SUBMISSION

07 July 2023

Submission to Treasury's Consultation on Reforms to the Payment Systems (Regulation) Act 1998 (Cth)

zepto

7 July 2023

Director
Payments System and Strategy Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: paymentsconsultation@treasury.gov.au
Dear Treasury

Re. Submission to Treasury's Consultation on Reforms to the *Payment Systems (Regulation) Act 1998* (Cth)

Zepto welcomes the opportunity to make a submission to Treasury's consultation on the proposed reforms to the *Payment Systems (Regulation) Act 1998* (Cth) (**PSR Act**).

As the first non-bank fintech to connect directly to the New Payments Platform as a Connected Institution, and the first non-bank payments provider to become an Accredited Data Recipient under the Consumer Data Right, Zepto has a unique perspective on the key challenges facing the payments industry and is well positioned to provide valuable insights to Treasury in respect of the proposed reforms.

Zepto wholeheartedly supports the Government's vision set out in its Strategic Plan for Australia's Payments System to create a *"modern, world-class and efficient payments system that is safe, trusted and accessible, and enables greater competition, innovation and productivity across the economy".* The proposed reforms to the PSR Act are the first step to making that vision a reality.

Zepto is an advocate for increased competition and innovation in the payments industry, whilst remaining committed to the highest possible standards of consumer protection. This is because we understand that a secure and safe payments ecosystem is not only *the* key driver of value for our businesses but is at the heart of a digital economy that empowers both consumers and businesses. We need a payments regulatory framework which fosters further innovation and enables the ecosystem to continue to thrive, whilst ensuring the right consumer protections are in place.

We are grateful for the opportunity to provide you with Zepto's submission to the consultation and have included some general observations as well as our responses to the consultation questions below. Zepto welcomes the opportunity to discuss our submission further, as well as to participate in any collaboration and discussion forums.

If you require further information or have any questions, please contact our Senior Legal Counsel and Public Policy Lead, Gabe Perrottet at gabe.perrottet@zepto.com.au \ 0433 244 870.

Yours sincerely

Chris Jewell
Chief Executive Officer (CEO), Zepto

About Zepto
www.zepto.com.au

Zepto is an infrastructure payments business which facilitates bank account to bank account payments for businesses in real-time by connecting them directly to their customers' bank accounts. Our mission is to deliver value for businesses and their customers by pioneering a more competitive, efficient and secure payments ecosystem.

Zepto was founded in 2017 in Byron Bay by four local entrepreneurs who had experienced the frustrations and debilitating impacts of legacy payments infrastructure in their successful tourism business. Since then, Zepto has grown from a start-up to an award-winning payments technology company employing people across Australia and processing more than $50 billion in account-to-account payments every year.

Zepto was the first non-bank fintech approved to connect directly to the New Payments Platform as a Connected Institution and the first non-bank payments provider to become an Accredited Data Recipient in the Consumer Data Right. Zepto was named FinTech Organisation of the Year at the 2023 Finnies Awards as well as being named NSW Business of the Year and receiving the Excellence in Innovation Award at the 2022 Business NSW Awards.

Last year Zepto launched in New Zealand and is assessing expansion into other international jurisdictions including the United States of America. As a remote workforce headquartered in regional New South Wales, Zepto is providing job opportunities for many people across Australia and adding value to the economy as we scale.

General observations

Broadly speaking, Zepto supports the proposed reforms to the PSR Act.

By defining what a payment system is, and granting powers to the Reserve Bank of Australia (**RBA**) to set access regimes and standards in respect of payment systems, the PSR Act seeks to set the rules by which the payments game in Australia is played. However, outdated definitions in the PSR Act combined with a preference for self-regulation in the Australian payments industry, has rendered the PSR Act underutilised and no longer fit for purpose.

By broadening the regulatory perimeter of the PSR Act to capture new, emerging and future payment systems and by ensuring, through enhanced powers for the RBA and a new role for Treasury, that access regimes and standards in respect of those systems can be both set and complied with, the proposed reforms will support competition in the payments industry, consistent with Zepto's mission to create *a better way to pay.*

Responses to Consultation Questions

1. Does the proposed approach to updating the definition of 'payment system' appropriately capture arrangements that are involved in facilitating or enabling payments?

A "payment system" is currently defined in s 7 of the PSR Act as follows: *"a funds transfer system that facilitates the circulation of money, and includes instruments and procedures that relate to the system*".[1]

We agree with the problems identified by Treasury with this definition and that it needs to be updated to:[2]

1. overcome any ambiguity regarding the interpretation of the phrase "circulation of money", so as to capture payment systems which facilitate either or both bilateral and multilateral arrangements; and

2. expand the coverage of the PSR Act to capture new and emerging types of "money" which might not be captured by the term "money".

