, p.18.

Beyond this, Members also request further clarity regarding who is likely to be captured by these reforms. In particular, this reflects the issue identified in response to question 3 above, that the payment functions appear to reflect financial services. Were this the case, only providers of that particular financial service would be subject to these obligations. Others who provide financial services regarding payment functions (which are financial services), such as providing financial product advice,[5] or dealing by arranging for another to deal in the financial product,[6] may not be subject to the proposed reform. Members requested further information as to what will fit in each of these categories. This will assist to prevent the same lack of clarity and inflexibility as the current regime.

Question 8. Does the list need to be broken down in more detail, for example, should facilitation, authentication, authorisation and processing be separate functions?

Members suggest this would be appropriate. Please see our response to questions 2, 3 and 7 above.

Question 9. Should any other payment functions be included?

Please see our response to questions 2, 3 and 7 above.

Excluded and exemption activities

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

FinTech Australia has considered the proposals regarding exemptions in detail. These views are provided in response to question 11.

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[5] Corporations Act, s766B.
[6] Corporations Act, s766C(2).

Question 11. Which existing exclusions and exemptions applicable to non-cash payment facilities should be amended or removed to support regulation of the proposed payment functions? Do any existing exclusions or exemptions require updating, such as the relief for low-value facilities?

FinTech Australia sets out its views in relation to each exemption in the table below.

Exemption	View regarding proposal
To be retained	
Limited purpose, including loyalty schemes, road toll facilities, gift facilities and prepaid mobile facilities.	Members agree with retaining these exemptions and the proposal to move them to primary legislation or regulations. However, some Members are concerned by the proposal to implement a "genuine limited purpose" test. In practice, many fintechs in the loyalty and gift card space rely are concerned that the amendments would mean that they are no longer able to rely on the exemption, particularly in respect of open loop facilities. Given those Members do not consider that there is any increased risk to the customer, they propose that neither the "genuine limited purpose" nor amendments which no longer exempt open loop facilities be included.
Low value non-cash payment facilities	Members agree with retaining the exemption and the proposal to move this exemption to primary legislation or regulations. In addition, Members consider that the total amount available for making non-cash payments under all facilities of the same class issued by that issuer at any time be increased from \$10,000,000 to \$50,000,000. This would align with the proposed thresholds regarding major and standard SVFs and would reflect that the current thresholds were set in 2003 and have not been indexed to inflation. Members consider this same low value threshold should apply across all services as the impact on any one customer is low given the value to be transferred and the nature of the transaction limits the customer's exposure to risk of the money transmitter.
Exclusion for cash	By removing the definition of "non-cash payment facility" as a financial product, and no longer referring to cash, we consider this exemption to be necessary and support the proposal.

To be removed	
Exchange and settlement between non-cash payment providers	Care should be taken to not conflate the settlement of obligations between providers of non-cash payment facilities with the provision of a payment clearing and settlement function. Rather than removing this exemption, it should be aligned with the new regime such that it allows for payment providers to still settle obligations between themselves whilst not allowing participants to offer a payment clearing and settlement service without a licence.
Electronic funds transfers (as set out in Corporations Regulations, reg 7.1.07G)	Members are split as to whether the electronic funds transfer exemption should be removed. Some are of the view that removing the exemption would impose significant licensing obligations on money transfer services which they assert do not pose a high risk to the payments system and thus should not be required to have a licence. Others suggest that removal of this exemption is appropriate given the role money transfer service providers play in facilitating payments. Instead, perhaps a volume or value threshold may be imposed below which licensing is not required. This would align with the risks to consumers and the payments system as a whole. Please see our comments in relation to money transfer services in our response to question 7 above for further detail.
Payments debited to credit facilities	Members do not support the removal of this exemption, and doing so would not be in line with the approach adopted internationally. Fintechs that currently rely on this exemption are already subject to regulation under the *National Consumer Credit Protection Act* (Cth) 2009, meaning consumers should already be protected. Were this to be implemented, as each would likely be providing multiple payment functions under the proposed definitions the regulatory burden would be high and benefit limited. This potentially onerour obligation appears somewhat unreasonable for a service that is not currently subject to licensing. Its removal may also have unintended consequences for those in the credit sector as multiple people may be providing the same function in respect of one payment. For example, when a

