EPAA SUBMISSION TO

PAYMENTS SYSTEMS MODERNISATION (REGULATION OF PAYMENTS SYSTEMS PROVIDERS)

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Director, Payments Licensing Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Submission by email to: paymentslicensingconsultation@treasury.gov.au

Title: Response to Payments Systems Modernisation (Regulation of Payments Systems Providers)

To Whom it May Concern,

Please find attached the submission of the Emerging Payments Association Asia (EPA Asia) to the *"Payments System Modernisation: Regulation of payment service providers" Consultation paper ("CP2")* released by the Australian Commonwealth Treasury in December 2023.

EPA Asia's goal is to unify the payments agenda in the region, drive business development and improve the regulatory landscape for all organisations within the payments value chain. We are a community of payments organisations whose goal is to strengthen and expand the payments industry for the benefit of all stakeholders. More information about EPA Asia can be found on our website www.emergingpaymentsasia.org.

Please note, that while we have consulted with our membership, any views expressed in this submission are solely the views of EPA Asia and do not necessarily represent the views of individual contributors, EPA Asia Ambassadors or EPA Asia Members.

EPA Asia has been broadly supportive of the Australian Government's payments reform agenda. We believe that modernising payments regulation in Australia, to better meet the needs of an increasingly complex and ever-changing ecosystem and to keep Australia as a desirable place to do business in, remains a necessary and laudable goal. A sound regulatory basis will enable a vibrant, responsive and secure payments ecosystem for Australia.

While EPAA is broadly comfortable with the approach outlined in the Consultation Paper, we do have a number of matters we wish to raise, particularly in relation to certain aspects of licensing as well as to the approach on mandatory technical standards and the role played by the Authorised Standards Setting Body (ASSB).

General Comments on the Consultation Process

We applaud the efforts of Treasury to take on board industry concerns between the issuance of the previous Consultation Paper ("CP1") in mid-2023 and the most recent Consultation Paper. Overall, the December 2023 Consultation Paper ("CP2") is thorough and has done a very good job in addressing stakeholder concerns, particularly in respect to payment service provider (PSP) licensing. However further consideration is required on the other issues outlined in CP2, in particular mandatory standards and the establishment of ASSBs.

We also believe that more can be done in respect to industry engagement as these reforms are refined and implemented throughout 2024 and beyond. While responses to the consultation paper as well as bilateral meetings between Treasury and individual industry stakeholders have been constructive, consideration should be given to whether industry roundtables or workshops, where a wide range of stakeholders can engage in an open discussion and where differing views can be heard, would assist in the efficient resolution of some of the outstanding issues.

PSP Licensing

Overall, we believe that the payment function definitions are significantly improved from those included in CP1. We greatly appreciate that Treasury has taken industry feedback on board.

One general observation is that for many PSPs, operating under an AFSL and interacting with regulators such as ASIC in their role as financial services regulator will be a new undertaking. As such this will represent a significant challenge to those entities and, as such, a measured, facilitative, and educative approach will be required from policymakers and regulators.

1. Feedback is welcome on the proposed approach to distinguish SVF products from banking business. Are there are any unintended consequences and are there suggestions on how to mitigate those?

We are comfortable with the preferred option where SVFs would remain the sole category, removing the duplicative PPF regime and making it clear that SVFs are a standalone class of regulated entities.

As these reforms are progressed, we would caution against the creation of an uneven playing field where bank accounts would remain input taxed under GST rules, while accounts held by SVFs are subject to GST.

As well, we would ask Treasury and regulators to consider the pathways for entities to move from Standard SVF to Major SVF to ADI in such a way that removes any inefficiencies and duplicative processes.

2. What are your views on the proposed changes to the SVF function and whether additional characteristics or principles are needed to distinguish SVF products? Should there be an additional principle that funds can be stored without any onward payment instruction?

We would support moving away from a time-based test and towards a business purpose / principle-based test for determining whether an entity is providing an SVF. In particular, the inclusion of the test in respect to customer direction will enable other forms of stored value, where funds are in transit, to not necessarily be caught by the SVF regime.

We would also note that care is needed around defining terms such as “loaded” and “stored” to ensure the definition of SVF remains technologically neutral and that ledger-based or token-based stored-value offerings are treated similarly when they exist for a similar business purpose.