Further, we agree that a principle-based definition is preferable to a prescriptive approach which lists out the types of payment systems on the basis that the latter approach risks becoming quickly outdated as payment systems continue to evolve and new payment systems come into existence.[3]

[1] *Payment Systems (Regulation) Act 1998* (Cth), s 7.
[2] *'Reforms to the Payment Systems (Regulation) Act 1998: Consultation paper'*, Treasury, June 2023 (**Consultation Paper**), p 6.
[3] Consultation Paper, p 6.

However, for the reasons that follow, Zepto does not agree with Treasury's proposed new definition for a "payment system", namely, *"an arrangement or series of arrangements for enabling or facilitating payment or transfer of value, or a class of payments or transfer of value, and includes any instruments or procedures that relate to the arrangement or series of arrangements."*[4]

Our concern with the proposed definition is twofold and relates to the use of the word "arrangement" to define a payment system.

First, the use of the term "arrangement" is more apt in describing payment products or services as opposed to payment systems. A plain English interpretation of the word "arrangement" infers some type of relationship or coordination between two or more persons, and payment products and services necessarily involve a relationship or agreement between two or more persons for the provision of the product or service.[5] Payment systems, on the other hand, can be standalone pieces of infrastructure such as, for example, the New Payments Platform (**NPP**), which do not, in and of themselves, embody any kind of arrangement between persons.

This position is currently reflected in the *Corporations Act 2001* (Cth) (**Corporations Act**) which uses the term "arrangement" to define non-cash payment products. Specifically:

- a "financial **product**" [emphasis added] is defined to include *"a **facility** through which, or through the acquisition of which, a person… (c) makes non-cash payments"* [emphasis added];[6] and

- a "facility" is defined to include *"an **arrangement** or a term of an **arrangement**"* [emphasis added].[7]

Here, the word "arrangement" is being used to describe a type of payment product, as opposed to a payment system. By adopting the word "arrangement" to define "payment system", Treasury's proposed definition could be construed to capture financial products and services by reference to how the term "arrangement" is used in the Corporations Act. Given that the PSR Act regulates payment systems, and does not regulate payment products or services, it is imperative that the definition of "payment system" under the PSR Act be free from any such ambiguity.

Secondly, the use of the term "arrangement" in the context of defining non-cash payment products has become increasingly fraught as payment flows have become increasingly intermediated with multiple parties and varying roles and responsibilities. In our experience, significant resources are dedicated to resolving legal questions with our merchants regarding what constitutes an "arrangement", and what persons are party to any such arrangement, for

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[4] Consultation Paper, Box 1.1, p 7.
[5] The Cambridge dictionary defines an "arrangement" as *"an agreement between two people or groups about how something happens or will happen*", source: https://dictionary.cambridge.org/dictionary/english/arrangement.
[6] *Corporations Act 2001* (Cth), s 763A(1)(a).
[7] *Corporations Act 2001* (Cth), s 762C(b).

the purposes of determining whether the merchant is itself providing its customers with a non-cash payment facility which requires an Australian Financial Services Licence.

To avoid a similar fate in respect of the definition of what constitutes a "payment system", which would extend to ambiguity regarding who the participants in the payment system are, we recommend avoiding the word "arrangement" altogether.

We recommend the following amendments to Treasury's proposed definition of "payment system" (additions in bold, deletions in strikethrough):[8]

> ~~*an arrangement or series of arrangements*~~ ***a system*** *for enabling or facilitating* ~~*payment or*~~ ***the*** *transfer of* ***monetary*** *value*~~*, or a class of payments or transfer of value*~~*, and includes any instruments or procedures that relate to the* ~~*arrangement or series of arrangements*~~ ***system***

In addition to avoiding the risks identified above in relation using the word "arrangement", this definition is simpler without compromising on accuracy or specificity. Simplicity is critical to delivering a clear and unambiguous regulatory framework and will allow companies like ours to dedicate precious resources to innovation rather than navigating a complex regulatory regime. In this way, we believe our proposed definition is consistent with the fourth key principle of the Government's Strategic Plan, "Efficiency". The Strategic Plan describes this principle as follows:[9]

> *"An efficient system is one in which competitive pressures drive down payment costs. Efficiency in payments systems is productivity enhancing as it empowers industry to allocating* [sic] *resources effectively to innovate, and respond to new developments and changing consumer preferences."*

In formulating our proposed definition of "payment system", we had reference to equivalent definitions in foreign jurisdictions, which we have set out in a table at **Annexure A** to this submission.

2. Does the proposed approach to updating the definition of 'participant' appropriately capture the full range of entities that currently and may in future play a role in the payments system?

