

**19 July 2023**

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

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

Dear Director

**Payments Licensing Consultation Paper: Gilbert + Tobin submission**

Gilbert + Tobin welcomes the opportunity to respond to Treasury's consultation regarding the *Payments System Modernisation (Licensing: Defining Payment Functions)* paper dated 7 June 2023 (**Consultation Paper**). Attached to this letter is our response to questions raised in the Consultation Paper, as well as background commentary to assist Treasury with its next phase of consultation.

We welcome the opportunity to discuss the matters in this submission with Treasury.

Yours faithfully

**Gilbert + Tobin**



**Peter Reeves**  
Partner  
M +61 410 542 790  
[preeves@gtlaw.com.au](mailto:preeves@gtlaw.com.au)



**Robert O'Grady**  
Lawyer  
M +61 422 491 788  
[raogrady@gtlaw.com.au](mailto:raogrady@gtlaw.com.au)

---

## Background

Gilbert + Tobin advises a range of providers in payments and payments adjacent industries. Our clients include major card schemes, card issuers and acquirers, alternative payments providers, closed and open loop payments system operators, marketplaces and digital platforms, crypto stablecoin issuers, loyalty scheme operators, payments authenticators, aggregators and facilitators, many of whom are responding to the Consultation Paper in their own capacity. This breadth of industry experience sits behind our responses to Treasury's questions and our submission reflects our experience, the challenges and opportunities that Gilbert + Tobin has seen and client feedback that Gilbert + Tobin has gathered in connection with our role in the payments industry over many years.

We recognise Treasury's efforts to cast a wide net for consideration of payment functions that are present within Australia's payments landscape. In addition to our responses, we make the following observations which may assist Treasury with its next phase of consultation.

### Regulatory clarity

- The Consultation Paper states the intention to reduce regulatory uncertainty regarding the treatment of non-cash payment (**NCP**) facilities and to minimise unequal application for comparable payments providers. We note the intention of the Wallis Inquiry was to adopt a broad concept of 'financial product', allowing flexibility for regulators to shape an appropriate regulatory perimeter. This includes the broad NCP facility definition. As drafted, almost any payment arrangement can satisfy the definition of an NCP facility. In the absence of regulatory guidance, industry views have developed regarding intended application. For example, as the Consultation Paper notes, the payment industry generally considers that acquirers do not operate NCP facilities as they allow payments to be received (not made). For this reason, acquirers are not providing a financial service and do not hold an Australian financial services licence (**AFSL**) for acquiring activities.
- In contrast with the current NCP definition and interpretation, the payment functions identified in the Consultation Paper are very extensive. It is likely that businesses playing minor roles in the movement of money will be caught by the regime (if adopted as proposed). This will introduce a disproportionate regulatory burden where multiple participants in a payments flow will be required to hold licences and comply with conduct and disclosure requirements, even where a provider performs only an ancillary or operational role in the making of an NCP. We support a tiered framework for licensing that reflects the different roles and risks to consumers and maintaining financial stability throughout the payments sector.
- If implemented as proposed, we expect a large number of payment providers will need to apply to the Australian Securities and Investments Commission (**ASIC**) for an AFSL (or other payments licence). If not properly managed through transitional periods, streamlined processes and

appropriate implementation timeframes, the influx of licence applications could cause significant disruption to Australia's payments industry.

- If the intention is regulatory clarity, this can be achieved without significantly shifting the way Australia has regulated payment providers to date. For example, regulating acquirers (if intended) can be achieved with minor clarifications to the NCP facility definition. We encourage Treasury to explore all avenues for appropriately regulating payments businesses.

