RESERVE BANK OF AUSTRALIA

Reforms to the Payment Systems (Regulation) Act 1998

Submission to Consultation on Exposure Draft Legislation

November 2023

Executive Summary

The Reserve Bank of Australia ('the Bank') strongly supports reform of the *Payment Systems (Regulation) Act 1998* (PSRA) to modernise the regulatory architecture for payments in Australia. The Bank's views on the exposure draft of the legislation amending the PSRA are set out below.[1]

Definitions

A key objective of the revised definitions of 'payment system' and 'participant' is to ensure that all entities involved in the payments value chain can be appropriately regulated. However, the proposed definitions are not broad enough to achieve this policy objective. In particular, they may exclude:

- payment systems that do not themselves directly effect a transfer of funds, including arrangements that use other payment systems (such as buy-now-pay-later arrangements)
- intermediaries in the payment value chain that facilitate payments but do not operate, administer or directly participate in a payment system, or provide services to those entities that do. This could include payment facilitators, payment gateways, and pass-through digital wallets.

Special designated payment systems

The Bank welcomes the requirement that something more than a 'core public interest matter', which lies within the Bank's mandate, is required for the Minister to invoke the national interest power to designate a payment system. However, the Bank remains concerned that this formulation could give the Minister the ability to overrule a decision of the Bank, by invoking a peripheral or less material national interest consideration. This would undermine the policy independence of the Bank and generate regulatory uncertainty for industry.

The potential scope and content of Ministerial directions also raises some concerns for the Bank, and it remains unclear how a special regulator should exercise its functions and powers in response to a Ministerial direction. In particular:

- The Ministerial directions power should not extend to enforcement and specific implementation mechanisms, consistent with the policy proposal that Treasury consulted on. This would help to

1 For the exposure draft of the legislation, see: Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023: Amendments of the Payment Systems (Regulation) Act 1998.

preserve the operational independence of a special regulator, allowing it to leverage its technical expertise on relevant issues when developing regulatory rules and enforcing them.

- It is not clear what matters a nominated special regulator can or should consider when giving effect to a direction from a Minister. This lack of clarity could impede the ability of a special regulator to take the necessary regulatory action.

The Bank agrees that potential conflicts between 'normal' and 'special' actions under the PSRA need to be appropriately dealt with. However, it is not desirable for the elements of the Bank's 'normal' access regimes, standards and directions to simply 'cease to be in force' if inconsistent with actions taken by a nominated special regulator. It would be preferable instead for any special action to 'prevail' to the extent of any inconsistency with a 'normal' action. It should also be made clear that the Bank can vary a 'normal' access regime, standard or direction to address any inconsistency with a 'special' action.

The PSRA should set out appropriate statutory immunities and protections for relevant regulators including the Bank (and their staff and officials, such as members of the Payments System Board) when the regulator acts in accordance with a Ministerial direction. This is necessary to ensure that regulators can give effect to the directions as intended, and is consistent with numerous domestic and international precedents.

Other matters

The Bank also offers views on other matters, including consultation obligations, authorised use or disclosure of information, and the exclusion of designated payment systems as financial products.

1. Introduction

The Reserve Bank of Australia (the Bank) welcomes the modernisation of the regulatory architecture governing payments in Australia. The way Australians make payments has changed significantly since the existing regulatory frameworks were put in place, and it is important that regulation is able to adapt to new developments and risks as the payments system continues to evolve.

The Bank is the principal regulator of the Australian payments system, with the Bank's payments system policy determined by the Payments System Board (PSB). The payments system mandate, powers and responsibilities of the Bank and the Payments System Board are mainly set out in the *Payment Systems (Regulation) Act 1998* (PSRA).[2]

The PSB has a general duty to direct the Bank's payments system policy to the greatest advantage of the people of Australia. The PSB has a specific duty to ensure that the Bank exercises its powers in a way that best contributes to: controlling risk in the financial system; promoting the efficiency of the payments system; and promoting competition in the market for payment services, consistent with the overall stability of the financial system.

2 Other relevant pieces of legislation are the: *Reserve Bank Act 1959*; *Payment Systems and Netting Act 1998*; and Part 7.3 of the *Corporations Act 2001*.

