

8 February 2023

Director—Payments Strategy & Policy Unit  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [paymentsconsultation@treasury.gov.au](mailto:paymentsconsultation@treasury.gov.au)

Dear Sir/Madam

**A Strategic Plan for the Payments System—Consultation Paper**

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) has prepared this submission in response to the Consultation Paper dated December 2022 issued by Treasury and titled “A Strategic Plan for the Payments System” (the **Consultation Paper**). The Committee thanks Treasury for this opportunity to respond to the Consultation Paper and for agreeing to a short extension of time in which to provide this submission.
2. The Committee is supportive of a review of the regulatory framework for the payments system, and considers that there are a number of important opportunities to increase efficiency and boost competitiveness while facilitating the development of new technologies.
3. The Committee hopes that the Strategic Plan will build on the work completed in recent reviews such as:
  - (a) the Review of the Australian Payments System, chaired by Scott Farrell, which commenced in October 2020 and for which the Final Report was released in August 2021;
  - (b) the Review of Retail Payments Regulation by the Reserve Bank of Australia (**RBA**), which commenced in November 2019 and for which a Conclusions Paper was published in October 2021;
  - (c) the Productivity Commission’s public inquiry into Competition in the Australian Financial System, which commenced in July 2017 and for which a final report was delivered in August 2018; and
  - (d) Treasury’s Black Economy Taskforce, which was established in December 2016 and delivered a Final Report in October 2017.

4. The Committee's response follows the list of questions found in Attachment A at page 15 of the Consultation Paper, as set out below.

## Key Principles

*What are your views on the proposed key principles? Are there other principles that should be included? Please provide an explanation.*

5. The Committee broadly supports the key principles for the review as specified in Part 1 of the Consultation Paper.
6. In particular, the Committee agrees that the review should focus on access to payment networks for service providers and on removing any unnecessary restrictions affecting that access. For example, the review could examine the extent to which it might be feasible and appropriate to apply accreditation by a global card or other payments scheme (perhaps in another jurisdiction) as evidence of the suitability of a prospective service provider's technology solutions, from a security perspective, for use in a payment system in Australia.
7. The Committee submits that there are a number of additional key principles which Treasury should consider, namely:
  - (a) controls on financial crime—which relates to the streamlining of the obligations that apply to the participants in the payments system under the anti-money laundering laws;
  - (b) competition—which builds on the principle of Efficiency which has already been identified; and
  - (c) consumer interests—which builds on the principle of Trustworthiness which has already been identified.
8. Each respective proposed additional key principle is discussed in more detail below.

### *Controls on financial crime*

9. Depending upon its precise character, the provision of a payment service may be a designated service for the purposes of Table 1 in section 6(2) of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**), with the result that a significant ongoing compliance burden is imposed on the service provider to both establish and operate the payment system. These requirements are over and above the requirements of the Australian financial services licensing regime, and include enrolment or, in some cases, registration with the Australian Transaction Reports and Analysis Centre (**AUSTRAC**). The Committee is of the view that it would be beneficial to undertake a cost-benefit analysis from a regulatory and law enforcement perspective.

10. In particular, much of the innovation in payment systems involves technological solutions to offer additional service functionality for payments which initiate and terminate in the traditional regulated banking system. The Committee acknowledges that there is a tension between:
  - (a) efficiency and seeking to reduce or avoid the duplication of obligations regarding a particular customer, on the one hand; and
  - (b) the potential stronger probability that unlawful activity will be detected if there are multiple checks and balances in place with more than one entity potentially being held accountable for conducting due diligence on, and monitoring, customers, on the other.
11. Among other things, transaction monitoring and reporting to AUSTRAC by a reporting entity of certain types of transaction within payment systems is required by the AML/CTF Act for the purposes of detection and tracing of criminal activity including the laundering of the proceeds of crime.
12. The Committee considers that it would be helpful to:
  - (a) test the reach of the AML/CTF Act within the evolving payment systems framework;
  - (b) look at which parties are governed by the AML/CTF Act;
  - (c) examine which parties are best positioned to carry the main burdens of compliance; and
  - (d) identify any potential for reducing duplication of efforts by a chain of participants in a payment system.
13. This testing would occur in tandem with the review of:
  - (a) regulation of access to and participation in payment systems,
  - (b) the extent to which prudential risks need to be managed through a mechanism such as the *Payment Systems Regulation Act 1998* (Cth) (the **PSRA**); and
  - (c) the scope of conduct supervision that may be needed, as presently contemplated by the regulation of the offering of non-cash payment (**NCP**) facilities under Chapter 7 of the *Corporations Act 2001* (Cth) (the **Corporations Act**).
14. Depending upon the licensing regime that emerges from that review, the Committee considers that there could be some potential to remove the registration requirements under the AML/CTF Act which apply to certain designated remittance providers (which function almost as another de facto licensing regime) and simply to provide for enrolment of an entity with AUSTRAC where the entity is licensed by another regulator to provide payment services. This would introduce the possibility of a system where the AML/CTF Act applies to categories of licensee (rather than to activities carried on by a person as uniquely defined in the AML/CTF Act). This would bring Australia into alignment with the method used by many comparable jurisdictions for implementing principles established by the Financial Action Taskforce (**FATF**), which was formed at the Paris G-7 summit in 1989 (and which Australia joined in 1990).

