1998

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PAYMENT SYSTEMS (REGULATION) BILL 1998

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer,
the Honourable Peter Costello MP)

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Outline

1.1 This Bill forms part of a package of legislation to implement the Government's response to the recommendations of the Financial System Inquiry as announced by the Treasurer, the Hon. Peter Costello, MP, in the House of Representatives on 2 September 1997.

1.2 The fundamental goals of the Government in introducing this package of legislation are to increase competition and improve efficiency in the financial system, while preserving its integrity, security and fairness.

1.3 The payments system covers the system of payment instruments (cash, cheques, smart cards among others), their delivery, the exchange or clearance of payment messages, and the final settlement of value between intermediaries providing payment services.

1.4 The payments system plays a central role in the financial system. The Government has decided to strengthen, and make more transparent and accountable, the regulation of the payments system undertaken by the Reserve Bank of Australia. Until now, the Reserve Bank has played a substantial regulatory role in the payments system as a direct participant and through the use of its banking powers. Regulation of the payments system is to be separated from the prudential regulation of banks because an increasing number of non-bank participants in the payments system are emerging to increase competition in the system. More direct means for achieving effective regulation are required for this purpose.

1.5 The Reserve Bank of Australia will be the regulator of the system, given the importance of the payments system to the overall stability of the financial system and given the central role of the Reserve Bank itself in the core areas of the payments system.

1.6 This Bill proposes a new regulatory framework for the payments system. While existing industry self-regulatory arrangements will be retained wherever these are performing satisfactorily (and thus may be subject to authorisation by the Australian Competition and Consumer Commission–the ACCC), the Bill provides powers to the Reserve Bank to enable it to undertake more direct regulation of designated payment systems (which are a subset of the payments system) where it is in the public interest.

These powers include the imposition of rules of access for participants on commercial terms, the determination of standards for the operation of payment systems, the giving of enforceable directions, and the voluntary arbitration of disputes relating to financial safety, efficiency, competitiveness and/or systemic risk. The development of access regimes and standards will be undertaken, as far as possible, in conjunction and consultation with the private sector. In addition, it is intended that the RBA will consult closely with the ACCC when preparing access regimes.

1.7 The Government recognises the importance of relationships between businesses and their customers. This legislation will not intrude into these individual relationships but will be the basis for encouraging the development of more efficient and safe payment systems that have the potential to benefit both customers and the providers of payment services.

1.8 Separate legislation provides for the establishment of a Payments System Board within the Reserve Bank to provide for policy making in relation to the payments system and to increase the accountability of the Reserve Bank in relation to its role in the payments system. See Schedule 14 of the Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998.

Financial impact statement

1.9 It is not envisaged that the Bill will have a financial impact on the operations of government. All costs incurred in the regulation of the payments system will be met by the Reserve Bank of Australia and are not expected to substantively affect forward estimates of the profits of the Reserve Bank or of the dividends flowing from the Reserve Bank to the Commonwealth.

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Abbreviations

The following abbreviations are used in this explanatory memorandum.

ACCC	-	Australian Competition and Consumer Commission
ADI	-	Authorised Deposit-taking Institution
APCA	-	Australian Payments Clearing Association
FSI	-	Financial System Inquiry
NBFI	-	Non-Bank Financial Institution
PSB	-	Payments System Board
RBA	-	Reserve Bank of Australia
TPA	-	*Trade Practices Act 1974*

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Regulation impact statement

Problem identification and regulatory objective

3.1 There are two particularly important features of the payments system which, although not unique to that system in every respect, give rise to the need for regulation.

(a) First, inherent to the functioning of the payments system in a modern market economy is the need for providers of most payment services to cooperate with one another in order to provide a comprehensive service to their customers.

(b) Second, the process of clearing and settling depends to a large extent on the standing and the integrity of the instructions delivered and exchanged and the ability of participants to honour their commitments. A particular risk to the collecting institution is that, having credited the customers' accounts, the paying institution defaults at time of settlement (settlement risk). Such an occurrence can affect adversely the ability of all participants to meet their obligations, resulting in systemic risk. There is a particular concern to minimise settlement risk because there is very little scope for users of the payments system to assess it and, since it may lead to systemic instability, the potential cost to the economy of failure to settle is very high. Hence, there is the need to screen participants in the payments system.

3.2 The combination of these factors has a number of implications. Competitive forces may be blunted through limits on the number of participating firms thereby giving them the opportunity to restrict supply, charge higher prices, and to stifle innovation. Moreover, if the firms currently in the market have the power to dictate access to that market, then it is clearly often in their interest to restrict entry and thereby, through barriers to entry, further limit competition. Government regulation may thus be justified so as to prompt participants to take certain actions such as liberalising access, or bringing forward investment and innovation in the interest of improving the efficiency and stability of the system.