### **Policy objectives**

- We support a clear payments licensing regime but encourage Treasury to consider the policy objectives for its scope. We suggest considering whether the identified payment functions carry such material risk that regulation is necessary, including identifying the customer that is impacted without regulation.
- For example, we note the intention to capture pass through digital wallets (**PTDW**) as a payment facilitation service. Current structures require NCP facility issuers to tokenise customer card details such that PTDWs only provide pass through presentment. That is, PTDWs are a technological conduit between the customer and the (licensed and regulated) issuer. The PTDW provider has no ability to alter payment flows and does not hold stored value. The provider is simply providing a technological solution in lieu of presentation of the card itself. While there is technological risk, this does not necessitate regulation as the relationship between the customer and issuer remains unaffected. This risk can be managed by imposing additional obligations on issuers when selecting a PTDW provider. If payments infrastructure is intended to be regulated, we suggest considering how this will be applied to other payments infrastructure (eg, the Consultation Paper does not propose capturing terminals despite similar risk profiles).
- We encourage Treasury to identify customers that are impacted by each payment function. For example, the Consultation Paper suggests payment gateways should be regulated. Payment gateways perform a supplementary function to terminals whereby merchants engage payment gateway providers to submit payment data to their acquirer. This data relates to the merchant's customer's payment details and therefore the risk primarily relates to the merchant's customer, not the merchant engaging the payment gateway provider. It would be inappropriate to require a payment gateway provider to, for example, issue a disclosure document to the merchant's customer prior to a transaction being initiated on a website. This is because the payment gateway provider has no relationship with the merchant's customer and the merchant's customer does not have a choice of payment gateway providers, albeit the risk relates to the merchant's customer's data. There may be unintended consequences associated with how regulation of these entities will practically apply, and we suggest considering the policy objectives for regulating such entities having regard to the customer that is at risk.

- We encourage Treasury to consider how the identified payment functions are already subject to regulatory oversight. For example, the Consultation Paper suggests regulating payments clearing and settlement services. As drafted, the only clear business to whom this would apply is a card and payment scheme (eg, Visa, Mastercard), noting the clearing and settlement of interbank transfers rests with the Reserve Bank of Australia (**RBA**). These schemes are already subject to regulatory oversight by the RBA, including in relation to the operation of scheme rules with which participants are required to comply. Capturing schemes under a payments licensing framework appears duplicative without clear regulatory benefits.

### **Competition and innovation**

- The Consultation Paper objectives relate to supporting a level playing field and reducing barriers to entry for providers. While licensing frameworks allow for a level playing field, they are also a barrier to entry. Australia is a leading jurisdiction in payments technology competition and innovation, including in relation to near real time payments and alternative models that improve consumer outcomes. This has been driven, in part, by a lighter approach to regulating the payments industry as compared with other jurisdictions (for example, the United Kingdom where prescriptive regulation has moderated the growth of its payments industry). This has made Australia an attractive jurisdiction for payments and technology providers to test and develop new products, contributing to capital inflows and the enhancement of Australia's payments system.
- We encourage Treasury to consider the impact to competition and innovation in Australia's payments industry by imposing a licensing regime that, as proposed, could regulate most of the industry in a single wave. Given the significantly protracted timelines that Australian regulators (primarily ASIC) provide for current licence applications, we consider casting a wide net of regulated payment functions risks stifling innovation and growth in Australia's payments industry. We suggest comprehensively testing the level of proposed regulation (if any) required to appropriately manage identified risks for each payment function without imposing disproportionate regulatory burdens.

---

## Responses to questions

---

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

We support the listed principles and make the following comments.

- **Principle 3:** We consider principle 3 should not translate into a broad payment services definition. Legislative mechanisms should be used to allow the payment services list to change and adapt (eg, designation powers), but this should not be implemented through broad definitions. We refer Treasury to the existing unclear interpretation of the NCP facility definition; this ambiguity should not extend into a new regime.
- **Not unnecessarily impeding innovation:** We suggest including a principle that any regulation of the payments industry not unnecessarily impede innovation or impose barriers to entry that cause Australia to be an unattractive jurisdiction for new business. See our comments in the 'Background' section of this submission.

---

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

We consider the proposed list should be refined and additional payment functions should not be included.

- **Issuance of payment accounts or facilities ('traditional stored value facilities (SVFs)'):**
  - The proposed traditional SVF definition also describes a deposit product (which is already captured as a financial product), and the Consultation Paper notes authorised deposit-taking institutions are likely to be captured under 'traditional SVFs'. Given the overlap between the traditional SVF function and deposit products, clarity should be given as to how regulation will delineate these products.
  - Clarity should be provided as to what is required to be "stored" for a product to be a traditional SVF. For example, it is common for marketplace platforms to provide customers with synthetic stored value (eg, credits in an account) which are purchased from the provider and may or may not correlate to a fiat currency value or a withdrawal right. While this provides a stored value experience, there are different risks in its implementation that warrant different approaches to regulation. We suggest adopting a similar level of detail for the traditional SVF definition that has been provided for the payment stablecoin definition.
  - The Consultation Paper notes this payment function "is not intended to capture services that store crypto assets". It would be beneficial for Treasury to also provide clarity regarding

whether crypto assets used as a method of payment more generally will be caught under the payment concepts in the new regime.