A "participant" in a payment system is currently defined in s 7 of the PSR Act as follows:[10]

> *"(a) a constitutional corporation that is a participant in the system in accordance with the rules governing the operation of the system; or*
> *(b) a constitutional corporation that is an administrator of the system."*

[8] Our proposed insertion of the word "monetary" is explained in response to the third consultation question.
[9] *'A Strategic Plan for Australia's Payments System'*, Australian Government, June 2023, p 10.
[10] *Payment Systems (Regulation) Act 1998* (Cth), s 7.

We agree that the current definition may be interpreted to be limited to entities that are formal members of a designated payment system which does not capture entities providing services in the payment chain which do not require formal membership to the payment system. Given the significantly increased intermediation of payment services, the prevalence of ancillary *payment* services which do not require formal membership to a payment system is now prevalent, and those services ought to be caught by the regulatory perimeter of the PSR Act. For example, a third party payment processor (**TPP**) can offer its clients PayTo services without being a formal member of the NPP by engaging Zepto which can process the transactions through its direct connection to the NPP as a Connected Institution.

Treasury's proposed new definition, extracted below, accurately reflects Treasury's intention to capture *"all entities that have a role in respect of facilitating or enabling payments that are made through a payment system"*.[11]

> *"A "participant" in a payment system means:*
>
> *(a) a constitutional corporation that operates, participates in or administers a payment system; or*
> *(b) a constitutional corporation that provides services for the purposes of enabling or facilitating a transfer of value using a payment system."*[12]

We acknowledge that the definition is intended to capture services beyond the definition of "payment services" proposed to be inserted into the Corporations Act.[13] We disagree with this approach on the basis that the definition risks capturing services that are ancillary to payment services but which cannot reasonably be considered to constitute participation in a payment system. To this end, Zepto agrees with Treasury's view that the definition should not *"capture typical merchants that sell goods and services, unless they are a member of a payment system or provide **payment services in their own right**"* [emphasis added].[14]

The risk is that by extending the regulatory perimeter of the PSR Act to ancillary (non-payment) services which cannot reasonably be considered to constitute participation in a payment system, businesses that offer those services may be forced to comply with access regimes and standards in respect of payment systems which they do not interact with, either directly or indirectly. Put simply, if someone does not provide payment services, they should not be subject to payments regulation.

The objective of the PSR Act is to regulate payment systems through the imposition of access regimes and standards on the participants in those systems.[15] The list of payment functions proposed to be included in the definition of "payment services" is broad and intended to capture the field of payment services (including many that do not require formal membership to a payment system).[16] In our view, this will capture all services that could

[11] Consultation Paper, p 8.
[12] Consultation Paper, p 8.
[13] *'Payments System Modernisation (Licensing: Defining Payment Functions): Consultation paper'*, Treasury, June 2023, p 8.
[14] Consultation Paper, p 8.
[15] *Payment Systems (Regulation) Act 1998* (Cth), s 6.
[16] *'Payments System Modernisation (Licensing: Defining Payment Functions): Consultation paper'*, Treasury, June 2023, pp 9-11.

possibly be considered to constitute participation in a payment system for the purposes of the PSR Act. For this reason, we consider that the definition of "participant" should directly refer to the definition of "payment services" in the Corporations Act, as follows:

> *A "participant" in a payment system means:*
>
> (c) *a constitutional corporation that operates, participates in or administers a payment system; or*
> (d) *a constitutional corporation that provides **payment** services **(as defined in s X of the Corporations Act 2001 (Cth))** for the purposes of enabling or facilitating a transfer of **monetary** value using a payment system.*[17]

Further, it is in the interests of consistency and clarity for the regulatory perimeter of the PSR Act to reflect the regulatory perimeter of the Corporations Act with respect to payments regulation. This will have the added benefit of ensuring that any future amendments to the definition of "payment services" in the Corporations Act automatically expands or restricts (as the case may be) the regulatory perimeter of the PSR Act.

In considering the alternative definition of "payment system", we had reference to equivalent definitions in foreign jurisdictions, which we have set out in a table at **Annexure B**.

3. Should other considerations be taken into account in updating the definitions?

We agree with the intention behind Treasury's proposal to update the definitions of "payment system" and "participant" to refer to the transfer of "value" rather than the transfer of "money". This will capture new and future payments made in non-traditional forms of money, such as digital assets.

However, given the broad plain English meaning of the word "value", consideration should be given to ensure that the new definitions do not unintentionally capture systems for the transfer of non-monetary value, such as real property. We consider that there are four potential ways to deal with this issue, which we set out below in order of our preference.