3.3 At present, the Reserve Bank of Australia (RBA) has only general powers as a central bank and prudential supervisor in the regulation of the payments system. In

many cases, in the absence of explicit regulatory powers, its influence over the system is achieved through direct participation in industry-based arrangements and moral suasion. In the case of settlement, an important power is that achieved through determining access to exchange settlement accounts with the RBA. However, the RBA has relatively limited direct regulatory powers in the areas of clearing and payment instruments. Regulation of the issuance of cheques is provided separately under the *Cheques and Payments Orders Act 1986*, however, there is no explicit regulation of most card-based and other electronic systems nor of instruments which are based on pre-payments of value (such as travellers' cheques, smart cards and electronic cash provided on the internet).

3.4 There are four multilateral payment clearing systems in use in Australia which are progressively being brought under the management of the Australian Payments Clearing Association (APCA), an industry owned, limited liability company. APCA was formed to oversee new entry to important parts (although not all) of the payments system and to manage and coordinate the effective operation of the major payment clearing systems. Individual institutions, which are providers of payment services that wish to operate in the four major clearing systems, must operate according to APCA's rules as set out for each system. These rules are subject to authorisation by the Australian Competition and Consumer Commission (ACCC). Under APCA's rules, only providers of payment services are allowed to participate fully in clearing. The practical effect of the rule so far has been to restrict full membership of all clearing streams to banks and Special Service Providers for building societies and credit unions. Current members thereby enjoy market power that could be anti-competitive. There are a number of provisions in the *Trade Practices Act 1974* (TPA) that aim to promote access to third parties to certain essential services on fair and reasonable terms. However, these provisions apply to the payments system only in very limited circumstances (such as if a natural monopoly were to emerge in a part of the payments system or in cases where the Government has some other form of regulatory leverage to require an institution to provide access to essential services).

3.5 While the ACCC provides broad oversight of the trade practices of the industry, there is a need for further specialised independent and continuous policy oversight of the payments system in view of its highly technical nature, the rapid rate of technological progress in this area, and its importance to the safety and efficiency of the financial system. The Financial System Inquiry (FSI) Report recommended that the RBA should carry out the role of independent and specialist regulator for the payments system, not just to ensure fair and competitive practices, but also to promote innovation and efficiency and to control risk.

3.6 The FSI identified considerable scope for increasing the efficiency of the payments system. While international comparisons of the efficiency of payments systems are unavailable, it examined proxy measures and concluded that Australia is in the middle of the field in terms of efficiency. One measure is to compare the relative use of various payment instruments given that certain instruments are more cost effective than others. An alternative is to compare the cost per payment transaction of operating in different countries as provided by internationally active participants.

Evidence provided to the FSI suggested that the security of the Australian consumer electronic system was world class but that current industry arrangements imposed unnecessary costs. The FSI Report also provided analysis that emphasised the importance of the payments system for the overall efficiency of the banking system and the importance of further developing electronic channels.

3.7 The emergence of new forms of purchased payment facilities has motivated calls for some regulation. Two new payment instruments currently under trial in Australia are smart cards and electronic cash. Smart cards can combine a stored value function with a re-loadable capability from a range of sources. It is expected that in addition to a payments function, smart cards will provide consumers and merchants with a wide range of other functions. The multifunctionality of smart cards means that a wide range of institutions will issue them and that the issuer of the 'electronic purse' (or the provider of the store of value) may be different from the issuer of the card.

3.8 Smart cards operating in closed systems for the purposes of a single merchant or small group of merchants (such as telephone cards) pose little systemic risk and require no special prudential regulation. However, smart cards operating in open systems, or intended for widespread use as a means of payment at many merchants, pose different risks because they become part of the general payments system.

3.9 In Australia there are no current specific legal restrictions, nor industry standards, to be met by potential issuers. Given that the failure of an unsupervised issuer could harm the commercial viability of other schemes, at least in the short run, consideration should be given to appropriate regulatory arrangements. Other instruments may emerge in the future and policies in this area should be designed to ensure that any regulation applies generally. Acceptance of these new instruments will depend a good deal on the confidence which purchasers and merchants have in the issuers. Some countries propose that these instruments will be issued only by supervised deposit-taking institutions, while others have chosen not to restrict those who may issue them.

3.10 The FSI considered that, in order to protect consumers and to ensure public confidence in these systems, the store of value behind all purchased payment instruments intended for use by a wide range of merchants, irrespective of the technology used, should be subject to regulations by the RBA in a way similar to those applying to licensed deposit-taking institutions.

3.11 Two important objectives are to provide a level of protection to consumers for the value outstanding on the cards or other instruments, and to assist the development of the industry by increasing consumer confidence in the instruments.

Regulatory objective

3.12 The major objective is to achieve a regulatory framework that would best promote efficiency and competition in the payments system without compromising

financial stability. The introduction in 1998 of a system to place all high value interbank payments for government securities, most other fixed interest securities and foreign exchange on an real-time gross settlement basis will serve to reduce settlement and systemic risk. However, further efforts could be made for introducing to other parts of the payments system some form of real-time settlement.

Identification of alternatives

STATUS QUO

3.13 The RBA could continue to seek to improve competition and reduce systemic risk in the payments system through cooperative arrangements within its current powers. However, as outlined above, the FSI found that the payments system is not operating as efficiently as it could be. In relation to purchased payment instruments, the status quo would be to not introduce any further regulation but to rely on existing or proposed disclosure regulation to protect consumers.

