Law Council
OF AUSTRALIA

Business Law Section

14 April 2026

The Treasury
Langton Crescent
PARKES ACT 2600

By email: Paymentslicensingconsultation@treasury.gov.au

Dear Treasury,

Regulation of payment service providers—Tranche 1 draft legislation

1. This submission is made by the Financial Services Committee of the Business Section of the Law Council of Australia, with informal input also provided by the Business Law Committee of the Law Council of New South Wales.

2. The Committee is grateful that some 4 weeks was provided for input, and that members attended the public roundtable. However, the Committee notes that the submission period included Easter, and that most professionals with expertise in payment system matters also practice in relation to anti-money laundering law, were on leave, and further, the submission period crossed over with the implementation of material reforms for all current AML 'reporting entities'. As such, the Committee is not able to comment on all aspects of the proposed reforms in the timeframe provided.

3. The Committee refers to and repeats the observations made in its submission dated 6 November 2025 about the exposure draft Tranche 1a draft legislation, and its submission dated 8 February 2024 in response to the Regulation of Payment System Providers Discussion Paper.

Exemptions

4. The Committee observes again that the general scheme of the proposed change to the law is that providers of services in respect of payments are to be brought within the existing licensing framework of Chapter 7 of the Corporations Act, in circumstances where a wide range of organisations presently provide relevant services without the need for licensing.

5. The Committee notes in passing that the Chapter 7 licensing regime imposes very high practical costs for benefits which are not always easy to see, and that the licensing system usually has very long processing times, which appear to be related not only to the extreme complexity of the regime as implemented but to material under-resourcing of the function. Each of these factors causes very significant costs to the regulated sector, and the Committee suggests that a general examination of

whether the licensing regime as currently in place is fit for its current purpose, or for the currently proposed reforms, is well overdue.

6. Some of these services were originally within the scope of Chapter 7 of the Corporations Act from its commencement, and have been provided exemptions under the current regime as they are known to be low risk—for example, gift cards. The majority of existing low-risk exemptions are in substance proposed to be preserved within the proposed new regime.

7. The Committee repeats its observation that a range of payment 'ecosystem' services are not within the current licensing regime at all, meaning that there is not any identified class that is to receive analogous low-risk relief. In the Committee's submission, low-risk services should be identified in advance and be offered relief.

8. Some existing unregulated service providers rely on the current distinction between 'making payments' services (which are currently regulated), and 'arranging for payments to be received' services (which are currently unregulated). The Committee understands that the proposed section 911A(2)(ca) 'commercial agent' exception is intended to cover some aspects of this. The Committee also understands that a policy decision has been made generally that payment service providers are to be subject to licensing and in many cases prudential supervision regardless of disproportionality of risk, but considers the specific exemption offered to be of far more limited application than need be. It is possible that current service providers relying on this model may change their business models by establishing separate legal entities, which can rely on the 'single payee' exemption in section 761ED(2)(b).

9. In the experience of Committee members, there is broader reliance on the 'incidental product' exemption, which is to be entirely abolished for payment services and left in place for other financial services. We submit that there are a wide range of very low risk business structures that rely on this current exemption in support of a service that overall has no 'financial product purpose'.

10. To expand on this point, so called 'ride share', food delivery, and accommodation sharing services (**Branded Service**) do not have an in-substance financial product purpose. The purpose of the Branded Service is transport, food delivery, or accommodation. Payment is made for the Branded Service , but the services are not ***about*** the payments. The Committee submits that in each case there are usually one or more entities that receive a payment from a member of the public who has requested the transport, food delivery or accommodation, and that each entity ultimately pays one person (or usually multiple persons), directly or indirectly, in connection with the delivery of the service.

11. The member of the public is not seeking a payment service provider, and does not see the entity that is directly paid as a payment service provider. In our view, the money of the member of public is adequately protected if the service provider organisation as a whole stands behind the delivery of the service to the member of the public. A licensing and prudential supervision regime is not, in the Committee's view, needed in this regard, and the costs of imposition are wildly disproportionate to the benefits that would be gained from imposing the regime.