1. Insert the word "monetary" before the word "value" in each of the definitions of "payment system" and "participant" in the PSR Act. This will capture new and future forms of payments, including payments in digital assets, without capturing non-monetary transfers such as transfers of real property. The use of the term "monetary value" is not without precedent, it being used in both the United Kingdom's and New Zealand's payments regulatory framework.[18]

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[17] The insertion of the word "monetary" is explained in response to the third consultation question.
[18] A "payment" is defined in New Zealand as a *"transfer of **monetary value**"* [emphasis added] (see *Retail Payment System Act 2022* (New Zealand), s. 7) and "money remittance" is defined in the United Kingdom to be a *"service for the transmission of money (or any representation of **monetary value**), without any payment accounts being created…"* [emphasis added] (see *The Payment Services Regulations 2017* (UK), s 2).

2. Include an additional sub-section in section 7 of the PSR Act to clarify that the definitions of "payment system" and "participant" do not capture transfers of real property.

3. Further amend the definitions of "payment system" and "participant" to expressly exclude transfers of real property.

4. Define "value" in the PSR Act to expressly exclude transfers of real property. We note that defining "value" is not straightforward and this approach carries the real risk of opening a pandora's box of legal arguments regarding what does and does not constitute a "payment system" and a "participant" in a payment system.

4. Is the proposed 'national interest' test appropriate for achieving the policy outlined in this paper?
5. Is the proposed approach to delineating the Treasurer's national interest powers clear and effective?
6. Are there views or considerations on whether the Government should include a list of relevant considerations for the Treasurer to have regard to in the legislation, explanatory materials, or a separate policy document?
7. Are there other considerations that have not been listed that should generally be considered in relation to 'national interest'?
8. Is the scope of the proposed Ministerial designation power effective and appropriate?

We strongly support, in line with recommendations 2 and 4 of the Government's Payment System Review, Treasury being given an enhanced leadership role in the payments ecosystem and a payments policy function.[19] We believe the enhanced leadership role is needed to, as highlighted by Mr Farrell, deliver broader representation in the payments industry and to ensure that all relevant stakeholders affected by payments issues can provide their view on issues that affect them.[20] As a non-regulator and elected representative of the Australian people, the Treasurer is well placed to facilitate this representation.

To this end, in addition to the proposed new powers for Treasury set out in the Consultation Paper (which we comment on below), we believe that Treasury should adopt Mr Farrell's recommendation for a payments industry convenor to be appointed by (or established within) Treasury to, among other things, *"collaborate widely with the private sector and bring together different industry representatives to develop advice and provide clarity on key emerging issues in the payments ecosystem to the government."*[21] Opening up a channel like this to industry and other stakeholders will be a powerful tool for the following reasons:

[19] *'Payments system review: From system to ecosystem'*, Australian Government, June 2021, pp xi-xii.
[20] *'Payments system review: From system to ecosystem'*, Australian Government, June 2021, p 52.
[21] *'Payments system review: From system to ecosystem'*, Australian Government, June 2021, pp 52-53.

1. conscious that the Government's Strategic Plan for Payments represents generational reform to payments regulation in Australia, it will provide a formal avenue for Treasury to hear from industry participants regarding the efficacy of the reforms including any teething issues and unintended consequences as the reforms are rolled out;

2. given the proposed enhanced role for Treasury in payments regulation, it provides an avenue for Treasury to take advice from industry on the exercise of its proposed new powers in specific circumstances on an ongoing basis; and

3. more generally, it enhances Treasury's ability to play a leadership and coordination role in the payments industry by providing an avenue for it to hear from and build relationships with all stakeholders in the payments industry, as opposed to limiting that coordination role to coordinating the relevant regulators. This benefit was described by Mr Farrell as follows:[22]

> *"The payments industry convenor also provides an avenue for the government to form and sustain close links with industry as key partners in the development and implementation of policy initiatives. Through the convenor, the government could also draw on relevant stakeholders from the private sector, which can include industry groups, banks, business representatives, consumer groups, academics among others."*

The Treasurer's proposed designation power

We agree that designation powers are a more effective and flexible mechanism for the regulation of payments systems, rather than a prescriptive approach of categorising payment systems from the outset, for the reasons set out by His Majesty's Treasury in the context of payments regulatory reform in the United Kingdom, namely:[23]

1. it will allow Treasury to focus its attention where it is required, without having to designate less relevant systems from the outset; and

2. it provides the flexibility to bring emerging payments systems and participants within the scope of the regulatory framework, as and when required.

We support the Treasurer having a broad "catch all" power to designate payment systems when it is in the "national interest" to do so, for two reasons. First and foremost, without any powers to actually influence payment policy, the Treasurer cannot possibly take an active leadership role in the payments ecosystem. Secondly, the RBA's designation power can only be exercised when it is in the "public interest" (as defined under the PSR Act) to do so, which is limited to circumstances of financial safety, efficiency, competitiveness and financial system risk.[24]

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[22] *'Payments system review: From system to ecosystem'*, Australian Government, June 2021, p 53.
[23] See *'Opening up UK payments: response to consultation'*, October 2013, p 10, [2.43]: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249085/PU1563_Opening_up_UK_payments_Government_response.pdf.
[24] *Payment Systems (Regulation) Act 1998* (Cth), s 8.