3. Are there any further activities that should be out of scope of the definition of SVF?

We would agree that the proposed list of out-of-scope activities appears appropriate, though care needs to be taken as to whether these will be explicitly excluded or whether this list will be used to develop guidance.

It remains important to clarify the distinction between PSPs that issue an SVF and "PSPs that are intermediaries in a payment transaction that hold funds for a short period of time for the purpose of facilitating a payment". Defining what qualifies as a "short period of time" could detract from business purpose / principles-based approach, so care is required.

4. Do you agree with the proposed framework for PSCs and how it interacts with the Digital Asset Platform Framework? Are there any considerations that should be given or issues that can arise which have not been captured in this proposal?

On an initial reading, the interaction between PSCs and the Digital Asset Platform Framework appears sensible, though "payment stablecoins" need to be defined in such a way that there are no significant differences or opportunities for regulatory arbitrage.

5. Do you agree with the scope of the 'Payment Instruments' function as it is currently defined? Are there any services that have not been captured by the definition but should be included (or vice versa)?

While the functional definitions appear to be significantly better than what was proposed in CP1, we believe that still more clarity is required.

We would reiterate that issuance is a primarily a legal and commercial relationship where the issuer agrees to provide a product / service to a customer. We would question whether those involved in physical manufacturing (such as a cheque printer or a card manufacturer) warrant licensing, particularly if the physical item is then "issued" by a regulated entity, such as a bank or PSP licensee, that has the legal relationship with and provides the product / service to the end-user.

6. Do you agree with the scope of the 'Payment Initiation Services' function as it is currently defined? Are there any services that have not been captured by the definition but should be included (or vice versa)?

While the definition for Payment Initiation Service is broadly acceptable, as with other definitions, care will be required in defining any exemptions or exclusions.

7. Do you agree with the scope of the 'Payment Facilitation Services' function as it is currently defined? Are there any services that have not been captured by the definition but should be included (or vice versa)?

8. Is there merit in disaggregating this function? If so, why and how should this be done?

9. Are there any other principles that should be used to define this function?

The definition of Payment Facilitation Service makes sense as it relates to a service where there is a possession of funds that creates a financial risk associated with loss of funds. Disaggregating this definition makes sense, though care will be needed in defining what constitutes the possession of funds and what was in transit.

10. Do you agree with the scope of the 'Payment Technology and Enablement Services' function as it is currently defined? Are there any services that have not been captured by the definition but should be included (or vice versa)?

11. Are the principles used to define the function appropriate?

12. Should a certain subset of entities captured under this function be subject to less rigorous obligations than what is proposed, and what should those be? Should the definition of this function be narrowed to exclude certain types of entities that do not pose significant risks, and if so, how?

This category and definition is a much improved over iterations in CP1 as it more clearly captures token-based services such as Apple Pay / Google Pay and does not require the service to somehow "touch the money" to be regulated. Clarity as to whether this function would also capture platforms which offer white-label payment products (e.g., spend management platform operators that are currently authorised to deal in non-cash payment products) that do not come into possession of funds, would be welcomed.

While the definition is an improvement, it does appear to mirror "Payment Facilitation Service" with the primary distinction being the possession of money. In this sense, the definition is both broad "enabling a payment to be made" but inclusive of an omission – namely not possessing funds. Such a broad definition may require exclusions that will result in further complexity.

While we are not yet recommending any particular language, we would suggest Treasury look closely at the Canadian PSP registration regime that has its similar definition, notably the "transmission, receipt or facilitation of in relation to a payment instruction", that would capture pass-through digital wallet services (as long as payment instruction is defined correctly). It could also reduce the need for "principles" to help define the regulatory perimeter.

Further, we would strongly caution against subsets of entities being subject to lesser obligations without there being a strong policy rationale.

13. Do you agree with the scope of the 'Cross-border Transfer Services' function as it is currently defined? Are there any services that have not been captured by the definition, but should be included (or vice versa)?

14. Excluding ML/TF risks, are there any unique risks that Cross-border Transfer Services present and should there be any tailored regulatory requirements for this function?

15. Is there a need for a separate function for Cross-border Transfer Services or should these services be captured together with domestic transfer services?

There are some differing industry views as to whether Cross-Border Transfer Services need to be separately distinguished.