15. The 2016 Report of the Statutory Review of the AML/CTF Act (the **Statutory Review**) recommended simplifying and streamlining transaction reporting requirements to minimise the regulatory burden and more closely align these requirements with FATF standards. The Statutory Review made a number of recommendations in this regard concerning the regulation of international funds transfers which directly relate to the payments system and, to the extent these have not been implemented, the Committee submits that the Strategic Plan should consider whether to action these recommendations.

#### *Competition*

16. The Committee submits that improving competition is an important principle to be highlighted in its own right, above and beyond its impact on improving efficiency. Treasury's comments in relation to least-cost routing are an example of an initiative which is intended to reduce small business transaction costs, but which also raises important competition policy issues. This was highlighted in the 2021 RBA Review of Retail Payments Regulation.
17. Greater transparency could also help balance prudential and competitive implications of requirements imposed by the Australian Prudential Regulation Authority (**APRA**) on authorised deposit-taking institutions (**ADIs**) in the establishment phase. Anecdotal experience is that APRA typically requires a new ADI, in the early phases of its existence, to hold 100% of its capital in the form of deposits with other ADIs. This means, in effect, that the institution must grow rapidly in order to stay solvent. In this respect, the Committee notes that a number of new entrants, such as Volt Bank and Xinja, have not been able to survive as ADIs, and the Committee submits that the review could investigate whether there are any common themes underpinning their lack of success. The Committee further submits that it may be timely to revisit the question whether the anticipated benefits of market forces and international competition in the Australian banking sector remain (or have ever been) realistic in the context of a broader strategic review.

#### *Consumer interests*

18. The Committee submits that the interests of the consumer may be said to extend beyond an expectation of Trustworthiness, as reflected in the Consultation Paper. As an example, the recent collapse of FTX has caused substantial losses for consumers and some members of the Committee believe this could be due perhaps in part to the blurring of the line between what is a payment method and what is a store of value (as well as a general lack of understanding of the arrangements under which relevant assets were held and the consequences of those arrangements). A further consumer issue is the responsible lending considerations raised by the buy-now-pay-later (**BNPL**) industry. The Committee notes that Treasury is considering submissions received in response to the recent Options Paper on this topic, however the relationship between BNPL and payment systems could also be explored.
19. In connection with these key principles, the Committee considers that it would also be helpful to explain how Treasury proposes to engage with regulators and other policymakers in the consultation process. In particular, what will be the respective roles (if any) to be performed in the consultation process by the Australian Securities and Investments Commission (**ASIC**), APRA, the RBA, the Payments System Board (**PSB**), the Australian Competition and Consumer Commission and AUSTRAC?

## Key priorities

*What are your views on the proposed key priorities? Do they provide enough certainty on what the key priorities are for the Government? Are there other matters that should be included? Please provide an explanation.*

20. The Committee supports the key priorities specified on page 10 of the Consultation Paper.
21. Having regard to the additional key principle that the Committee has proposed above with respect to controls on financial crime, the Committee submits that the alignment of regulation under the AML/CTF Act with the licensing regime that is eventually adopted should be a key priority.
22. The reach of such a regime is a foundational issue. Under the current law, the definition of “payment system” as a “funds transfer system that facilitates the circulation of money...” is difficult to apply because the threshold at which a particular product or facility becomes sufficiently widely used to be said to “facilitate the circulation of money” is a matter of judgment. The Committee submits that it would be beneficial to formalise the informal guidance currently circulating in this respect. Increased transparency would, in the Committee’s view, improve efficiency and consistency between broadly similar products.
23. The Committee submits that an early announcement saying whether or not there is likely to be any material change to the coverage of who is to be regulated in the future should also be a key priority.
24. At present a significant number of participants in the supply of payment services are expressly exempted from the PSRA and the Corporations Act. For example, *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211* provides relief for the following types of NCP products (as summarised in the following manner on the website of ASIC):
  - (a) travellers’ cheques, which are exempt from the requirement to provide confirmation of transaction under the Corporations Act;
  - (b) loyalty schemes and road toll facilities, which are not subject to the financial services laws in the Corporations Act;
  - (c) prepaid mobile arrangements and some single use gift vouchers, which are exempt from the licensing, conduct and disclosure obligations in the Corporations Act; and
  - (d) low value payment products, which are exempt from the licensing, conduct and disclosure obligations in the Corporations Act but are subject to alternative disclosure and dispute resolution obligations.