	BNPL customer makes a transaction using an existing credit or debit facility, the BNPL provider may be exempt where the transaction is subsequently debited to the customer's credit facility attached to their BNPL account. Removal of this exemption may require BNPL providers to hold an AFSL. We refer to our response to question 7 where we note that on a policy basis, BNPL products should not be captured for the same reason that credit facilities are not included in the SVF function, being that SVFs are concerned with customers' own money that they have transferred as opposed to credit. This would also align with the approach taken in the UK, where authorised credit institutions can carry on payment services without the need for further licensing.
Unlicenced product issuers who use licenced intermediaries	Members do not support the removal of this exemption, noting that it is relied upon by many when providing services to third parties or as part of intercompany arrangements. However, it is acknowledged that its removal in relation to SVFs only may be an appropriate measure to manage the risk that exempt SVFs pose to consumers and the payments system broadly. Further clarity as to the scope of its removal, and when corporate authorised representative arrangements may be relied upon in relation to the proposed payment functions, would also be beneficial.
Relief given to specified entities	We do not have any feedback in relation to this exemption.
Other exemptions not considered specifically in the proposals	
Non-cash payment facilities used for third party payments	Members consider that this exemption should remain as it ensures that financial services licensees are not required to hold an AFSL when accepting and making payments and are not providing any other financial service in relation to those payments. This aligns with other exemptions in the regulations.[7] To facilitate this, it should be moved from the

[7] Corporations Regulations, reg 7.6.01(1)(l)(la).

	ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 to primary legislation or regulations.[8]
Single payee	Members support the retention of the single payee exemption as it is relied upon by many fintech businesses. The risk posed by the performance of payment functions that take the benefit of this exemption is low, as many businesses rely on it to offer products and services under intercompany arrangements, or products and services that are already subject to obligations under other regimes, such as gambling and credit. Given the limited scope of harm, and that many may already be exempt, we consider this exemption should be retained.
Physical equipment and infrastructure	As also discussed in our response to question 7, while not expressly contemplated as being amended or removed in the Paper, Members feel strongly that the physical equipment and infrastructure exemption under section 765A(1)(x) of the Corporations Act be retained. Further, this exemption may benefit from amendment to align with any changes made to the payments regime and PSRA such that it remains current and technology neutral. Providing further clarity as to the application of this exemption in light of the kinds of physical equipment and infrastructure currently used in the payments systems would be beneficial and may limit licensing obligations for payment facilitators in particular.

Existing exemptions for certain exempt NCPF from compliance with the design and distribution obligations are due to sunset October.[9] Members strongly request that these exemptions be made permanent.

Question 12. Should the incidental product exclusion apply to the proposed list of payment functions?

Members suggest that the incidental exemption should remain as it provides the regime with flexibility to exempt financial products which do not meet the “financial product purpose”.[10] Removal of this exemption for payment functions would mean these are inconsistent with Chapter 7 of the Corporations Act. We do not see any increased risk from relying on the incidental product

[8] This assumes that PSPs will be required to hold an AFSL with appropriate authorisations. If another licence is required the practical mechanisms by which the exemption operates may need to be considered in detail.
[9] ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784.
[10] Corporations Act, s763E.

exemption for payment functions as we do for other financial products which meet the criteria in section 763E of the Corporations Act. Accordingly, we do not consider this should be removed.

Question 13. Should any exclusions or exemptions be revised to be more consistent with comparable jurisdictions? For example, should the 'single payee' exclusions and relief for loyalty schemes, electronic road toll devices, prepaid mobile phone account and gift cards be replaced by a general exclusion for payment instruments that can be used only in a limited way?

Please see our response to question 11.

Question 14. Should the exclusion for low value facilities apply to any PFS, such as money transfer services? If so, what thresholds should be considered a low value PFS?

Please see our response to question 11.

Question 15. Should any other exclusions or exemptions be provided?

Please see our response to question 11. In addition, we suggest a regulatory sandbox exemption be available for those providing services which are below a certain value and volume threshold. Further details are set out in our response to question 20 below.

Characterising the risk of each payment function

Question 16. Are there any other risk characteristics of a payment function that should be considered?

Question 17. What are the types of payment risks posed by the performance of each of the proposed payment functions?

Members recognise the importance of assessing risks however without better understanding the scope of the payment functions, and who is intended to be regulated in what way, it is difficult to identify the risks which are to be considered.