We agree that there are some different risks that would apply to a provider of cross-border services such as foreign exchange rate fluctuations, settlement and fraud / scam risk, as well as AML/CTF requirements. Further consideration of this as a separate function is not entirely obvious though and warrants closer examination.

16. Is the proposed removal of the 'Clearing and Settlement Services' function appropriate, given the risks associated with these activities are intended to be addressed by payment system access arrangements and proposed common access requirements?

The removal of Clearing and Settlement Services from the PSP licensing regime carries modest risk, given how entities providing these services are otherwise regulated or subject to oversight. However, the explanation provided in CP2 is very basic and it would be good to better understand Treasury's thinking around its removal.

17. Is the proposed approach the best way to incorporate the functions into the Corporations Act? Or is Option B, Option C, Option D or another option not canvassed by this paper preferable?

We would broadly support incorporation through Option A.

18. Are there any functions that are proposed to be regulated as a product that should instead be regulated as a new type of financial service or vice versa?

As noted, the financial product / financial service distinction as described appears to be primarily premised on what will trigger additional requirements, particularly around the provision of financial advice for a product.

Particular care needs to be taken on two accounts. First, often payment products are not necessarily acquired by a consumer in the same way as a bank account, insurance policy or superannuation fund. The product may be a "one off" for the completion of a particular transaction and on that basis, the advice obligations may be inappropriate. Second, the service and product distinction can be difficult based solely on the definitions and there may need to be consideration of business purpose to determine what should be subject to advice requirements.

This could help with determining whether activities such as Payment Facilitation Service and Cross-border Transfer Service are better categorised as a financial service rather than a financial product.

The Corporations Act has an incidental product exemption that should apply to payments licensing. We would note that there are business purpose or materiality tests applied in jurisdictions such as Canada and the UK so that if a payment activity is incidental to the business then it would not necessarily be caught and require the business to be licensed.

19. Are there any practical issues created by separating out different 'functions' and treating them as separate products and services? Would it be simpler to have fewer different functions that cover more payment services?

The proposed approach of categorising various PSP functions as "financial products" or "financial services" does force a wide range of offerings into pre-existing categories that were not really designed for this purpose. While this can be managed, some of the complexity could be removed if there were a "payment business" licence that was more of a "top down" approach as opposed to the proposed "bottom up" approach. Then the functional definitions would define what the obligations are on particular entities dependent on what they do. This would make it easier to provide clarity where providers engage in multiple activities.

20. What needs clarifying regarding the tests of 'dealing in' and 'arranging' for PSPs?

As noted in CP2, issuing is not "manufacturing of a card" but the establishment of a commercial arrangement between a provider of a product / service and the end-user. "Dealing in" and "arranging" are similarly definitions that may work for some products and services but do not necessarily translate to payments. These should be carefully defined as such (possibility with a business purpose or materiality test) so that merchants, device manufacturers and so forth are not inadvertently caught by licensing.

21. Is the scope of the exclusion for payments debited to a credit facility in section 765A(1)(h)(ii) of the Corporations Act appropriate?

We would support efforts to close loopholes that exist between ACL and other licensing regimes.

22. Should existing exemptions for unlicensed product issuers be restricted for certain payment functions?

We would support retaining exemptions for unlicensed foreign product issuers, as this avoids difficult questions of extra-territoriality. Requiring these products to be offered in Australia through a licensed intermediary offers necessary protections and provides more options for new entrants that wish to enter the Australian market.

As a means of addressing risks, consideration should be given to making the AFSL holder whose AFSL covers the provision of the services responsible for ensuring certain baseline safeguards are in place to protect customer funds. This could include making certain exemptions conditional upon the foreign product issuer being subject to equivalent client money safeguarding requirements in their jurisdiction.

23. Should PSPs that process or facilitate transactions or store value below a certain amount have reduced requirements under the Corporations Act? If so, what should they be?

While we do not have any significant concerns around updating the low value thresholds and their inclusion with regulations, care always needs to be taken to prevent arbitrage opportunities.

24. Should the low value exemption apply at the controlling entity level, if there are a group of related entities?

Potentially removing low value exemption to those products that are part of a group will create challenges for entities that have operated under these exemptions for many years. Clarity on how "controlling entity level" / "not part of another financial product" etc are defined will be very important to provide certainty.