25. In addition to exemptions similar to those mentioned above, there are exemptions from the PSRA for an entity that would otherwise be regulated if:
  - (a) the aggregate stored value in all of the purchased payment facilities that it offers does not exceed \$10 million (the Committee notes that this amount has not been indexed since at least 2006); and
  - (b) the number of persons who can be paid using a particular type of purchased payment facility (**PPF**) does not exceed 50.
26. The Committee submits that it would be helpful for the scope of the review and reform work envisaged under the Strategic Plan to be clearly communicated to industry in sufficient detail to make it very clear, at an early stage, whether these exemptions are under review and are therefore likely to change.
27. The Committee submits that:
  - (a) if parties who rely on exemptions of this type rightly or wrongly perceive that this foundation on which their businesses operate may not continue and that they may be regulated in future, it is likely that they will spend a large amount of time, money and effort in presenting their positions to Treasury;
  - (b) if it is made clear that new regulation will not affect them, assuming this is Treasury's intention, then what might otherwise be wasted expenditure can be avoided; and
  - (c) it would therefore be helpful to have an early indication whether or not there will policy changes affecting any parties who are currently exempted.
28. Further, the Committee notes that one likely proposal appears to be an expansion of payments regulation to cover both "making payments" services and "receiving payments" services, and that only the former has been previously regulated in Australia. The Committee observes that entities that generally offer regulated payments services to unrelated entities usually hold an Australian financial services licence (**AFSL**) and may not be significantly affected if the other limb of the transaction were to be regulated in a similar way.
29. In relation to "receiving payments" services, Committee members are aware of a significant body of entities that receive payments from third parties on behalf of other entities which belong to the same group, where those payments relate to services which do not constitute financial services. The Committee does not believe that this type of activity is intended to be regulated as a payments business for which a licence ought to be required. If it is expected that there would be "intra-group" relief in respect of any services that are to be regulated for the first time, the Committee submits that an early announcement to that effect would also potentially allow for the avoidance of wasted expenditure.
30. The Committee submits that the focus on scams and fraud could be extended to recognise the role of education and financial literacy in reducing the incidence of scams. ASIC has in the past operated a successful program in this respect, which has in recent years been scaled back for budgetary reasons. This may be a simple measure which, in the Committee's view, could have a significant impact in the protection of consumers over time.

## Key initiatives

*What are your views on the proposed key supporting initiatives? Are there other initiatives that could be included in the Plan? Please provide an explanation.*

31. Again, the Committee broadly supports the key supporting initiatives as outlined on page 12 of the Consultation Paper.
32. The Committee has commented above on the need for payment systems to be accessible and notes that Treasury says that a key supporting initiative will be to “promote competition by facilitating proportionate, objective and transparent access to payment systems”. That initiative could and, in the Committee’s view, should be informed by checking how the access regimes for designated payment systems as established by the PSB have operated in practice (the RBA has of course exercised its power under the PSRA to designate payment systems).
33. Treasury has identified, as a key initiative, a need to maintain access to cash (see page 21 of the Consultation Paper). At the same time Treasury has pointed to the declining use of cash (see page 4 of the Consultation Paper). There appears to be a likelihood that, within a relatively short period, it could become nearly impossible for a person to make some essential payments with cash. Some members of the Committee have expressed concern that there are some individuals who might be excluded from being customers of an ADI because of that ADI’s application of the requirements of Rule 4.2.2, and the corresponding rules in Parts 4.2 to 4.8, and Chapter 15 of the *Anti-Money Laundering and Counter Terrorism Financing Rules 2007 (No. 1) (Cth)*. Therefore the Committee recommends that the review keep in mind the risk that, should cash largely disappear from circulation, some individuals may face challenges accessing funds and making payments.
34. The Committee will await the report of the outcome of the pilot for central bank digital currency (referred to on page 20 of the Consultation Paper) and will look with interest for any benefit or use case that will not be satisfied by real-time payments within conventional payment systems.
35. The Committee strongly agrees that, if there is to be effective competition in the payment systems, there would be benefits in establishing a tiered payments licensing framework for payment service providers. The Committee’s view is that this needs to be a main focus of Treasury’s review. This is discussed in greater detail below. The Consultation Paper does not specifically mention whether or not the proposed tiered payments licensing framework will permit payment licence applicants to apply solely through ASIC, without the need to go through multiple regulators. This was part of Recommendation 9 of the Final Report on the Review of the Australian Payments System and was accepted by the Government in December 2021. The Committee supports a licensing framework with a single application process co-ordinated by ASIC.