Question 18. While having regard to the obligations proposed to be imposed on the payment functions (outlined in Section 7), are the risks posed by the performance of each payment function appropriately mitigated by the payments licensing regime? Or are they more appropriately addressed by a framework outside of the payments licensing regime such as the PSRA or AML/CTF Act?

When making a decision to regulate a payment function under the revised licensing framework, FinTech Australia supports the view identified in the Paper that:

> "not all risks that a PSP presents will be addressed by the proposed payments licensing framework if it would result in duplication of existing regulatory obligations, or if it is more appropriately addressed elsewhere."[11]

For example, risks like data security, lending, and money laundering and terrorism financing are addressed through privacy laws, credit laws, and AML/CTF laws respectively. Other areas could be managed through other frameworks, such as other provisions of Chapter 7 of the Corporations Act.

Accordingly, Members support the view that additional regulation or obligations should only be imposed where it is necessary given the risks. Where existing obligations sufficiently cover those risks, Members caution against imposing licensing or other additional regulatory obligations.

Overview of possible regulatory obligations

Question 19. Is the proposed risk-based approach to applying regulatory obligations appropriate?

Please see our response to questions 15, 16 and 17.

Question 20. Should payment functions that are not customer facing be required to hold a payments licence? Should providers of these non-customer facing payment functions have different regulatory obligations, such as only having to comply with relevant industry standards?

Members understand that many of them will require a payments licence to undertake various payment functions under the proposals. This includes fintech businesses which do not currently hold an AFSL.

As a preliminary matter, Members suggest that an AFSL may not be the appropriate framework to licence PSPs. Instead, some suggest a bespoke payments licence may be more appropriate as it can be tailored to the specific risks of payments. Further, this may be able to be tailored to reflect payments functions and not be required to fit the distinction between financial products, and financial services. Regardless of the nature of the licence, we expect there to be a net increase in the number of companies which are required to hold some form of licence to undertake payment activities. Some may be adversely impacted by the added compliance burden, particularly if it is not appropriately tailored to the payment function itself. As such, FinTech Australia notes the importance of differentiating between payment functions with different risks.

[11] Paper, p.23.

Other obligations to be considered include:

- obligations as the holder of a credit licence, particularly to the extent that these relate to consumer protection. This includes imposing novel obligations for buy-now pay later; and
- changes to require mandatory compliance with the e-payments code.

Members suggest that the payments licensing process and its transition would benefit from guidance with respect to the licensing authorisations required for each payment function, as well as clarity on any grandfathering or transition periods. Members suggest this should at a minimum be 12 months to provide sufficient time to obtain a licence and meet obligations under that licence. Please see our response to question 24 below for further detail.

Members also see value in having access to a payments sandbox to test payment functions. For such a sandbox to be effective:

(1) it must be integrated into a regime that properly and clearly captures payment functions;

(2) it must provide fintechs with the opportunity to openly engage with regulators regarding the development of their product or service in that sandbox;

(3) it should be scalable and allow fintechs to innovate and experiment with further authorisations under the framework before obtaining those authorisations;

(4) it should be consistent or integrated with other existing sandboxes and pilot product exemptions (e.g. the Enhanced Regulatory Sandbox (ERS) or Consumer Data Right 'pilot products'); and

(5) it should be made available to exempt companies below a specific threshold (e.g. transaction, value or time limits).

Such an approach will support innovation and assist companies to transition into becoming fully licensed once necessary. We also note this concept was considered in the Payments System Review final report as a possible extension of the existing ERS. FinTech Australia supports further consideration of this idea through any forthcoming review of the ERS framework. Bringing payments licensing into this framework would likely promote greater uptake of the ERS and ease the transitional burden of the new payments licensing framework for both industry and regulators.

Please also see our response to questions 7, 15, 16 and 17.

Question 21. Should the common access requirements and industry standards be linked to the payments licence? For example, would it be appropriate for some entities to only be required to comply with mandatory industry standards but not be required to hold an AFSL or comply with the ePayments code?

Members are strongly in favour of ensuring consistent access to payment systems. Members submit that those who have the ability to restrict access to payment systems should be subject to regulatory oversight. Licensing is a simple way of managing who is able to set and impose such rules. Members understand that access regimes may have elements which appear anti-competitive but are necessary to protect consumers. However, this places the operators of those systems in a position of power which, although not intended, may be exercised in a manner that is anti-competitive. Imposing licensing may provide a regulator an ability to oversee those who impose these arrangements and require them to be applied consistently and fairly.