25. Are the proposed thresholds for low value facilities appropriate?

As noted above, we do not have significant concerns, though arbitrage opportunities should be closely monitored, and entity / group definitions clearly defined.

26. Should the low value exemption be available for all payment functions?

For sake of regulatory consistency, the same low value exemption should apply for all payment functions – though it is unclear how this would apply / be calculated for services where there is no holding of funds.

27. How could a limited network exclusion be appropriately confined to avoid regulatory arbitrage? Are the conditions for this exemption appropriate? Should it apply to all payment functions?

While a more general exemption would be preferable to the current mix of limited network exemptions, the tests suggested in CP2 are difficult to understand and greater clarity would be appreciated.

28. Should there be a commercial agent exclusion?

It is unclear why the commercial agent exclusion should be extended to payments and more information as to the basis for such an exclusion (beyond its existence within the current AFSL regime) would be beneficial.

29. Is the proposed amended exemption for designated payment systems that have been declared not to be a financial product appropriate or should it be further revised, replaced or removed?

Given the breadth of services that the new PSP licensing regime intends to capture and the likelihood that most if not all of the designated payment systems will be captured through one of the definitions, it is unclear why this exemption should be retained.

30. Should there be an exclusion for global financial messaging infrastructure? For example, Singapore excludes from regulation 'global financial messaging infrastructure which are subject to oversight by relevant regulators'.

We would note that global financial messaging infrastructures are excluded in a number of jurisdictions. We would not be concerned about such an exclusion as long as it is tightly defined (for example, Canada explicitly excludes SWIFT).

31. Should the relief provided by ASIC for certain activities be moved into regulation or discontinued? For example, should loyalty schemes, road toll devices and electronic lodgement operators be exempted?

As we note, exemptions should be done for sound policy reasons, be clear and consistent, and avoid creating arbitrage opportunities. Ideally, specific businesses or activities should not need to be identified within any exclusion but rather a more principles-based approach taken so as to better "future proof" the regime and avoid complexity later on.

32. Do loyalty schemes that allow credits or points to be purchased present particular risks?

The risks associated with loyalty schemes are relatively low and generally understood though we would recommend that loyalty schemes with broad acceptance/transferability, the ability to convert to fiat currency or load/store material amounts of value should be considered SVFs.

33. Should payment activities by not-for-profit/charitable and religious organisations be exempted?

Particular care may be needed in this sort of exemption as these organisations could be targeted by unscrupulous service providers precisely because they are operating outside of the regime. As such, an exemption could heighten the risks involved.

34. Do the proposed options for streamlining licensing processes adequately balance safety with the need to foster competition in the SVF sector?

Streamlined processes are welcomed.

We would further suggest maximum timeframes for assessment of licence applications, along with guidance on how early to engage with APRA prior to submission of the licence application. The pre-submission engagement can help to ensure applicants have all required information in their application before submission, to minimise instances of APRA receiving incomplete applications that would then require follow up.

35. What further information or guardrails could assist a Standard SVF make a smooth transition to Major SVF?

As noted earlier, there are significant benefits associated with clear processes and definitions (supported through clear guidance, worked examples, transparency and responsiveness) so entities can move between Standard SVF, Major SVF and ADI, if required.

Further benefits would come from clearly communicating the additional obligations that Standard SVFs transitioning to Major SVF status would need to comply with; a regulatory sandbox environment for transitioning SVFs; and a grace period for new Major SVFs in relation to compliance with such additional obligations.

36. Are the general AFS obligations fit for purpose for PSPs?

As we will explain below, some of the general AFS obligations such as client money obligations were designed for a different purpose and their unaltered application on payment service and product providers is somewhat problematic.

37. Are the general risk management obligations sufficient, or should PSPs undertaking particular functions have additional or tailored risk management obligations?

As we noted previously, there may be some benefit in a top-down approach. This could be supplemented by an approach where the licensee is subject to general obligations and then whatever mix of functions they perform would determine some more specific obligations on them.

We would also suggest using this reform process as an opportunity to address apparent differences between ASIC and APRA obligations.

38. For currently unregulated PSPs, are any aspects of the financial services obligations or compliance processes disproportionately burdensome?

As we will discuss below the client money requirements are particularly ill-suited.