However, by having two entities with designation powers, there is a risk that regulatory inertia sets in with neither party exercising the power. For this reason, it is imperative that the regulatory framework makes clear:

1. which entity, the RBA or the Treasurer, is primarily responsible for designation of payment systems; and

2. that neither the RBA's or the Treasurer's designation powers are intended to be reserve powers (as the RBA's current designation powers under the PSR Act were intended to be),[25] in order to make clear that both the RBA and the Treasurer are expected to play an active role in payments system regulation moving forward.

We acknowledge and agree that the delineation between "national interest" and "public interest" is not entirely clear. For example, it is difficult to imagine circumstances in which it will be in the "national interest" to designate a payment system but not in the "public interest" to do so, particularly given that, in defining "public interest", the PSR Act stipulates that the RBA can have regard to *"other matters that it considers relevant"* in exercising its power.[26]

However, for the following reasons, we do not consider this to be a significant problem:

1. the scope of the designation powers need not be perfectly distinct, on the basis that:

    a. in practice, the Treasurer may receive advice from a broader range of stakeholders (both from within and outside of Government) than the RBA and therefore the Treasurer may on occasions be better placed to exercise the designation power despite the relevant circumstances also enlivening the RBA's designation power; and

    b. the Treasurer and the RBA could develop a collaborative approach to designation of payment systems which would allay concerns regarding the overlap of powers (see further below under the heading "Allow the RBA and Treasurer to take advice from each other prior to designation"); and

    c. the fact that there will be overlap between the Treasurer's and the RBA's designation powers can be managed provided any differences of opinion between the Treasurer and the RBA regarding designation can be resolved (see further our response to consultation question 15 below);

2. the broader nature of the Treasurer's designation power can be made clear by including in the PSR Act a non-exhaustive list of considerations that the Treasurer might have regard to in exercising its designation power, which will help set the power apart from the RBA's designation power; and

[25] *'Payments system review: From system to ecosystem'*, Australian Government, June 2021, p 24.
[26] *Payment Systems (Regulation) Act 1998* (Cth), s 8.

3. in practice, given its mandate and expertise, the RBA will likely only designate payment systems for reasons of financial safety, efficiency, competitiveness and financial system risk, despite the definition of "public interest" allowing the RBA to consider *"other matters that it considers are relevant"*.

Regarding the second of the above points, in addition to the potential considerations listed on page 12 of the Consultation Paper, any such list of considerations included in the PSR Act (or in any explanatory materials or separate policy document) should include the following considerations:

1. competition in the Australian payments industry; and

2. economic benefits for Australian individuals and businesses.

Broaden the RBA's designation power

We consider that the RBA should take a more active role in payments systems regulation, and this appears to be reflected in the proposed reforms to the PSR Act. To ensure this, the RBA's designation power should not be considered to be a "reserve power" (as mentioned above was the intention for the RBA's current designation power under the PSR Act) and consideration should be given to broadening the RBA's designation power as follows.

The boundaries of the RBA's designation power are set by the definition of "public interest" in s 8 of the PSR Act. That definition reflects two of three of the duties of the Payment System Board set out in s 10B(3) of the *Reserve Bank of Australia Act 1959* (Cth) (**RBA Act**) (extracted below), specifically the duties set out in s 10B(3)(b) and (c) but not the duty set out in s 10B(3)(a), the latter of which is the duty to ensure the *"Bank's payments system policy is directed to the greatest advantage of the people of Australia"*. The RBA's designation power under the PSR Act could be broadened by updating the definition of "public interest" to reflect this additional duty, as follows:

> *In determining, for the purposes of this Act, if particular action is or would be in, or contrary to, the public interest, the Reserve Bank is to have regard to the desirability of payment systems:*
>
> ***(a) being (in its opinion) directed to the greatest advantage of the people of Australia;***
>
> *~~(a)~~ **(b)** being (in its opinion):*
>
> *(i) financially safe for use by participants; and*
>
> *(ii) efficient; and*
>
> *(iii) competitive; and*
>
> *~~(b)~~ **(c)** not (in its opinion) materially causing or contributing to increased risk to the **stability of the** financial system.*

> *The Reserve Bank may have regard to other matters that it considers are relevant, but is not required to do so*

The Payment System Board's duties under s 10B(3) of the RBA Act are as follows:[27]