The Bank strongly supports reform of the PSRA. In particular, the Bank supports:

1. the expansion of the regulatory perimeter of the PSRA, by updating existing definitions of a 'payment system' and 'participant', to ensure that all entities that play a role in facilitating or enabling payments, including new entrants, can be appropriately overseen and regulated.
2. reforms to ensure the Government can intervene to address emerging payment issues of national significance that lie beyond the remit of independent regulators.
3. other changes to the PSRA to ensure the regulatory architecture is appropriate and effective, such as enabling the Bank to accept court-enforceable undertakings from payment system participants.

The following comments relate to the exposure draft of the Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023: Amendments of the Payment Systems (Regulation) Act 1998 (the Bill). Unless otherwise indicated, section references are to proposed new or amended sections of the PSRA (not sections of the Bill).

2. Substantive issues for the Bank

2.1. Definitions

The Explanatory Materials to the Bill note that a key objective of the revised definitions is to ensure that 'all entities involved in the payments value chain, including entities with or without a direct relationship to a payment system, are captured', so that all entities that play a role in facilitating or enabling payments can be appropriately regulated.

However, there is a material risk that the proposed definitions of 'payment system' and 'participant' in the Bill will not achieve this policy objective. Given that the existing definitions of 'payment system' and 'participant' have been interpreted narrowly by the courts,[3] and that some entities intended to be captured by the revised definitions are likely to resist regulation, it is imperative that there are no ambiguities in the definitions.

2.1.1 Key intermediaries in the payments value chain

Before reviewing the proposed definitions, it may be helpful to describe some of the more prominent types of entities involved in the payments value chain:

- Payment facilitators sit between an acquirer and a merchant, using the services of the acquirer on a wholesale basis to provide card acceptance services to a merchant.
- Payment gateways provide the technology that allows merchants to accept electronic payments from customers online. They effectively act as a virtual card terminal for online merchants by facilitating the secure transfer of payment information from the customer to the acquirer.
- Digital pass-through wallets – such as Apple Pay, Google Pay or Samsung Pay – allow cardholders to make payments using a digital representation of their card on their mobile device.
- Buy-now-pay-later (BNPL) providers offer electronic instalment payment arrangements. They allow consumers to purchase goods and services by paying part of the purchase price at the time of the transaction and the remainder to the BNPL provider in a series of instalments (often on interest-

3 See *Visa International Service Association v Reserve Bank of Australia* [2003] FCA 977.

free terms). The customer receives their purchase immediately and the merchant is paid up front by the BNPL provider.

2.1.2 Definition of *funds*

The Bank is concerned that the proposed definition may exclude systems which develop in the future for the transfer of value using different technological foundations. Accordingly, the Bank recommends – at a minimum – replacing '*digital* units of value' with '*other* units of value' (as shown below). This amendment would ensure the inclusion of units of value which relate to money, but which are not money. It is aligned with the definition in section 36 of the *Canadian Payments Act 1985* which includes 'transfers of value' as well as the 'making of payments' in the definition of payment system. These transfers of value may (or may not) be transfers of digital currencies for the purposes of Australia's GST legislation.

The **Bank recommends the following change to the definition of 'funds'**:

> **funds** *includes, but is not limited to, the following:*
>
> *(a) money;*
>
> (b) ~~*digital*~~ *other units of value, including digital currency (within the meaning of the* A New Tax System (Goods and Services Tax) Act 1999*).*

2.1.3 Section 7 (definition of *payment system*)

The Bank is concerned that the proposed definition could be interpreted narrowly as excluding arrangements that do not themselves effect the transfer of funds, such as arrangements that use, or sit on top of, other payment systems.

For example, consider a BNPL arrangement, under which the BNPL provider orchestrates a payment from the customer to the merchant: as noted above, the BNPL provider immediately pays the merchant in full, while the customer pays the BNPL provider in instalments over time. The BNPL provider may pay the merchant directly from its bank account and the customer may pay the BNPL provider with their debit card. In the Bank's view this is still a system that facilitates payments – it just uses other payment systems to transfer funds. But it is at least possible to argue that since the actual transfers of funds occur via the Bulk Electronic Clearing System (for the account-to-account payment from the BNPL provider to the merchant) and the relevant debit card scheme (for the debit card payments from the customer to the BNPL provider), the BNPL provider is not part of a payment system.

Accordingly, the **Bank recommends the following amendments to the proposed definition of 'payment system'**. The specific rationale for each amendment is set out in Table 1.