39. Are the proposed financial requirements appropriate for PSPs? Are there particular payment functions where financial requirements should be increased or decreased?

We note that there are strongly differing views on the proposed financial requirements. Some have expressed a view that they are too onerous while others that they are too lenient. On this basis we believe there is a signification work that needs to be done and that this would benefit from further explanation and engagement.

40. Are the standard compensation requirements appropriate for PSPs?

We do not have any specific comments on the standard compensation requirements, though further information as to how PSP licensees will be covered by AFCA would be appreciated.

41. Is the proposed exemption to the hawking prohibition appropriate? Should it be broader or narrower?

We would broadly agree with the proposed approach for consistency with the basic banking products in respect to the hawking prohibition.

42. Should the standard disclosure requirements not apply to any particular activities, for example, gift facilities (outside the existing exclusions)?

Our general views on exemptions and exclusions apply in this instance.

43. Should the 'shorter PDS regime' apply to any activities?

We would support the ability for any financial product issuer covered in CP2 to be able to provide a shorter PDS with the option of a full PDS on request.

44. How should the FSG and PDS disclosure exemptions for a facility for making non-cash payments related to a basic deposit product be updated?

45. Is the proposed approach to applying client money rules on all PSPs that hold funds appropriate? Should APRA-regulated PSPs be subject to the standard AFSL client money obligations?

46. To ensure the effectiveness of the standard obligations for client money, are additional changes necessary to tailor the client money rules for PSPs? If so, in what fashion?

47. Should alternative approaches to client money rules be considered, for PSPs processing funds in transit?

We note that there is significant concern within industry as to the application of the client money provisions. As has been noted, these provisions were designed for other circumstances, such as when a financial planner or insurance broker is transiting funds from a client to a product issuer.

The requirement to hold funds in trust seems onerous, particularly as other jurisdictions are permitting or considering alternatives to funds held on trust with insurance or bank guarantee options.

Further, there will need to be some refinement of the payment of interest requirements to better reflect the nature of payment services versus other forms of financial services.

48. Are the proposed obligations for low value payment products appropriate? Should these obligations apply to low value payment activities that are not proposed to be regulated as a payment product (such as Payment Initiation Services)?

As previously noted, exclusions and exemptions need to be based on sounds policy rationale, clear and consistent and minimize arbitrage opportunities.

49. Are proposed amendments to the Major SVF criteria appropriate? Should there be additional criteria retained or added?

While the definitions of who qualifies as a Major SVF are generally clear and appropriate, further guidance is required on what "whole-of-group" basis refers to. If the intent is to minimise gaming of the threshold by the major SVF sets up entities under it to issue SVFs, then our view is that this should cover only the licensee's group entities that are performing SVF functions within Australia. This is also important for low value exemptions.

50. Is the proposed Ministerial designation power to amend the size threshold for Major SVFs appropriate? Are there alternative approaches preferred?

51. Is the proposed approach to allowing the Minister to designate further SVF providers or Payment Facilitation Service as being subject to APRA's prudential regulation appropriate? Are there alternative approaches preferred?

While we would be supportive of there being flexibility to respond, there needs to be clear guardrails so that any adjustment to the threshold is done of a genuine public policy reason and any use of a Ministerial designation power should be subject to appropriate safeguards and oversight. Such amendments should be kept to a minimum to avoid introducing unnecessary complexity.

52. In order for regulators to retain visibility and to help determine which businesses may be designated for prudential regulation, should Payment Facilitation Services be subject to ongoing reporting requirements in relation to funds held and transactions processed?

We are broadly supportive of regulatory reporting where the data can assist regulators in doing their job more efficiently and effectively. However, the regulators should work closely with industry to develop an approach that provides regulators the data they need while not imposing a significant burden on regulated entities.

53. Are the additional proposed obligations for SVFs appropriate? Should SVFs be subject to prohibited activities such as a restriction on paying interest? Should consumers have a general right to redeem funds for SVF products?

While a general right to redeem is sensible, care needs to be taken to not overly design product features and remove the ability for innovation and competition.

54. Is the proposed extension of APRA-administered legislative powers and broader requirements appropriate for Major SVFs? Are there particular requirements that should be tailored for Major SVFs?

We are broadly supportive of APRA requirements being reviewed as to their appropriateness for application on Major SVFs.