We recognise the importance of access requirements and note they should be part of the framework in some form. The exact form that this takes should be the subject of further consultation.

Question 22. What types of businesses should be subject to the common access requirements? There is limited information available on the number and size of non-bank PSPs interested in directly participating in Australian payment systems to clear and settle payments. If this is something that your business is interested in, please provide further information (including via a confidential submission).

The regime should facilitate access to payments systems for non-bank PSPs.

Please see our response to question 21 for further detail.

Question 23. Further information is sought to help identify the number and profile of participants that perform each payment function and therefore may potentially be affected by the new licensing framework.

We cannot provide precise information mapping the profile of participants at this time, particularly given the breadth of the cohort potentially captured. However, we would be open to supporting Treasury in surveying this and integrating relevant questions into our annual FinTech Census.

Question 24. How can the payments licensing processes across regulators be further streamlined?

Streamlining licensing

Members strongly support streamlining of licensing obligations for payments providers including by imposing a single licence with various obligations tailored to the appropriate functions, overseen by one regulator.

Members note that it will be necessary to provide some form of transitional period and, where appropriate, some form of grandfathering. We note the likely burden on the regulator in terms of processing the huge volume of expected applications or variations and encourage consideration of flexible approaches to managing the transition.

Members also suggest that the regulator should be encouraged to assist companies through their licencing journey to promote consistency, stability, and innovation. Companies seeking payments licences in the UK have close engagement with the FCA through the licensing process. This has led to more competition and better consumer outcomes in the payments landscape.

Which regulator?

While Members are not unified as to which regulator should oversee payment service providers, they acknowledge that, on the basis of the skills and experience, ASIC is the more appropriate regulator for the payments industry. If ASIC were to assume this role, Members request ASIC be given additional resources including in relation to licensing and oversight.

Further, even where regulation is overseen by both ASIC and APRA, Members support streamlining the process to make one application to ASIC which is considered by both as and when relevant. To manage this:

- the responsibilities between each should be clearly defined;
- appropriate resources are to be allocated to ensure there is an appropriate structure and sufficient capabilities to have oversight of payments. One suggestion was that this be housed in a separate committee and function to traditional AFSL applications and for coordination with the OAIC and AUSTRAC. Such an approach would also reflect Members experience working with overseas regulators, particularly in the UK, to become a licensed entity, aligning our regime with theirs; and
- to have sufficient oversight, ASIC will require additional resources which Members encourage government to make available.

Obligations

In developing this framework, it is important to ensure that industry are able to understand the obligations under each authorisation to undertake various payment functions and under a major SVF. In particular:

- which payment function is undertaken, and which authorisation required should be clear and transparent. As noted in response to question 7 above, there is significant overlap between the payment facilitation services in particular, which may require multiple, overlapping authorisations on the one licence. This outcome does not meet the principles underpinning the reforms;
- the definition of stored value facility should be subject of further consultation (please see comments above in our response to question 4);
- in relation to major SVFs, where prudential obligations are imposed to further protect funds held, these should be appropriately tailored to SVFs which are not banks. In particular, Members encourage consideration of the cost of capital and seek to hold capital other than in a bank account or by means other than cash such as cash equivalents, particularly when a SVF issuer is subject to regulation by APRA; and
- capital requirements for SVFs should be lower than currently required for limited ADIs. Members suggest that this be set at 2% or lower and include high quality liquid assets.

Question 25. Is the proposal to provide central guidance and a website portal for PSP licensing processes a good alternative to the single point of contact proposal recommended by the Payments System Review?

While we support the proposal to provide central guidance and a dedicated PSP portal, these initiatives are fundamentally different to the more robust 'single point of contact' concept outlined in the Payments System Review. The Review proposed a coordination role for the lead licensing regulator (i.e. ASIC) and reducing the need for prospective applicants to approach multiple regulators. We support further steps towards coordination between regulators and, to the extent possible, a single interface for licence applications and related regulatory requirements, such as AUSTRAC registration and future CDR payment initiator accreditation.

Conclusion

FinTech Australia thanks Treasury for the opportunity to provide views on such an important suite of issues, and greatly appreciates the work Treasury has put into the Paper, the Strategic Plan and other past consultations. We look forward to engaging in future consultations on the future of the payments system.