> **payment system** *means an arrangement or series of arrangements under which, or pursuant to which:*
>
> *(a) payments or transfers of funds are made or are designed to be made; and/or*
>
> *(b) the transmission or exchange of messages for effecting, ordering, enabling or facilitating a payment or transfer of funds is enabled or facilitated,*
>
> *including:*
>
> *(c) an arrangement or series of arrangements that includes or involves the transfer of funds using another payment system; and*

~~(a)~~(d) ~~includes~~ *any instruments and procedures that relate to the relevant~~at~~ arrangement or series of arrangements*

Table 1: Definition of 'Payment System'

Proposed change	Rationale
'or pursuant to which'	To protect against the provision not applying to arrangements which do not themselves transfer funds, but which cause them to be transferred under another system. The express reference to payments (in addition to transfers of funds) is aligned with the definition in section 36 of the *Canadian Payments Act 1985* which includes 'transfers of value' as well as the 'making of payments' in the definition of 'payment system'.
'payments or'	
'or are designed to be made'	To protect against the exclusion of a system if funds have not been transferred. It is aligned with the effect of similar wording in section 182 of the UK *Banking Act 2009*.
'or the transmission or exchange of messages for effecting, ordering, enabling or facilitating a payment or transfer of funds is enabled or facilitated'	To further protect against the provision not applying to arrangements which do not themselves effect the transfer of funds, but provide the messaging, information or technology systems which are an important part of that transfer (since a payment can be thought of as an electronic message from the payer to the payee). It is aligned with the wording of section 36 of the *Canadian Payments Act 1985*.
'including an arrangement or series of arrangements that includes or involves the transfer of funds using another payment system'	To further protect against the provision not applying to arrangements which do not themselves effect the transfer of funds, but rely on contractual or other arrangements to effect payments using another payment system (such as a BNPL provider arranging periodic payments from the customer using their debit card). It is aligned with the definition of 'payment system' in section 41 of the UK *Financial Services (Banking Reform) Act 2013*.

2.1.4 Section 7 (definition of *participant*)

The Bank is concerned that the proposed definition of 'participant' in a payment system may be too narrow to achieve the Government's policy intent (which the Bank strongly supports). It does not appear to capture 'all entities involved in the payments value chain, including entities with or without a direct relationship to a payment system' and therefore would not ensure that all entities playing a role in facilitating or enabling payments can be appropriately regulated.

(a) 'a constitutional corporation that operates, administers or participates in a payment system'

The vast bulk of entities involved in the payments value chain do not 'operate' or 'administer' payment systems. For example, in the context of card payments, the entity that 'operates' or 'administers' the payment system would likely be the card scheme itself (such as the relevant Visa, Mastercard or eftpos entity).

Further, given previous narrow judicial interpretation of the existing definition of 'participant', 'participates in a payment system' could also be interpreted narrowly, to possibly only capture those entities that have a certain direct relationship with the operator or administrator. For example, in the context of a credit or debit card scheme, the entities that 'participate' in the payment system may be only the direct members of the card scheme – that is, the card issuers and acquirers. Such an interpretation would exclude the wide range of other payment service providers that play a role in enabling or facilitating card payments, such as those described above.

(b) 'a constitutional corporation that provides services that enable or facilitate the operation or administration of, or participation in, a payment system'

It is not clear that paragraph (b) of the definition would cover all entities that do not directly participate in a payment system but which play a role in enabling or facilitating payments, and so does not appear to achieve the Government's policy objective. First, '*a constitutional corporation that provides services that enable or facilitate the operation or administration of… a payment system*' would seem to only capture those entities that provide services to the operator or administrator of a payment system (such as the relevant Visa, Mastercard or eftpos entity in the context of card schemes). The various intermediaries in the payments value chain discussed above typically do not provide services *to* such schemes, but rather *use* such schemes to facilitate payments. For example, a digital pass-through wallet provider – such as Apple Pay, Google Pay or Samsung Pay – provides services to card issuers and their customers, but not to the card scheme itself.