55. Are the proposed obligations under the SVF framework appropriate for PSCs? Should there be additional obligations considered for the regulation of PSCs?

As noted previously, there should be as much alignment between the SVF and PSC framework to prevent an uneven playing field or emergence of regulatory arbitrage opportunities.

Common Access Regime

56. What are the different risks associated with payments clearing and settlement? How should these be managed?

57. The CARs are intended to increase access to payment systems while managing the risks of direct access. How can both of these objectives be achieved?

Conceptually the CAR makes sense by seeking to create shared minimum requirements that would make it easier for a new entrant to join multiple payment systems. Many systems share similar, though not identical requirements, particularly in respect to risk management, security, technical and operational matters.

While this is not a bad idea in theory and could be effective for a few players, it would be good to gauge the demand for this to help determine the urgency and work commitment to be directed towards this versus other reforms.

58. Should CARs be legislatively mandated for all non-ADI PSPs seeking direct access for payments clearing and settlement, or should it be optional? Why?

The basis for a legislative mandate needs to be better explained for us to have a considered view.

59. APRA would have the power to set the CARs through prudential standards setting powers. To enable effective APRA-supervision of entities subject to CARs, what other APRA powers should be extended to the CARs regime and why? For example, should it include resolutions powers, enforcement powers, directions powers and application of group regulation powers?

We would agree that for CARs to be effective there needs to be a degree of regulatory oversight. However, extending APRA's powers to areas such as resolution, enforcement and directions requires should be limited as such so that they only apply to the implementation of the CARs and not more broadly to either the entity seeking access or the payment system operators involved.

Standard-setting framework

60. What are the issues with the current mix of voluntary standards and payment system requirements? What would be the benefits of introducing a formal framework for mandatory technical standards? What are the key reasons why the current status quo of voluntary standards is insufficient to achieve the key objectives set out in the discussion of the standard-setting framework?

While modernising the standard setting regime within Australian payments has the potential bring about greater efficiency through better coverage and compliance, it remains unclear from our perspective what the burning platform is. While providing an ability to make standards mandatory can have benefits, it needs to be recognised that the RBA already has its own powers to designate and make standards.

From our perspective, the issuance of mandatory standards should need to meet a relatively high threshold where there is either significant non-compliance which is creating serious issues within the ecosystem or else the benefits from issuing mandatory standards are significant and broadly agreed to.

We strongly believe that the current approach to voluntary standards will continue to be the dominant form of standards issuance and compliance and as such creating mandatory standards and investing the ASSB with significant, quasi-regulatory powers needs to be approached with care and caution. This is particularly the case given the significant number of regulators in the payments landscape that impose costs on organisations.

61. Is the PSRA bill definition of payment system 'participants' an appropriate regulatory perimeter for compliance with mandatory technical standards?

While the actual definition of participant from the PSRA may be an appropriate place to start, it is a very wide definition and the application of this in practice will be very difficult. It remains unclear how entities will know whether or not they are subject to mandatory standards. We cannot expect entities to resort to seeking legal advice or RBA guidance on their status and, as such there needs to be a clear, fair and transparent basis for determining coverage and for consulting with and informing entities that are possibly affected by a mandatory standard.

There remains significant concern from some PSPs that an ASSB would be governed or influence by incumbents and invested with significant powers to impose standards and enforce penalties and that this could result in significant market distortions as standards are created, applied and enforced.

62. Should complying with mandatory technical standards be an explicit condition for PSPs that are required to hold an AFSL?

Given more work is required on the nature of the mandatory technical standards, it is premature to determine whether it should be a condition of an AFSL. We would contend that it depends on the entity and its functional activities as well as what the technical standard seeks to address.

63. Are there any additional criteria that should be considered when evaluating the design of the framework?

We believe that the threshold for a standard to be mandatory should a relatively high bar and based around a clear definition of public interest.

64. Are there any other options for the framework that should be considered; if so, why?

The RBA already has the power to designate a payment system and to mandate standards. The extension of the RBA's powers to include an explicit power to mandate a technical standard could be done without creating an ASSB and should be considered as an alternative model.

65. This paper outlines a potential variation to the proposed standard-setting framework. What are the advantages or disadvantages of this variation (where the RBA has only a veto power, compared with being required to formally approve a standard)? Which approach is preferred and why?

