

**4 August 2023**

Director  
Payments Licensing Unit  
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The Treasury  
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Dear Director

**Payments System Modernisation (Licensing: Defining Payment Functions)**

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) makes this submission to Treasury in response to the consultation paper titled “Payments System Modernisation (Licensing: Defining Payment Functions)” (the **Consultation Paper**), which was released on 7 June 2023.
2. The Committee also thanks Treasury for granting an extension of time for the Committee to respond to the Consultation Paper, and apologises for its delay in providing this submission.
3. Set out below are the questions posed in the Consultation Paper, and the Committee’s responses to them.

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

4. The Committee does not suggest any principles additional to those that are listed on page 9 of the Consultation Paper.

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

5. The Committee does not suggest the addition of any payment functions to those that are listed on page 10 of the Consultation Paper.

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

6. It is unclear to the Committee how the proposed “payment functions” in Table 1 on page 10 of the Consultation Paper may be treated as either financial products or financial services. The Committee considers that many of the payment functions do not involve products that may be financial products, nor do they reflect activities that may be financial services that could be subject to Chapter 7 of the *Corporations Act 2001* (Cth).
7. The Committee considers that a stored-value facility (**SVF**) could be a category of financial product. However, the payment function as conceived in the Consultation Paper seems to relate solely to “issuing” the SVF.
8. By contrast to an SVF, the Committee considers that each of the payment facilitation services appears likely to be better classified as a financial service rather than as a financial product. However, there is no clear financial product to which each payment facilitation service relates. Instead, the ‘product’ for many of these services is the payment itself. If every payment were classified as a financial product, it would have a wide range of impacts, which would require further consideration.
9. If each payment facilitation service was to be classified as a financial product, it would be necessary to consider and to define how a person may be providing the applicable financial services in relation to the relevant product. This too may not be feasible, as the nature of the payment facilitation services presupposes the existence of, and depends upon, certain activities, such as activities concerning initiation, authentication, clearing and settlement etc. Where any new financial product was introduced, it would be necessary to consider whether a market licence or a clearing and settlement facility licence was necessary, and, if so, whether that could apply to any of the services that were described as payment functions.
10. In addition, it would be necessary to consider whether other regulatory obligations, such as design and distribution obligations, were able to fit within this framework. The Committee submits that it may be difficult to apply these obligations in situations where a licensee has no direct connection with a payer or payee.
11. The Committee notes that many of the providers of payment facilitation services will have no direct relationship with a customer who makes a payment, and it would not be feasible for them to do so. Please refer to the Committee’s comments below in response to Questions 21 and 22.

*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?*

12. The Consultation Paper proposes (at page 13) that the term “payment stablecoin” is to be applied to a stablecoin that aims to maintain a stable value with reference to a fiat currency. The Consultation Paper then points out (on page 14) that some stablecoins may be collateralised by other means that are likely to be more volatile than a stablecoin backed by cash or cash equivalent reserves, and proposes that only those stablecoins backed by fiat currency would be regulated as SVFs.

13. The Committee questions whether it is possible that, despite their volatility, and because they are easily transferable, stablecoins that are not backed by fiat currency may nevertheless be used for payments. If so, the Committee considers that the term 'payment stablecoins' may not necessarily accurately describe stablecoins backed by fiat currency.
14. The Committee therefore considers that it may be preferable to use a term that denotes the distinguishing characteristic of the stablecoin. For example, this might be a term such as "cash-backed payment stablecoin".
15. Alternatively, the Committee queries whether it would be appropriate to capture these products as payment stablecoins where they meet the economic properties of money as they are "functionally similar to fiat currency". If so, it would be necessary to consider compliance obligations.

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

16. In the view of the Committee, it is not the actions of transferring funds and storing value that distinguish a payment stablecoin from other types of stablecoin. Rather, it would be the fact that a stablecoin's "aim [is] to maintain a stable value with reference to a fiat currency". Accordingly, the Committee believes it is worth considering whether the type of asset 'backing' a "payment stablecoin" (that is intended to be regulated as an SVF) should be its distinguishing feature.