- We note this payment function is limited to issuance. We encourage Treasury to consider whether any other services associated with traditional SVFs should be caught by regulation. For example, providing advice or arranging for a traditional SVF to be issued to, or acquired by, a customer.
- **Issuance of payment stablecoins ('payment stablecoin SVFs'):**
  - See our response to Question 5 on the definition of payment stablecoin.
  - We encourage Treasury to consider whether jurisdictional limits should apply to this definition. For example, most payment stablecoins currently in the market are not issued in Australia but are used by Australian customers in secondary markets. If the right to fiat redemption against the issuer flows with the stablecoin, Treasury should consider whether secondary sales (up to a limit, for example 12 months) should be captured as an effective issuance.
  - We note this payment function is limited to issuance. We encourage Treasury to consider whether any other services associated with payment stablecoin SVFs should be caught by regulation. For example, providing advice or arranging for a payment stablecoin SVF to be issued to, or acquired by, a customer.
- **Issuance of payment instrument:**
  - Clarity should be provided regarding the definitional limits of this payment function. Based on the current drafting, it is unclear whether this payment function applies to the entity that is responsible for acting on instructions associated with the payment instrument (ie, the payment facility issuer) or the entity that physically created the instrument. For example, debit card issuers will typically use third parties to create the physical debit card and develop the underlying PIN technology associated with that card. While the card is created by the third party (which carries risk if the card or PIN does not function as intended), the arrangement remains between the payment facility issuer and the customer.
  - Clarity should be provided as to what "unique to a customer" means. For example, generic non-reloadable prepaid cards and gift cards are not unique to an individual (they are user agnostic) but are, in fact, a payment instrument.
  - See our comments in the 'Background' section of this submission regarding the intention to regulate technology arrangements (ie, PTDWs) as against regulating relationships.

- **Payment initiation services:** We agree this function carries a level of risk for customers. However, we suggest splitting this function into two categories: (a) customer directed initiation (eg, direct debit arrangements) and (b) managed initiation (eg, brokerage arrangements). In our view, the former carries significantly less risk than the latter and this should be reflected in the approach to regulation.
  
- **Payment facilitation, authentication, authorisation and processing services:**
  - There is an overlapping and unclear delineation between the services captured under this payment function, including interaction with other functions. For example, a PTDW could be a payment instrument, a payment initiation service and a payment facilitation service. We encourage Treasury to consider splitting these services into standalone functions and clarifying the interaction between functions.
  
  - The Consultation Paper notes this payment function is intended to capture merchant acquirers. While we support the appropriate regulation of acquirers, this service is not explicitly named in the payment function title and it is unclear whether acquirers are intended to be captured. This similarly applies to issuers, noting they are likely captured under other payment functions.
  
  - As noted in the 'Background' section of this submission, some services captured under this payment function should not be subject to the same regulatory requirements as others. For example, the risks to consumer and financial stability associated with payment gateways and payment processors are significantly less than the risks associated with card issuers and merchant acquirers, and they should not be regulated to the same degree. In our view, this payment function should capture entities that have practical control over merchant funds (ie, acquirers, payment aggregators and some payment facilitators). Splitting this function will assist with targeting regulation.
  
- **Payments clearing and settlement services:** See our comments in the 'Background' section to this submission. As noted, businesses that are likely to be captured under this definition are already subject to RBA oversight and additional regulation would be duplicative.
  
- **Money transfer services:** We support the inclusion of this payment function. However, clarity should be given regarding:
  - its interaction with other payment functions (eg, merchant acquirers would be captured under the current drafting);
  
  - the application of this service to overlay products (eg, if a platform operator provides an instruction for a customer to an underlying bank to transfer funds to a third party bank, is the operator providing a money transfer service); and



- the application of this service to closed loop environments (eg, marketplaces where the operator is both sender and receiver of funds within a limited system).