Between the two options, we would strongly support Variation A, where a mandatory standard requires RBA approval. An RBA veto invests the ASSB with significant power, as it is unlikely the RBA will veto unless it has a very good reason to do so. We would also believe that the ASSB should be required to follow a robust public consultation process prior to sending a standard for RBA approval and that the RBA should also follow a robust public consultation prior to implementing a mandatory technical standard.

66. It is proposed that the ASSB is responsible for enforcement of minor breaches. Which body is best placed to resolve appeals to the ASSB's enforcement decisions?

There are serious concerns within our membership on the ASSB's possible enforcement powers as outlined in CP2 and that enforcement powers should ordinarily rest with public regulators.

First of all, we would strongly question whether the ASSB, as a non-regulator, should have the power to fine – particularly the power to fine non-members that are captured by the standard. Further, any remediation power and or power to issue notices by the ASSB should not be based on statutory powers.

67. Do you agree with the proposed scope for mandatory technical standards developed by an ASSB? Are there any type of technical standards that should not be within the scope of the ASSB?

The ASSB should not be in a position where it decides what standards are required to be made mandatory.
As we note above, there needs to be a significant threshold for a standard to be made mandatory.

If there are significant levels of non-compliance, then the ASSB should be able to request that a voluntary standard be made mandatory by the RBA.

68. This paper proposes that the ASSB seek authorisation from the ACCC for a technical standard where necessary. Are there any issues with this approach, and if so, how might these be resolved?

Whether ACCC authorisation is required is a matter of law and is independent of whether such work is done by an ASSB or a voluntary body. This should be separate from any process where the RBA approves / mandates a mandatory standard.

69. What should be considered 'major breaches' versus 'minor breaches' under the mandatory technical standards regime?

70. What are the appropriate penalties for a major breach of technical standards?

Until such time as there is greater clarity on the nature and role of the ASSB and the roll-out of mandatory technical standards, it is premature to provide views on what would constitute a major or a minor breach.

71. How should the mandatory technical standard-setting framework be funded?

The funding of the ASSB is a highly problematic issue as the body will be a private body playing a quasi-regulatory role. What is even more concerning is that entities required to fund the ASSB will include non-members with no governance or consultation rights.

The proposal to fund the monitoring and enforcement of technical standards using a fixed, tiered, mandatory annual fee for entities that are required to comply with such standards is deeply concerning. This presents a "triple whammy" for non-member PSPs in terms of funding the entity, the costs associated with complying with the standards and possible fines for non-compliance.

ePayments Code

72. Is the proposed application of the Minister's rule-making power for the ePayments Code appropriate?

Further information in respect to how the Ministerial rule-making power will work in practice will be appreciated. In particular, it would be good to better understand the scope of rulemaking as well as the operation of parliamentary oversight / disallowance and the ability to challenge rules through courts or administrative appeal processes.

73. Are the proposed subject matters for the Minister's rule-making power for the ePayments Code appropriate? Are there technical matters that are better dealt with through an ASIC rule-making power or by the ASSB?

We believe there may need to be some consideration of resequencing the creation of rule-making powers and the content review. If the review of the ePayments Code were to come after the introduction of a Ministerial and ASIC rule-making powers, then we would recommend this also form part of any review.

74. Are there additional areas to consider in ensuring appropriate interaction between the proposed Scams Code Framework and the ePayments Code?

We are supportive of efforts to find clear alignment between the Scams Code Framework and ePayments Code.

75. Is the proposed transition period (18 months) an adequate grace period for new prospective licensees?

At this point, 18 months would appear sufficient, but the time needed is premised on things such as the clarity of the regime as well as the level of education and engagement undertaken by the relevant regulators.

76. Is the proposed grandfathering process for existing AFS licensees adequate? Are there additional transition issues that should be addressed for existing AFS licensees and PPFs?

At a high level, we are comfortable with the grandfathering of existing licensees.

We are more than happy to expand further on the items raised in this submission or to provide further information. If you do have any comments or questions, please feel free to contact EPA Asia's Policy Lead, Dr Brad Pragnell at brad.pragnell@34south45north.com.

Yours sincerely,
Camilla Bullock, CEO

Ph: +61 419 468 165
Email: camilla.bullock@emergingpaymentsasia.org