*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?*

17. In the view of the Committee, regulation as an SVF appears to be one example of a potentially suitable framework for regulation of an issuer of a payment stablecoin that is supposed to be backed by cash or cash equivalent reserves.

*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?*

18. The Committee has not identified a need for any additional payment functions.

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

19. The Committee recommends that there should be a separate function for any service that has any perceived material risk that is different to risks attached to other services.

*9. Should any other payment functions be included?*

20. The Committee has not identified any payment functions that should be included.

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

21. The Committee considers that removal of the identified exclusions would be likely to bring many organisations within the regulatory regime when their primary business is unrelated to payments.
22. Further, imposing a “genuine limited purpose test” on the remaining exemptions could include providers of toll road services, loyalty schemes, retailers that provide low value gift cards, and telecommunications/IT companies. The Committee is not aware of evidence of consumer detriment that would warrant the regulatory and administrative burden that would result from removing these exclusions for limited-purpose facilities.
23. At present, an entity that provides a facility for exchange and settlement between non-cash payment providers is exempted. The Committee agrees that this exclusion appears inconsistent with the proposed “payments clearing and settlement services” function. However, the Committee is not aware of evidence of specific risks resulting from the exclusion. Presumably this is because providers of non-cash payment facilities are themselves regulated and are professional participants in the settlement and clearing system, and they understand and manage relevant risks.
24. If the exemption is removed for a facility for exchange and settlement between non-cash payment providers, the Committee believes it may be necessary to consider whether there is any increased or different risk which may be mitigated by these obligations which cannot be addressed by requiring the entity to have a clearing and settlement facility licence.

*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?*

25. Having regard to the risks associated with the role of an issuer of an SVF, and (if the SVF is to be a financial product) the probable need for a framework that includes funds being held in a client money account or by a trustee for customers of the SVF, the Committee submits that it may be appropriate to restrict reliance by an issuer of an SVF on a licensed intermediary that arranges for the issue of the product (paragraph 911A(2)(b) of the Corporations Act).
26. The Committee believes that there is merit in considering whether the existing exclusion from regulated financial products in paragraph 765A(1)(x) of the Corporations Act for “physical equipment or physical infrastructure by which something else that is a financial product is provided” should be made medium-agnostic. This may in practice place constraints on the effect that the introduction of the Consultation Paper’s proposed payment function class of “payment facilitation, authentication, authorisation and processing services” would otherwise have. This suggestion is in addition to, not in replacement of, the Committee’s comments and suggestions in response to Question 3.
27. The Committee is not aware of any policy reason for exempting certain “one-off” money transfers where an ADI or operator of a payment system (such as a remittance service provider) has no standing arrangement with the client under which funds may be transferred electronically (see regulation 7.1.07G of the Corporations Regulations 2001 (Cth)).

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

28. The incidental product exemption that appears in section 763E of the Corporations Act applies where the payment function is either:

- (a) an incidental component of a facility that also has other components; or
- (b) a function that is incidental to one or more other facilities,

and it is reasonable to assume that the main purpose of the facility or incidental product is not a financial product purpose, which includes making non-cash payments.

29. The Committee considers that there is unlikely to be any harm in retaining the exemption in its present form because the scope for its application is limited.

*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?*

30. The Committee considers that it would be desirable to adopt a general exclusion for payment products and services that can be used only in a limited way because this will "future proof" the carve-out. To ensure that existing exclusions remain, the Committee submits that this should also be included as a separate limb for specific limited purpose exemptions, including the specific examples mentioned above for a single payee scenario, loyalty schemes, electronic road toll devices, prepaid mobile phone account and gift cards.

*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?*

31. The current exclusion for low value facilities addresses the amount of stored value held in a SVF, or the amount available for making payments under a non-cash payment facility. The Committee considers that:

- (a) prudential supervision of the kind currently imposed under the *Payment Systems (Regulation) Act 1998* (Cth) (the **PSRA**) should not apply to low-value facilities; and
- (b) similarly, licensing should not be required for low-value facilities.