> *(3) It is the duty of the Payments System Board to ensure, within the limits of its powers, that:*
>
> *(a) the Bank's payments system policy is directed to the greatest advantage of the people of Australia; and*
>
> *(b) the powers of the Bank under the Payment Systems (Regulation) Act 1998 and the Payment Systems and Netting Act 1998 are exercised in a way that, in the Board's opinion, will best contribute to:*
>
> *(i) controlling risk in the financial system; and*
>
> *(ii) promoting the efficiency of the payments system; and*
>
> *(iii) promoting competition in the market for payment services, consistent with the overall stability of the financial system; and*
>
> *(c) the powers and functions of the Bank under Part 7.3 of the Corporations Act 2001 are exercised in a way that, in the Board's opinion, will best contribute to the overall stability of the financial system.*

<u>Allow the RBA and Treasurer to take advice from each other prior to designation</u>

In order to build a collaborative approach to the designation of payment systems between the Treasurer and the RBA, the PSR Act reforms could include provisions allowing the RBA and the Treasurer to take advice from each other prior to exercising their powers to designate payment systems. A similar type of provision is included in s 827C of the Corporations Act which allows the RBA to take advice from the Treasurer in respect of clearing and settlement facilities. This would have the following potential benefits:

1. it would encourage and formally allow the Treasurer and the RBA to work together in designating payment systems; and

2. should, either in practice or because the reforms specify, either the RBA or the Treasurer become the primary designator of payment systems, it provides an avenue for the other entity to provide a lesser but still potentially valuable contribution to payment systems regulation, conscious that the RBA and the Treasurer will have different perspectives and take advice from a different range of stakeholders (reflecting their different mandates and functions).

[27] *Reserve Bank of Australia Act 1959* (Cth), s 10B(3).

Resourcing

As a practical matter, given the proposed new and expanded roles for the Treasurer and the RBA respectively, it is critical that they receive increased resources for their payment functions, utilising, where possible, the payments regulation expertise across Government departments and agencies. This will be critical to setting both Treasury and the RBA up for success in their new roles, both in the initial stages as they build out their payment functions and on an ongoing basis to carry out their roles effectively.

9. Is the Treasurer's proposed ability to allocate responsibility to regulators (within their mandate) other than the RBA appropriate?

The Consultation Paper notes that this proposed power is intended to be used by the Treasurer to *"allocate responsibility for addressing a **particular policy issue** concerning specific designated systems to the best-placed regulator"* [emphasis added].[28] Provided the power is limited to allocating responsibility to address "particular policy issues", we support this power being vested in the Treasurer. It is another tool which allows the Treasurer to provide an enhanced leadership role in the payments ecosystem and may be useful in resolving any regulatory inertia or other undesirable policy positions adopted by any of the payment regulators.

However, we strongly caution against this power or any of the powers proposed to be vested in the Treasurer being used as an alternative to enshrining in legislation clearly defined and delineated roles and responsibilities for each of the payment regulators. There should be no need for the Treasurer to allocate or clarify regulatory responsibilities between payment regulators more generally as these should be enshrined in legislation. In a co-regulatory model, this is critical for the following two reasons:

1. it will allow the regulators to fulfil their roles by arming them with clarity of purpose and avoiding any regulatory inertia which might emerge from overlapping roles and responsibilities; and

2. it will provide industry participants with the certainty of knowing which regulator they need to deal with in respect of different aspects of payments regulation.

We consider that the proposed power should extend to all Treasury portfolio regulators involved in payments regulation, including the RBA.

10. Is the scope of the Treasurer's power to direct Treasury portfolio regulators (ACCC, ASIC, RBA) to implement a policy position appropriate?

We support this power being vested in the Treasurer. We consider that it should include a general power to direct a regulator to implement a general policy position (for example, to

[28] Consultation Paper, p 11.

set access regimes in respect of payment systems), and a specific power to direct a regulator to exercise their powers under the PSR Act in a certain way (for example, to set a specific access regime in respect of a specific payment system). We agree that the scope of the directions power should be limited to PSR Act powers.

The specific directions power might be particularly useful if a regulatory stalemate occurs whereby the Treasurer designates a payment system under the PSR Act but the RBA, for whatever reason, does not exercise its powers to set an access regime or standards in respect of that payment system. The Treasurer could then step in and direct the RBA to either set an access regime and/or standards in respect of the payment system, leaving the specific details up to the RBA (using the general directions power), or direct the RBA to set a particular type of access regime or particular standards in respect of the payment system (using the specific directions power).

We agree that the general directions power could be modelled on sections 12 of the *Australian Securities and Investments Commission Act 2001* (Cth) and *Australian Prudential Regulation Authority Act 1998* (Cth) (**APRA Act**), which give the Treasurer the power to direct ASIC and APRA on the *"policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers"* under the relevant legislation.