Second, '*a constitutional corporation that provides services that enable or facilitate… participation, in a payment system*' also may not cover many of the various intermediaries in the payments value chain noted above. This is because such intermediaries often provide services only to merchants and/or customers, which are not – and are not intended to be – 'participants'.[4] For example, payment facilitators leverage the services of an acquirer to provide card acceptance services to a merchant; accordingly, given that these entities procure services *from*, rather than *to*, a participant (the acquirer), and that merchants are not 'participants', these entities arguably do not provide services that enable or facilitate 'participation' in a payment system. Similarly, BNPL providers also typically only provide services to merchants and customers.

To address these concerns, the Bank **recommends expanding the proposed definition of 'participant' as shown below**.

participant *in a payment system means:*

(a) a constitutional corporation that operates, administers or participates in a payment system; or

(b) a constitutional corporation that provides services that enable or facilitate one or more of the following:

(i) the operation or administration of, or participation in, a payment system;

(ii) a payment or transfer of funds under or pursuant to a payment system;

~~(i)~~(iii) the transmission or exchange of messages for effecting, ordering, enabling or facilitating a payment or transfer of funds, under or pursuant to a payment system.

4 See paragraph 1.23 of the Explanatory Materials.

Table 2: Definition of 'Participant'

Proposed change	Rationale
'a payment or transfer of funds under or pursuant to a payment system'	To protect against the exclusion of those entities who do not: (i) operate or administer the system; or (ii) participate in the system by directly interacting with the operator or administrator; or (iii) provide services to the above entities, and ensure that all intermediaries in the payment value chain that facilitate payments, including by transmitting payment messages or credentials, are captured. This is aligned with the definitions of 'participant' and 'payment service provider' in section 42 of the UK *Financial Services (Banking Reform) Act 2013* and the definitions of 'participant', 'service provider' and 'payment services' in section 7 of the New Zealand *Retail Payment System Act 2022*.
'the transmission or exchange of messages for effecting, ordering, enabling or facilitating a payment or transfer of funds, under or pursuant to a payment system'	

2.1.5 Paragraph 1.22 of the Explanatory Materials

The new definition of participant would extend to BNPL products, digital wallet passthrough services (such as Apple Pay and Google Wallet), cash in transit services and services that facilitate payment in crypto assets (such as payments stablecoins), where such entities provide services to existing payment systems (such as Visa or Mastercard schemes)."

This paragraph is both inconsistent with the proposed definition of 'participant' in section 7 and the Government's stated policy intent of capturing all entities that play a role in facilitating or enabling payments. It suggests that the various intermediaries in the payments value chain – such as providers of digital wallets – are only captured '*where such entities provide services to existing payment systems (such as Visa or Mastercard schemes)*'. As discussed above, many intermediaries that facilitate or enable payments do not provide services *to* a particular payment system, but rather *use* particular payment system(s) to facilitate payments. Digital pass-through wallet providers and BNPL providers are clear examples of this, with the former providing services only to card issuers and customers, and the latter providing services only to merchants and customers.

2.2 Special designated payment systems

The Bank supports the Minister being provided with new powers to address payments system issues that are outside the scope of the Bank's public interest powers, where that would be in the national interest.

2.2.1 Overlap of *national interest* and *public interest*

Treasury's consultation paper on the PSRA reforms noted, in relation to the new Ministerial powers, that the "proposal is aimed at preserving the RBA's independence with respect to matters wholly in the 'public interest' and … [t]he new powers for the Treasurer are not intended to operate to empower the Treasurer to stand in the shoes of the RBA and remake a decision of the RBA made wholly on public interest grounds" (Treasury 2023, p 12). The Bank strongly supports preserving the Payments System Board's policy independence.

Against this backdrop, the Bank welcomes the requirement in section 8A that something more than a 'core public interest matter' is required for the Minister to invoke the national interest power. (Section 8A defines a 'core public interest matter' as a matter that the Bank is required to have regard to when determining whether action under the PSRA is in the public interest, namely: financial safety, competition, efficiency and risk to the financial system.) However, the Bank remains concerned that this formulation could give the Minister the ability to overrule a decision of the Bank, by invoking a peripheral or less material national interest consideration. This could raise doubt about the independence of the Payments System Board and the Bank, and the finality of its regulation, which would both hamper the effectiveness of the Bank in meeting its payments policy mandate and create significant regulatory uncertainty for the payments industry, which could in turn hamper innovation and investment.