32. This position reflects the policy underpinning the existing exemption for low-value non-cash payment facilities in section 9 of the ASIC Corporations (Non-Cash Payment Facilities) Instrument 2016/211.

33. For future purposes, the Committee submits that:
- (a) the level of aggregate stored value that is exempted could be increased because it has not been revised since it was first established under the PSRA in 2006; and
  - (b) the maximum level of stored value that is exempted for a particular customer could also be increased because it has not been revisited since 2016.

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

34. The Committee notes that many payment facilitation services may be provided from outside Australia to an Australian-based SVF provider by an entity that is not carrying on business in Australia. The Committee recommends that some consideration should be given to defining the circumstances in which a payment facilitation service will have a relevant connection to Australia for licensing purposes.

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

35. The Committee will leave this question to be answered by risk specialists.

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

36. The Committee will leave this question to be answered by risk specialists.

*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?*

37. The Committee prefers the view that:
- (a) prudential risk is best addressed outside the financial services licensing regime, especially for a Major SVF (as defined in the Consultation Paper), by ensuring that stored value is held with an entity supervised by APRA;
  - (b) subjects such as conducting an ML/TF risk assessment of a business, imposing an applicable customer identification regime, transaction monitoring and reporting suspicious matters are best kept out of the licensing regime and addressed in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**). However, designated services as defined in the AML/CTF Act, in particular items 21, 22, 23, 24, 29, 30, 31, 32 and 32A of Table 1 in section 6(2) of the AML/CTF Act should be revisited and recast by reference to the activities of persons who hold or ought to hold relevant licences; and
  - (c) certain operational and conduct risks would be best managed through the financial services licensing regime.

38. The Committee submits that, where a Major SVF is not a large ADI, and is not required to become an ADI, the Major SVF should be permitted to establish a structure under which it holds its assets in the form of accounts or deposits with a large ADI or large ADIs. If these accounts or deposits are subject to statutory trust rules for the benefit of customers, there should be no need for the Major SVF to hold capital against them.

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

39. The Committee agrees that a risk-based approach to applying regulatory obligations is appropriate. The Committee considers that an assessment of risk presented by a particular type of service is the best guide to the character of regulation that ought to be applied to the service.

*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?*

40. The Committee supports requiring compliance with common standards, which may not be set out in legislation or subordinated legislation. The requirement to meet these standards may be overseen by a regulator. The Committee considers that, whilst in some circumstances it may be possible to require compliance in the absence of licensing requirements, practically this may be complex. The Committee submits that further consideration should be given to each payment function, appropriate obligations and where these may be set out.

*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?*

41. The Committee considers that there may be benefits in reducing the administrative burden and cost if the provider of a service must comply with applicable mandatory industry standards, either:
- (a) as part of their obligations as an AFSL holder; or
  - (b) instead of those obligations.

*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).*

42. The Committee's view is that common access requirements for payments systems need to finely balance the policy desire to ensure competition with the need for financial stability. The Committee submits that a Major SVF subject to regulatory obligations of the kind described in Section 7 of the Consultation Paper (at page 29) should be assured of common access to any payment system.

*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.*

43. The Committee is not in a position to respond to this question.

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

44. The Committee is not in a position to respond to this 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?*

45. The Committee recognises the challenges with a single point of contact at ASIC that are identified on page 31 of the Consultation Paper. For the same reasons as set out in the Consultation Paper, the Committee considers that there may be drawbacks in dealing solely through one regulator when a number of regulators will continue to have regulatory responsibilities for a SVF or other payment system participants. On balance, the Committee would therefore prefer a model that provides central guidance and a website portal for PSP licensing processes.

46. If Treasury has any questions or would like to further discuss any matters raised in this submission with the Committee, please do not hesitate to contact Pip Bell, Chair of the Financial Services Committee ([pbell@pmclegal-australia.com](mailto:pbell@pmclegal-australia.com)).

Yours faithfully



**Philip Argy**  
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