---

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

There is definitional inconsistency in the identified payment functions. For example, some of the payment functions include both a financial service (eg, issuing) and a product (eg, payment instrument). We suggest aligning the payment functions to allow for a clear distinction between a financial service and financial product, including how this interacts with other financial services in the existing regime. We provide the following as an example clarification only, which should be subject to further consideration and consultation in the context of our other responses.

- Proposed financial products:
  - Traditional SVF;
  - Payment stablecoin;
  - Payment instrument; and
  - Money transfer facility.
- Proposed financial services:
  - Existing financial services (ie, advice, issue, acquire, dispose (principally and on behalf), arrange);
  - Payment services:
    - Payment initiation services;
    - Acquiring and payment facilitation services; and
    - Money transfer services (ie, sending or receiving money under a money transfer facility).

We do not consider the identified payment functions should be treated as all financial services or all financial products. We encourage Treasury to consider the nature of each function and whether it includes a service and/or a product.

---

### **4 Does the term ‘payment stablecoins’ accurately describe the types of stablecoins this paper seeks to capture for regulation or are there other terms that may be more appropriate?**

As Treasury intends to capture stablecoins by reference to their underlying collateral (ie, fiat currency) not their use (ie, payment), we suggest the term ‘fiat backed stablecoin’ or ‘fiat collateralised stablecoin’ is more appropriate to avoid confusion with other stable value crypto assets that may be used as a form

of payment or a stable store of value in a closed or specified system. For the same reasons, we also suggest this is not augmented to 'fiat referenced stablecoin'.

---

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

While the proposed definition distinguishes the arrangement from other stablecoin arrangements, the concept is less clearly distinguished from other technological arrangements. Under the proposed definition, any marketplace or platform credit system, or any digital representation of money-like value could be captured. We suggest incorporating a reference to blockchain (if that is the intention) or narrowing the definition to bearer instruments that are widely used for payment (ie, not specific marketplace or closed loop systems).

---

## **6 Is regulation as an SVF an appropriate framework for the regulation of payment stablecoins? If not, why? What would be an appropriate alternative?**

We do not have any comments on this Question.

---

## **7 Does the list of proposed payment functions adequately capture the range of payment services offered in Australia currently and into the future that should be regulated under a payments licensing regime?**

See our response to Question 2 regarding further refinement of the payment functions. To reiterate, the payments landscape is innovative and fast paced. It is not possible to futureproof regulation in a way that captures all future payment services. Treasury should consider an approach to regulation that is adaptable and responsive to the evolving landscape, such as by using legislative instruments and regular periods of consultation to ensure regulation remains fit for purpose.

---

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

See our response to Question 2. We consider these should be separated into discrete functions that align with the associated risk profile.

---

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

No. Please refer to our response to Question 7.

---

## 10 Would the removal of the identified exclusions create unintended consequences?

- **Exchange and settlement between non-cash payment providers:** As noted, we do not see the regulatory benefit in additional regulatory layers for clearing and settlement services.
- **Payments debited to a credit facility:** Removal of this exemption could cause dual regulation for credit providers. We suggest considering whether a modified version of this exclusion should remain.
- **Unlicensed product issuers that use licensed intermediaries:** As the proposed payment functions have the capacity to capture most payments businesses, we suggest retaining this exclusion to alleviate regulatory burden for providers. If there is concern regarding the application of this exclusion to SVF providers, we encourage Treasury to consider carve outs for those entities.

---

## 11 Which existing exclusions and exemptions applicable to non-cash payment facilities should be amended or removed to support regulation of the proposed payment functions? Do any existing exclusions or exemptions require updating, such as the relief for low-value facilities?

We agree the identified exemptions and exclusions should be retained and make the following comments.