Accordingly, the Bank's preference is for the 'national interest' to be defined as *excluding* core public interest matters, so that the Minister could not have regard to core public interest matters when determining whether a particular action under the PSRA is in the national interest. This would remove the overlap between the Minister's and the Bank's mandates, which would better preserve the independence of the Bank and avoid the potential uncertainty for industry. Alternatively, it could be made clear that when the Minister does have regard to a core public interest matter, the additional matter(s) that the Minister must have regard to under section 8A(b) must be sufficiently material.

2.2.2 Scope of Ministerial directions

The potential scope and content of Ministerial directions raises some concerns for the Bank, and it remains somewhat unclear how a special regulator – whether the Bank or another regulator – should exercise its functions and powers in response to a Ministerial direction.[5]

(a) No carve out for specific implementation mechanisms and enforcement

Under sections 10(1A), 11E and 11F, the Minister's direction could potentially be very specific and granular. Treasury's consultation paper on the PSRA reforms noted that "the Treasurer would be precluded from directing a Treasury regulator on enforcement of regulatory rules, specific implementation mechanisms or directing operators of payment systems or participants directly..." (Treasury 2023, p 14). However, the Bill does not include any carve-out of 'enforcement of regulatory rules' or 'specific implementation mechanisms' from the Ministerial directions power and each of subsections 10(1A)(b), 11E(1) and 11F(1) expressly extends to the exercise of (enforcement) powers under the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act).

The **Bank strongly supports the inclusion of carve-outs for enforcement and specific implementation mechanisms**, and the consequent removal of the references to the Regulatory Powers Act mentioned in the previous paragraph. This is consistent with the policy proposal previously consulted on, and is needed to preserve the operational independence of the Bank, and its ability to leverage its technical expertise on relevant issues in developing regulatory rules and enforcing them.

5 The Explanatory Materials note that the prescribed special regulators will likely include other Treasury portfolio regulators such as the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Australian Competition and Consumer Commission (ACCC).

(b) Lack of clarity on how a special regulator may or must exercise powers under PSRA

At the same time, sections 11E and 11F also imply that the Minister's direction could be quite general and high-level. In such a scenario, it is not clear the extent to which a special regulator should consider national interest matters or other matters when exercising its powers.

More specifically:

- Under subsection 11CA(2), a nominated special regulator must not perform a function or exercise a relevant power under the PSRA unless:
    - the performance of the function, or the exercise of the power, is for the purposes of giving effect to a direction given to the nominated special regulator by the Minister under subsection 11E(1); *or*
    - the Minister has given the nominated special regulator a direction under subsection 11E(1) specifying matters that must be considered by the nominated special regulator before performing the function or exercising the power.
- Under section 11F a Ministerial direction *may* specify the matters that the nominated special regulator must consider when performing or exercising a function or power, but this implies that it also may not. In circumstances where no matters are specified by the Minister, it is unclear what factors may or must be taken into account by the nominated special regulator and there may be scope for dispute as to whether regulatory powers under the PSRA have been exercised 'for the purposes of giving effect to' the direction.
- In addition, even where matters are specified in a Ministerial direction as contemplated by s11F(1)(d), the operative provisions in Part 3 relating to access regimes provide that the nominated special regulator may consider the interests of current and future participants in the system and 'any other matters' that it considers relevant (see subsections 12(2)(b),(c) and (d), 14(1)(b),(c) and (d) and 15(3)(b),(c) and (d))[6]. The operative provisions do not refer to the 'national interest' which is in any event largely undefined.
- Accordingly, there is generally a lack of clarity around how a nominated special regulator could exercise its powers under the PSRA and what matters may or must be taken into account in doing so. This lack of clarity could impede the ability of a special regulator to take the necessary or intended regulatory action to achieve the Government's policy objective.
- In order to provide additional certainty, **subsections 11CA(2) and section 11F could be amended so that a Ministerial direction *must* specify matters that the relevant nominated special regulator must consider** when performing or exercising a function or power in relation to a special designated payment system. In any event, the **extent to which a nominated special regulator may take into account any other matters when exercising its powers under the PSRA should be clarified**.

6 Note that there are no equivalent provisions in relation to the standards-making power under section 18. The Bank may have regard to other matters that it considers relevant when determining whether a standard would be in the public interest (see sections 8 and 18(1)), but a nominated special regulator exercising power to determine a standard under the new section 18(1A) has no guidance on the factors it can take into account other than that it must under the new section 18(1B) have regard to any matters it has been directed by the Minister to consider.