The specific directions power could be couched in terms which give the Treasurer the power to direct the regulators to exercise their powers under the PSR Act in a specific way.

11. Is the proposed consultation approach sufficient for both Ministerial designations and directions?

We support appropriate consultation periods for the Treasurer to consider the views of any relevant stakeholders prior to exercising its power to make directions to regulators. Further, we agree that there should be no consultation period for the Treasurer to exercise its power to designate payment systems (on the basis that designation does not itself impose any regulatory requirements on any payment system or participants).

In the interests of regulatory transparency and clarity, the length of the consultation periods should be enshrined in legislation and should not be unduly burdensome. Further, consideration ought to be given to any necessary exceptions to the Treasurer's requirement to consult, for example, if the Treasurer considers the direction needs to be made imminently in the interests of Australia's national security.

12. Would it be appropriate to enable the RBA to have greater information disclosure powers? What constraints or conditions should be applied as part of such a power?

Yes. If the RBA is to play a more active role in payments regulation, it needs the usual regulatory toolkit afforded to other financial system regulators to play that role effectively. The ability to publicise information it receives from industry participants may be used by the RBA to promote transparency and competition (such as by publishing requirements for

access to a particular payment system) or as a low level enforcement tool, for example, by publicising the details of non-compliance by a particular participant in order to deter non-compliance from other participants in the industry.

This power should be constrained in the same way APRA's equivalent power under s 57 of the APRA Act is, that is, the RBA should not be able to disclose confidential information to the public and should provide affected parties with an opportunity to make representations to the RBA as to the confidentiality of the information before publicising it.

13. Is there merit in providing the RBA with the power to accept enforceable undertakings on a voluntary basis?

Yes. Again, the RBA should be given the usual regulatory toolkit to play its role effectively. Generally speaking, Court-enforceable undertakings have been a useful regulatory tool in the financial services industry to ensure regulatory compliance without protracted and costly enforcement actions and/or Court proceedings. This softer enforcement tool can be utilised by the RBA to deal with lesser breaches of the PSR Act such as minor non-compliance with access regimes or standards, without having to immediately resort to penalties which may, depending on the beach, be too heavy handed.

14. Would there be benefits in introducing a more graduated penalty regime into the PSRA?

Yes. The current penalty regime under the PSR Act is not fit for purpose which is reflected in the fact that, since the introduction of the Act in 1998, it has never been used. We consider that the key problems with the current penalty regime are as follows:

1. it only allows for criminal penalties with the maximum penalty for any criminal offence being $68,750, which renders the penalty regime unable to deter both minor non-egregious offences (which cannot fairly be considered to constitute criminal conduct) and offences committed by large organisations (for which $68,750 is not a large sum of money); and

2. the only offences under the PSR Act are for non-compliance with a direction by the RBA regarding the failure by a participant to comply with an access regime or a standard. The participant's failure itself does not constitute an offence.

The RBA needs a penalty regime which allows it to penalise both minor and serious offences under the Act. We therefore agree that a graduated civil and criminal penalty regime should be introduced into the PSR Act. We also consider that s 21 of the PSR Act should be amended to make it an offence for a participant to commit *serious* breaches of any access regime or standards set by the RBA under the PSR Act (conscious that there may be very minor breaches of access regimes or standards which should not constitute an offence of the PSR Act), in addition to it being an offence to fail to comply with RBA directions.

15. Given the arrangements in place and the proposed ministerial designation power is there an ongoing role for section 11 of the RBA Act or should it be removed? In what circumstances would section 11 of the RBA Act be the most appropriate mechanism to resolve differences of opinion between the Government and the RBA on payments system policy?

We believe there is an ongoing role for s 11 of the RBA Act (as it relates to payments policy) on the basis that it provides an avenue for the resolution of differences between the RBA and the Government across the entire gamut of payments policy. To the extent that any of the proposed reforms to the PSR Act nullify the need for a formal avenue for the resolution of differences between the Government and the RBA (which we contest below), this benefit will be limited to differences of opinion regarding matters relevant to the PSR Act, which is limited to the regulation of payment systems.

Given that the Treasurer's proposed designation power is broader and overlaps with the RBA's designation power, and the Treasurer will also have the power to direct the RBA to do certain things, we consider that a formal avenue for the resolution of differences is more needed rather than less needed following the reforms.

In the interests of simplicity, we consider that any differences between the Government and the RBA regarding payment system policy can be resolved pursuant to s 11 of the RBA Act, rather than introducing into the PSR Act a new provision for the resolution of differences regarding payment systems specifically.