- **Limited value SVFs:** We suggest aligning SVF exemptions with the RBA's declarations for purchased payment facilities (ie, limited payee and limited value SVFs). This will alleviate regulatory burden for new entrants testing the market and aligns with the perception of risk already identified by the RBA. In the stablecoin context, this also aligns with the approach taken for MiCA in the EU for asset referenced tokens below EUR 5 million.
- **Single payee exemption:**
  - As the Consultation Paper notes, there is inconsistency in the market regarding the interpretation of the single payee exemption (eg, whether it can be used on a per-transaction basis within a broader facility that supports payments to multiple payees). This exemption should remain as it provides appropriate coverage for closed loop systems and platforms with a single operator to whom payments are made. However, we suggest providing guidance regarding its intended application.
  - We also suggest either expanding the single payee exemption or issuing an additional exemption to apply where the payee is in the same corporate group as the issuer. Many global businesses leverage different group entities to support payment collection from

customers in multiple jurisdictions. Given the broad scope of payment functions the Consultation Paper proposes to regulate (including acquiring), we consider an exemption should apply where an entity makes, collects or facilitates payments between customers and entities within a single corporate group. This will alleviate regulatory burden associated with common global platform models that could be unintentionally caught by the regime.

- **“Not a component of another financial product”**: Each of the gift card, loyalty scheme and low value exemptions under ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 require that the “facility is not a component of another financial product”. In practice, this limb is difficult to understand, particularly where NCP facilities increasingly form part of a broader digital experience. We suggest either removing or clarifying this component of the relief.

---

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

Yes, however clarity in the form of regulatory guidance would assist in understanding the parameters.

---

## **13 Should any exclusions or exemptions be revised to be more consistent with comparable jurisdictions? For example, should the ‘single payee’ exclusions and relief for loyalty schemes, electronic road toll devices, prepaid mobile phone account and gift cards be replaced by a general exclusion for payment instruments that can be used only in a limited way?**

See our response to Question 11. We also encourage Treasury to consider the creation of an exemption that applies to low risk and limited environments (eg, closed loop marketplaces where no funds can be withdrawn).

---

## **14 Should the exclusion for low value facilities apply to any PFS, such as money transfer services? If so, what thresholds should be considered a low value PFS?**

Yes, the current low value facility exemption should be applied to money transfer services (also see our responses in Question 11 regarding SVFs). We also encourage Treasury to consider increasing the \$1,000 threshold to better align with single transaction values that have increased with inflation.

---

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

See our responses to Questions 11 to 14.

---

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

Please refer to our comments in the 'Background' section of this submission regarding identifying the customer at risk.

---

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

We do not have any comments on this Question.

---

**18 While having regard to the obligations proposed to be imposed on the payment functions (outlined in Section 7), are the risks posed by the performance of each payment function appropriately mitigated by the payments licensing regime? Or are they more appropriately addressed by a framework outside of the payments licensing regime such as the *PSRA* or *AML/CTF Act*?**

Yes, noting our comments regarding existing regulation of clearing and settlement systems.

---

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

Yes.

---

**20 Should payment functions that are not customer facing be required to hold a payments licence? Should providers of these non-customer facing payment functions have different regulatory obligations, such as only having to comply with relevant industry standards?**

We consider such businesses should hold a payments licence, however tiered obligations should exist having regard to the risks associated with their function.

---

**21 Should the common access requirements and industry standards be linked to the payments licence? For example, would it be appropriate for some entities to only be required to**

## **comply with mandatory industry standards but not be required to hold an AFSL or comply with the ePayments code?**

We have not commented on this Question, as the appropriate regulatory framework will be informed by more clearly defined payment functions. We generally support only imposing regulatory obligations that are required to manage the payment function risks and not overburden businesses.

---

### **22 What types of businesses should be subject to the common access requirements? There is limited information available on the number and size of non-bank PSPs interested in directly participating in Australian payment systems to clear and settle payments. If this is something that your business is interested in, please provide further information (including via a confidential submission).**

We do not have any comments on this Question.

---

### **23 Further information is sought to help identify the number and profile of participants that perform each payment function and therefore may potentially be affected by the new licensing framework.**

We do not have any comments on this Question.

---

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

We support the examples provided in Box 2.1. We generally support streamlining applications where an applicant already complies with a higher bar of regulation (eg, APRA regulated entities).

---

### **25 Is the proposal to provide central guidance and a website portal for PSP licensing processes a good alternative to the single point of contact proposal recommended by the Payments System Review?**

We consider both central guidance and a central point of contact will alleviate issues associated with cross-agency engagement (which is currently protracted and, at times, circular).