2.2.3 Conflicts between 'normal' and 'special' actions under the PSRA

The proposed new sections 15AA, 18AA and 21A provide that any 'normal' access regime, standard or direction (imposed by the Bank in relation to a designated payment system) automatically 'ceases to be in force' to the extent that it is inconsistent with a 'special' access regime, standard or direction (imposed by a nominated special regulator in relation to a special designated payment system).

While the Bank agrees that potential conflicts need to be appropriately dealt with, these provisions are problematic for several reasons.

First, it is not desirable for the elements of the Bank's 'normal' access regimes, standards and directions to 'cease to be in force' if inconsistent with actions taken by a nominated special regulator. This is because 'normal' access regimes, standards and directions imposed or issued by the Bank would usually create obligations on participants. These participants would likely have taken actions as a result, in turn affecting other persons. If elements of the Bank's regulation simply cease to be in force, it could create uncertainty about the legality of actions taken by participants, exposing them to potential legal action. Further, there could be considerable uncertainty as to 'the extent of any inconsistency' and which parts of the Bank's 'normal' access regime, standard or direction have 'ceased to be in force'. That would particularly be the case where both the 'normal' and 'special' access regimes, standards or directions can technically be complied with, but where the 'special' one is intended to displace the 'normal' one to some extent.

Accordingly, the Bank submits that **sections 15AA, 18AA and 21A should instead stipulate that if there is any inconsistency between a 'normal' access regime, standard or direction and a 'special' access regime, standard or direction (respectively), the 'special' access regime, standard or direction (as applicable) is to 'prevail' to the extent of the inconsistency**. This would be consistent with the more usual approach adopted for resolving conflicts between regulations set by different regulators in other legislation.[7] To provide additional certainty to participants, such a priority provision could be **supplemented with a provision making it clear that a participant does not contravene a 'normal' access regime, standard or direction if it fails to comply with any part of the access regime, standard or direction that is inconsistent with a 'special' access regime, standard or direction (as applicable)**.

Second, it would be desirable to augment or expand the proposed inconsistency or priority provisions and the conditions on giving directions with processes or obligations that help prevent or resolve any inconsistencies as much as possible. In particular:

(a) the Minister should have to, before giving a direction to a nominated special regulator, consult the RBA if the nominated special regulator is not the RBA (this obligation could be reflected in a new paragraph in section 11E(3));

(b) a regulator imposing a new access regime, standard or direction could be required to provide guidance to participants on whether, and how, it is inconsistent with any existing access regime, standard or direction; and

(c) it should be made clear that the Bank is able to vary a 'normal' access regime, standard or direction to address any inconsistency with a 'special' access regime, standard or direction, to provide clarity to industry. Since the Bank's mandate is to act in the public interest (and only in the public interest), there may be questions regarding the extent to which the Bank could vary a 'normal' access regime, standard or direction to address the inconsistency. This

7 See, for example, subsection 827D(2A) of the Corporations Act 2001 which deals with any inconsistency between the financial stability standards determined by the Bank and various rules which may be determined by ASIC.

could be addressed **by amending section 8 to make it explicit that the Bank can have regard to any actual or potential inconsistency with a 'special' access regime, standard or direction when determining whether action would be in the public interest**.

Finally, the provisions do not deal with the situation where there are multiple nominated special regulators which have imposed special access regimes, standards or directions in relation to the same special designated payment system, and some of those access regimes, standards or directions are inconsistent with each other. Accordingly, **additional provisions or amendments may be necessary to address this gap**.

2.2. 4. Legal protections

The Bank remains of the view that **the PSRA should set out appropriate statutory immunities and protections for relevant regulators** including the Bank (and their staff and officials, such as members of the Payments System Board) when the regulator acts in accordance with a Ministerial direction. This is necessary to ensure that the Bank and other regulators can give effect to the directions as intended.

The Bank submits that provisions conferring protection from liability should be sufficiently broad to cover anything done, or omitted to be done, in good faith by the regulator (and its staff and officials) for the purposes of complying with a Ministerial direction, including in the exercise or performance of any function or power conferred on it as a nominated special regulator.