12. For completeness, the 'commercial agent' model is not designed to, and plainly does not, encompass this very common use case.

13. Also for completeness, so long as the co-ordinator of the Branded Service does stand behind the delivery of the Branded Service, the risks are substantially the same, whether the Branded Service is to be provided on the same day (such as ride share and food delivery) or several months in the future (such as accommodation sharing).

14. Additional licensing relief should be available at least for 'branded' payment entities collecting the payment for a Branded Service that is to be provided to (or at the direction of) the payer, regardless of whether the payment is indirect or may be made to persons that are not related bodies of the Branded Service co-ordinator (such as ride share drivers, insurers or toll operators).

15. As a separate observation, the proposed exemption for stored value facilities, which are useable only within a corporate group in regulation 7.1.04FA, should in the submission of the committee be repeated for payment facilities only useable within a corporate group. In the experience of the committee, intra-group stored value facilities are not widely used, but intra-group payments services are common and should not be subject to regulation.

PSRA 'participants' in 'payment systems'

16. The legislation proposes to apply a mandatory ePayments Code to 'participants' within the meaning of the *Payment Systems (Regulation) Act* (**PSRA**): section 1101AH(c). The committee submits that recent amendments to the PSRA make the use of its definitions unsuitable for this purpose (or any purpose). The definitions as amended are so exceptionally broad that they fail to distinguish the intended regulated community from the generic environment. There is, in the view of the Committee, no textual limitation within the PSRA as currently in force that limits any activity of a 'constitutional corporation' that is apropos of payments from being a payment system.

17. For example, a majority of companies that have employees, have a payroll function, in consequence of which employees receive their wages. The payroll function is 'an arrangement, or a system of arrangements', and is therefore a 'system' (section 7A(4)). Payments or transfers of funds occur 'pursuant to' the payroll function, therefore it is a 'payment system' (section 7A(1)). From this analysis it is plain that the great majority of constitutional corporations will be the operators of at least one and usually several distinct payment systems (for example, an accounts payable or an accounts receivable function).

18. The definition of 'participant' is equally unsatisfactory. Any constitutional corporation that provides services that facilitate the **operation** of a payment system (section 7A(2)(a))—such as a constitutional corporation providing cleaning services or utilities—or **facilitate the transfer or receipt of messages**—such as utilities providers and, in the case of substantive payment systems, every merchant—is a participant in each such payment system.

19. The recent PSRA amendments were not fit for purpose, but do not become a substantive mistake until new legislation is passed that imposes obligations on all 'participants'. The proposed ePayments Code amendment should not be made until the PSRA is corrected with definitions that have exclusions and defined end-points.

20. The existence of a power for ASIC to exempt entities is not, in the submission of the Committee, a suitable substitute for an excessive legislated scope. The legislation should give considered and plainly worded indications of the population that is intended to be caught.

Controls on client money

21. It is plain that the proposed measures on safeguarding 'relevant PS money' in the Corporations Act and in the Payment Entities Regulation Bill, are very closely based on the existing Part 7.8 'client moneys' provision. In the submission of the Committee, they repeat the central flaw of the existing Corporations Act provisions, which is that there is no provision for *actually making the relevant payment as directed by the payer*. In the context of regulated payment services providers under the Corporations Act, the response to this has frequently been to adopt a purposive approach, and conclude that funds that have been accepted purely for the purpose of on-payment never become client moneys at all (on the basis that the receipt of the funds for that purpose is the delivery of the relevant service: ie that a non-cash payment facility has been issued).

22. In the context of legislation that is intended to regulate payments, the omission is surprising.

23. To illustrate the current issue, assume payment service provider P accepts $100 from client C to be paid to recipient R. The usual method would be to pay the funds to a financial institution account in the name of R. On the basis that the $100 is client money, it may lawfully be paid 'to, or in accordance with the written direction of, the person entitled to the money': Regulation 7.8.02(1)(a). However, that is subject to the condition in regulation 7.8.02(1)(b) that, if the payment is to a licensee, the licensee must be told that the money is client money of C. Read literally, the client money can never cease to be client money.