16. Are there any other changes to the PSRA that the Government should consider?

We make one final observation. Noting that Mr Farrell recommended that common access requirements for payment systems form part of the payments licence itself,[29] consideration needs to be given to how any such common access requirements enshrined in legislation would interact with the RBA's power to set access regimes under the PSR Act. For example, if the licensing framework enshrined in legislation the common access requirements for the NPP, how would this affect the RBA's power to designate the NPP as a payment system and set an access regime in respect of the NPP under the PSR Act?

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[29] *'Payments system review: From system to ecosystem'*, Australian Government, June 2021, pp 68-70.

Annexure A - definitions of "payment system" in foreign jurisdictions

#	Jurisdiction	Definition
1.	Singapore	"payment system" means a funds transfer system or other system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system.[30]
2.	United Kingdom	"payment system" means a system which is operated by one or more persons in the course of business for the purpose of enabling persons to make transfers of funds, and includes a system which is designed to facilitate the transfer of funds using another payment system.[31] "payment system" means a funds transfer system with formal and standardised arrangements and common rules for processing, clearing and settlement of payment transactions.[32]
3.	Canada	"payment system" means a system or arrangement for the exchange of messages effecting, ordering, enabling or facilitating the making of payments or transfers of value.[33]
4.	New Zealand	"retail payment" means a payment by a consumer to a merchant for the supply of goods and services.[34] "retail payment network" means the participants, arrangements, contracts, and rules that facilitate a class of retail payment.[35]
5.	Hong Kong	"payment system" means: a clearing and settlement system; or a retail payment system.[36] "retail payment system" means:[37] ● a system or arrangement for the transfer, clearing or settlement of payment obligations relating to retail activities (whether the activities take place in Hong Kong or elsewhere), principally by individuals, that involve purchases or payments; and ● includes related instruments and procedures.

[30] *Payment Services Act 2019 (No. 2 of 2019)* (Singapore), s 2.
[31] *Financial Services (Banking Reform) Act 2013* (UK), s 41(1).
[32] *The Electronic Money Regulations 2011* (UK), s 2.
[33] *Canadian Payments Act (R.S.C., 1985, c. C-21)* (Canada), s 36.
[34] *Retail Payment System Act 2022* (New Zealand), s 7.
[35] *Retail Payment System Act 2022* (New Zealand), s 7.
[36] *Cap. 584 Payment Systems and Stored Value Facilities Ordinance* (Hong Kong), s 2.
[37] *Cap. 584 Payment Systems and Stored Value Facilities Ordinance* (Hong Kong), s 2.

Annexure B - definitions of "participant" in a payment system in foreign jurisdictions

#	Jurisdiction	Definition
1.	Singapore	"Participant", in relation to a payment system, means any person that is recognised in the rules of the payment system, or is otherwise recognised by the operator or settlement institution of the payment system, as being eligible to settle payments through the payment system with other persons that are similarly recognised, or to process payments through the payment system.[38]
2.	United Kingdom	The following persons are "participants" in a payment system:[39] (a) the operator of the payment system; (b) any infrastructure provider; (c) any payment service provider. "Operator", in relation to a payment system, means any person with responsibility under the system for managing or operating it; and any reference to the operation of a payment system includes a reference to its management. "Infrastructure provider", in relation to a payment system, means any person who provides or controls any part of the infrastructure used for the purposes of operating the payment system. "Payment service provider", in relation to a payment system, means any person who provides services to persons who are not participants in the system for the purposes of enabling the transfer of funds using the payment system.
3.	Canada	"Participant" means a party to an arrangement in respect of a payment system.[40]
4.	New Zealand	"Participant", in relation to a retail payment network, means a person that is a network operator or any other service provider.[41] "Network operator or operator", in relation to a retail payment network, means any person that is or does 1 or more of the following:[42]

[38] *Payment Services Act 2019 (No. 2 of 2019)* (Singapore), s 2.
[39] *Financial Services (Banking Reform) Act 2013* (UK), s 42(2)-(5).
[40] *Canadian Payments Act (R.S.C., 1985, c. C-21)* (Canada), s 36.
[41] *Retail Payment System Act 2022* (New Zealand), s 7.
[42] *Retail Payment System Act 2022* (New Zealand), s 7.

		(a) is wholly or partly responsible to the participants (or any of them) for the network rules: (b) operates or manages the network or the core infrastructure of the network. "Service provider", in relation to a retail payment network, means any person that provides or facilitates the provision of payment services in the network (for example, a payment or an infrastructure service provider), but does not include a merchant.[43]
5.	Hong Kong	"Participant", in relation to a payment system, means a person who for the time being is a party to the arrangement by which the system is established.[44]

[43] *Retail Payment System Act 2022* (New Zealand), s 7.
[44] *Cap. 584 Payment Systems and Stored Value Facilities Ordinance* (Hong Kong), s 2.