There are various precedents for provisions providing statutory protection from liability when complying with a direction (see, for example, section 70AA of the *Banking Act 1959*) and when exercising powers or functions under legislation (see, for example, section 58 of the *Australian Prudential Regulation Authority Act 1998* and section 246 of the *Australian Securities and Investments Commission Act 2001*). International precedents for statutory immunity conferred on regulators when exercising powers or functions under legislation include section 244 of the UK *Banking Act 2009* (immunity for the Bank of England in its capacity as a 'monetary authority') and section 20 of Canada's *Payment Clearing and Settlement Act 1996* (immunity for the Bank of Canada and its staff (amongst others) in connection with the discharge of powers or duties under the Act).

3. Other comments

3.1 Special designated payment systems

3.1.1 Section 11AA Multiple designation—consultation by Reserve Bank

Subsection 11AA(3) requires the Bank to consult each nominated special regulator in relation to a 'target payment system' (that is, one that is both a designated payment system and a special designated payment system) before the Bank 'performs a function, or exercises a power', under the PSRA in relation to that target payment system.

The Bank is concerned about the breadth of this consultation requirement, which would seem to apply to the performance of *any* function, or exercise of *any* power, under the PSRA in relation to the target payment system. The Bank is particularly concerned about this requirement applying to the Bank's information-gathering powers under section 26: it would be administratively burdensome for the Bank to consult with a nominated special regulator *every* time the Bank seeks information from a participant that relates to the target payment system.

Accordingly, the Bank recommends **narrowing this consultation obligation to the performance or exercise of *specific* functions or powers under the PSRA** – namely:

(a) the imposition, variation or revocation of an access regime under section 12, section 14 or section 15 respectively;

(b) the determination, variation or revocation of a standard under section 18; and

(c) the issuing, variation or revocation of a direction, under section 21.

3.1.2 Section 11CA Functions and powers of nominated special regulators – practical effect of consultation obligations

Subsection 11CA(4) requires a nominated special regulator to consult with the Bank and other nominated special regulators before performing a function, or exercising a power, in relation to the relevant special designated payment system. However, it is unclear how this obligation to consult (and general consultation obligations under the *Legislation Act 2003*) interacts with the nominated special regulator's obligation under subsection 11CA(3) to 'comply with any directions given to the nominated special regulator by the Minister'. In particular, it is not clear whether, and to what extent, a nominated special regulator can or should genuinely take on board the views of the Bank, other nominated special regulators or stakeholders consulted, especially where those views are potentially inconsistent with the Ministerial direction.

3.1.3 Section 11H - Authorised use or disclosure of information

The Bank considers that various amendments should be made to section 11H to address the intended interaction between that provision and the secrecy provisions under section 79A of the *Reserve Bank Act 1959* (RB Act). In particular:

(a) It is likely that information and documents covered by subsection 11H(1) may include 'protected information' and 'protected documents' for the purposes of s79A of the RB Act. Accordingly, it should be clear that disclosure of any 'protected information' or 'protected document' to a nominated special regulator in accordance with subsection 11H(1) is permitted under s79A of the RB Act. Without limiting any other exceptions which may apply, the Bank considers that such disclosure would be permitted under s79A(2) of the RB Act – that is, the disclosure would be for the purposes of the PSRA. To clarify the intended interaction of the two provisions, the Bank recommends **that an additional note is included in subsection 11H(1) to the following effect**:

> Note 2: For the purposes of section 79A of the *Reserve Bank Act 1959*, disclosure of information or documents in accordance with this subsection is authorised under subsection 79A(2) of the *Reserve Bank Act 1959*.

(b) Given that section 79A of the RB Act applies to Bank staff, PSB members and other 'officers', **subsection 11H(1) should be expanded to apply to the Reserve Bank and any officer (within the meaning of subsection 79A(1) of the RB Act)**.

(c) Subsection 11H is currently limited to 'information or documents obtained by the Reserve Bank under or for the purposes of [Part 3]'. Information may be obtained by the Bank (and nominated special regulators) under section 26 (which is included in Part 5) and may not necessarily be 'for the purposes of' Part 3 of the PSRA (noting that the Bank's information-gathering power applies to participants in a payment system, whether or not it is a designated

payment system or a special designated payment system). Accordingly, the Bank submits that **subsections 11H(1) and (2) should be expanded to also cover information obtained by the Reserve Bank or nominated special regulator (as applicable) under Part 5 of the PSRA**.