*Do you have any feedback on the proposed approach for any of the initiatives (as outlined in Attachment B)? Please provide an explanation.*

36. On page 20 of the Consultation Paper, in Attachment B, the following statement has been made:
- “With the fragmentation of the payments value chain and the disintermediation of payment services, the Government supports opening access to Australia’s payment systems to payment service providers that do not hold an ADI licence, provided these participants are subject to requirements that can mitigate operational, financial and systemic risks.”
37. The Committee wishes to pick up a particular example of the need for this initiative and how it may be approached in the review.
38. Under the PSRA, only an ADI or an “approved purchased payment facility provider” can hold the stored value under a PPF (as defined). A general exemption was granted by the RBA under section 25 of the PSRA on 10 March 2004 for corporations purchased payment facilities that are guaranteed by a Commonwealth, State or local government authority. There are only two approved PPF providers and APRA has dealt with applications for approval as PPF providers as though the application was for approval of a sub-species of ADI. It may be that the PSRA functions as a potential barrier to entry for a proposed provider of a PPF, and the Committee is of the view that Treasury should investigate this.
39. A critical policy reason for requiring that the holder of the stored value is an ADI (or equivalent) is to ensure that a customer for a PPF will have a claim against an ADI for funds paid over to and held by the customer with the provider of the PPF. Presumably the core policy behind this requirement is to ensure that a customer has a claim against a prudentially supervised entity. Committee members are aware that some PPF providers have created structures by which an ADI gives a guarantee to a trustee for customers, and APRA appears to allow this approach at least until the PPF provider crosses an (unpublished) aggregate asset threshold.
40. It may also be possible in theory for a PPF provider to comply with the PSRA by holding customers’ funds in a trust account with an ADI. In practice, from the perspective of compliance with the AML/CTF Act, the Committee expects that an ADI may be reluctant to offer such a trust account to a PPF provider because the ADI would be aware of the purpose of the account but would not have direct visibility as to the identity of, or transactions conducted by, a customer of the PPF provider. At a minimum, the Committee believes that the ADI would want to be satisfied that the PPF provider was regulated by the AML/CTF Act and that the PPF provider’s systems for compliance with the AML/CTF Act were effective.
41. Under the current regulatory regime, a PPF provider will also need to have an AFSL because it will be providing an NCP facility that is a financial service for the purposes of Chapter 7 of the Corporations Act. Generally speaking, an AFSL holder must have a client money account into which client funds are paid until they are used to acquire a financial product, but at the moment there are only limited circumstances where the client money provisions of the Corporations Act appear to apply to the provider of an NCP facility.



42. The Committee submits that this overlap of the PSRA and the Corporations Act is an important example of the potential for benefits and rationalisation, which a tiered approach to regulation in this area could offer. The Committee submits that, if a provider of a NCP facility was required to hold an AFSL, become subject to supervision by ASIC, and pay customers' moneys into a dedicated account with an ADI that is modelled on the client moneys provisions of the Corporations Act, there may be little added benefit in separate regulation of that provider as a PPF provider under the PSRA. Claims by customers should then always be in respect of funds held in a segregated client moneys account. If the ADI can establish that the provider is enrolled with AUSTRAC as a reporting entity in its own right, then the AML/CTF Act could be amended to exempt the ADI from certain responsibilities for AML/CTF compliance which it might otherwise have in relation to customers of the NCP facility provider.
43. After evaluating all of the relevant risks, the Committee submits that Treasury may decide that regulation of a provider of payment services under the Corporations Act (including a facility that would today be regulated as a PPF) may be sufficient until a very large (stipulated) asset threshold is reached.

*What are the key milestones for particular key initiatives that you would like to see included in the Plan? Are there any conflicts between milestones or pressure points that need to be taken into account in revising the roadmap?*

44. The Committee does not wish to comment on timing, except to say that it considers the consultation and review at this stage to be timely because of the rapid evolution of payment systems.

#### **Process for reviewing the Plan**

*What are your views on the proposed review process and engagement arrangements? Please provide an explanation.*

45. Having regard to the complexity of the subject matter, the Committee submits that a period of nine months may be too ambitious. There are likely to be many stakeholders and a large number of submissions to be reviewed. This a highly dynamic sector of Australia's economy, which means that that participants in this sector are constantly changing and evolving. The Committee believes that Treasury may need to actively scour the market to ensure that it is always engaging with all who may be affected by any regulatory proposals.

*Are there any other sections or topics that you would like to see added to the Plan? Please provide an explanation.*

46. At this stage the Committee does not wish to suggest any additions to the Plan.

47. If Treasury has any questions or would like to further discuss with 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

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

**Philip Argy**  
**Chairman**  
**Business Law Section**