24. With extensive reliance on statutory interpretation principles, a licensee might make the payment as directed from its own funds, and use the $100 as reimbursement, on the basis that making the payment is 'a payment made to acquire, or acquire an increased interest in a financial product' (viz: the non-cash payment facility that it itself provides) but the argument is plainly strained.

25. In the context of the current payment system reforms, it is surprising that essentially the same model has been repeated.

26. The Committee notes that the draft explanatory memorandum at paragraph 1.182 (bullets 2 and 3) argues against the reading that the payment services provider should make the payment from their own funds and seek reimbursement from the relevant PS Money that is held. The committee submits that it would be surprising (perhaps inadvertently) and unfeasible for a provider to be required to hold a large float of its own money (sufficient to make payments both large and small) and use

that money to actually make the payments as requested before a subsequent reimbursement from the money that the client provided for the purposes of being paid to a recipient.

27. If that highly inefficient model is intended, the Committee submits that far too much reliance upon statutory interpretation principles is needed to conclude that this is the intention.

28. Although the draft explanatory memorandum goes into significant detail about a legislative intention of keeping the relevant PS money safeguarded so that the requested payment can be made, there is no clear provision under which payments may lawfully be actioned. This is a fatal flaw of the legislation. The relevant PS money provisions for payment services **should not** be based to any extent on the existing Corporations Act 'client money' provisions, and should be fundamentally re-thought from first principles based on the intended use case—payments.

29. The Committee notes that it may be appropriate to draw a distinction between 'straight through' payment products, and stored value products where the funds are intended to be held in an intermediary facility for a defined period, including when the intended payee may not have been ascertained at the time that funds are provided to the payment services provider.

30. As an aside, the Committee notes that, in many cases, the client will desire that funds be received and transmitted in accordance with client instructions after only a very short period, and there should not be onerous requirements that could delay that processing.

31. In circumstances where (it is submitted) there is no clear lawful way to perform the very service that the client desires, it is more concerning than it would usually be that section 983HY contains an anti-avoidance provision that is not present in Part 8.

Credit facilities

32. The Tranche 1 legislation proposes to repeal subparagraph 765A(1)(h)(ii) of the Corporations Act 2001, which exempts "a facility for making non-cash payments, if payments made using the facility will all be debited to a credit facility covered by subparagraph (1) (a credit facility within the meaning of the regulations)" and replace it with "a payment instrument issued by the provider of a credit facility, if the credit facility is the only facility from the credit of which non-cash funds transfers of funds may be made using the payment instrument".

33. As identified in paragraph 1.151 of the explanatory memorandum, this narrows the exemption so that "the exclusion will not cover payment instruments that access funds from a credit facility but that are issued by a person other than the credit provider".

34. This updated exception will impact non-bank lenders with structures whereby the credit funds are accessed from a trust or separate entity that is not the issuer of the facility (although a related party). This would appear to be incongruent with the intention of the exclusion, which is to ensure that the credit facility and the credit provider are the same. In a situation where a non-bank lender provides credit funds

via a trust structure, the related parties should be considered to be part of the "issuing entity"—however, in a technical sense, in the context of the new reforms they are unlikely to be.

35. Such a non-bank lending entity is already subject to the Australian Credit Licensing framework under the National Consumer Credit Protection Act 2009. Obliging such an entity to comply with both licensing frameworks on the basis of what would appear to only be a structural or operational decision not contemplated under the new reforms appears to be unnecessarily burdensome.

36. The Committee recommends that a note to be added, *"the provider of a credit facility"*, in the context of a party already licensed under the NCCPA, is intended to encompass a group company or representative arrangement.

37. The Committee would be pleased to discuss any aspect of this submission.

38. Please contact the co-chair of the Committee James Moore [redacted], if you would like to do so.

Yours sincerely



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Chair, Business Law Section