3.1.4 Subsection 26A(2) – authorised applicant in relation to civil penalty provisions for non-compliance with s26 requirements

Paragraph 26A(2)(b) should be amended so that the Bank is not the only authorised applicant for the purposes of Part 4 of the Regulatory Powers Act in relation to **the civil penalty provisions for non-compliance with s26 (information-gathering) requirements**.

In particular:

- Subsection 26A(2) provides that for the purposes of Part 4 of the Regulatory Powers Act, the following are authorised applicants:
    - in relation to subsection 21(10) of the PSRA (non-compliance with directions) – the entity (whether the RBA or a nominated special regulator) that gave the direction to which the contravention relates; and
    - in relation to *any other civil penalty provision of this Act – the Reserve Bank*.
- The only other civil penalty provision under the amended PSRA is proposed new s26(3B), which relates to contravention of s26(3) (refusal or failure to comply with a requirement to provide information under s26).
- The Bill amends section 26 to enable a nominated special regulator to require a participant in a special designated payment system to give the nominated special regulator information relating to that system and its participant (see new s26(1A)).
- In the event that a participant in a special designated payment system failed to comply with a requirement to provide information to a nominated special regulator under s26(1A), the relevant nominated special regulator that issued the requirement (which may not always be the Bank) should be an 'authorised applicant' for the purposes of Part 4 of the Regulatory Powers Act.

3.1.5 Exclusion of designated/special designated payment systems as financial products for the purposes of the ASIC Act and Corporations Act

There is currently an exception in paragraph 765A(1)(j) of the Corporations Act which provides that 'a facility that is a designated payment system for the purposes of the [PSRA]' is not a financial product for the purposes of Chapter 7 of the Corporations Act (and an equivalent exception in paragraph 12BAA(8)(e) of the ASIC Act). The proposed amendments in items 108 and 113 of the Bill would extend the exception to special designated payment systems.

While it is primarily a matter for ASIC, the Bank recommends **revisiting this exception as part of the proposed payments licensing reforms**, including to consider whether its scope should be narrowed and the link to designation under the PSRA should be removed. In particular:

- The expanded definition of 'payment system' is intended to cover a much wider set of arrangements – that is, not limited to multilateral systems with a single scheme administrator/operator – which could be designated by the Bank and/or the Minister under the PSRA (such as BNPL arrangements). Automatically excluding any such arrangements that

are designated under the PSRA from the various definitions of 'financial product' could result in unintended consequences from a financial services regulation perspective, which go against other reforms which are designed to ensure that some of these arrangements are licensed and within ASIC's jurisdiction.

- More generally, it may not be desirable for the scope of the exception to be determined or affected by whether or not a payment system is designated under the PSRA given that the two regulatory regimes have different objectives and serve different purposes. In particular, it is not clear that a decision by the Bank to designate (or not designate) a payment system in the 'public interest' under the PSRA should necessarily determine or affect whether the payment system is exempt from the various definitions of 'financial product' for the purposes of financial services regulation laws.

In the interim, subject to ASIC's views, the Bank submits that **paragraph 765A(1)(j) of the Corporations Act (and equivalent exemption under s12BAA(8)(e) of the ASIC Act) should be amended to read as follows**:

> a facility that is:
>
> (i) a designated payment system [or a special designated payment system or both] for the purposes of the *Payment Systems (Regulation) Act 1998*; and
>
> ~~(i)~~(ii) specified under regulations made for the purposes of this paragraph.

If this amendment were made, there would then need to be regulations made (under the Corporations Act and ASIC Act) specifying which designated payment systems are exempt from the definition of 'financial product'. This would ultimately be a matter for the Minister in consultation with ASIC, but at least initially it would seem appropriate for each of the current payment systems designated by the Bank to be specified under the regulations (so that the eftpos, Mastercard and Visa card systems and the ATM system would continue to be exempt). For any payment systems designated by the Bank (or the Minister) under the PSRA in the future, consideration could be given to whether that payment system should be exempt from the definition of 'financial product' on a case-by-case basis (and if so, the relevant payment system specified under the regulations).

Reserve Bank of Australia
1 November 2023

References

Treasury (2023), 'Reforms to the Payment Systems (Regulation) Act 1998: Consultation paper', June.