REGULATION

3.14 The RBA could be given additional legislative powers to regulate clearing and settlement systems, to control risk in the financial system, and to promote efficiency and competition in the public interest. In particular, it could be given powers to:

(a) designate a particular payment system as being subject to RBA direction;

(b) determine the rules for participation in clearing streams, including to ensure access to new participants; and

(c) arbitrate and make determinations on disputes over matters relating to financial safety, competitiveness and systemic risk.

3.15 In addition, the RBA could be given the power to regulate holders of stores of value of purchased payment systems. Examples of these include travellers' cheques, smart cards, electronic cash and other payment instruments that are intended as a means of making payments to a wide range of merchants.

Impact analysis

STATUS QUO

3.16 Under the status quo, the benefits of greater competition and better risk control would be less certain and take longer to achieve. Given the international trend towards strengthening the powers of central banks to regulate the payments system, a failure to

do so in Australia could result in our falling further behind other countries in terms of efficiency and stability, adversely affecting the competitiveness of our financial system.

REGULATION

3.17 Regulation of the payments system needs foremost to promote competition and efficiency while ensuring security, confidence and stability. While done in consultation with the existing participants, the regulator must ensure that conditions of access to designated payment systems are fair, transparent and contestable.

3.18 Users of payment instruments and services will receive the benefits that competition, or the threat of competition, would bring in terms of service costs, choice and quality (eg the proposed reduced cheque clearing times could be introduced sooner). The economy as a whole would benefit from a more stable and secure financial system.

3.19 Banks would face greater competition in clearing systems with possible consequences for their profitability. Non-bank financial institutions (NBFIs) (such as building societies and credit unions) would be given greater access to clearing systems but would also be exposed to greater competition, or the threat of competition, from other participants.

3.20 Technology and other developments are providing a new range of participants, many from outside the financial services industry, with the capacity to play an active role in the provision of financial services. Non-traditional participants might include:

(a) utilities, which could potentially use considerable physical and communications infrastructure for the delivery of transaction services; and

(b) retail organisations, or consumer product companies, which could potentially lever-off strong brand names, large customer networks and well-developed marketing and segmentation capabilities to offer a wide range of financial services.

3.21 Non-traditional participants will benefit from greater access to the payments system on more reasonable terms and conditions. Entry into the clearing system will give these new participants a greater say on issues such as standards setting, which in turn would allow them to participate more broadly in the payments system.

3.22 The RBA may incur minor additional resource costs associated with undertaking these new functions, which will be met from their existing resources. The proposal includes the establishment of the Payments System Board (PSB) to govern the relevant RBA staff in undertaking their payments system responsibilities. See separate Schedule 14 of the Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998.

3.23 One of the major reasons for regulation in the financial sector arises from the intensity and nature of informational imbalances that exist between financial institutions and retail consumers of financial services. The objective of disclosure regulation is to ensure that consumers understand the contracts they enter into (or promises they purchase), including their risks. This is achieved through, among other things, the proscription of false or misleading promises, and through provision for recourse in the event that a contract is not met. However, consumers cannot, regardless of the information they receive, assess whether an entity that offers them a promise is able to meet that promise. In purchasing a financial promise, consumers often have very limited means of assessing the capacity of the supplier to meet the promise and often rely on that capacity being maintained over a long period during which it could radically change. To deal with this market failure requires more intensive regulations such as liquidity, collateral, and capital requirements. Therefore, reliance on disclosure regulation would not meet the objective of protecting consumers in the case of a failure of a participant and may limit consumer acceptance of smart cards thus lowering the benefits to business and consumers of widespread use of this technology.

3.24 The second option is to give the RBA the power to regulate holders of stores of value of purchased payment systems. These systems are intended as a means of making payments to a wide range of merchants. Where the provider of the store of value is not a prudentially regulated deposit-taking institution, regulation could include collateral or other security arrangements, consistent with existing practice in the US for travellers' cheques. However, the RBA would need to apply collateral requirements flexibly taking into account the particular circumstances of the institution.

3.25 Banks and NBFIs are unlikely to be directly affected by this proposal as they are already prudentially regulated to a high standard. Other non-bank participants that wish to be holders of stores of value would face compliance costs associated with meeting collateral or other prudential requirements or they may enter into an arrangement with a licensed deposit taker to provide a store of value. On the other hand, they would also benefit from the greater consumer confidence that regulation would provide. All participants would benefit from the broader development of the industry.

3.26 Consumers would benefit from a higher level of financial safety than if participants were unregulated.

Consultation

3.27 The main consultation process was undertaken by the FSI, which received a total of 421 submissions, including 153 submissions responding to a Discussion Paper published by the FSI in November 1996. These submissions were prepared by a broad cross-section of industry participants and other interested individuals, corporations and groups. The FSI held public consultations in all mainland capital cities during December 1996, and met with a range of financial industry experts and participants;

regulatory agencies and consumers; both in Australia and overseas. The FSI also participated in a range of conferences and seminars, and had a home page on the internet that helped to stimulate debate.

3.28 In submissions to the FSI, all the major banks, with one exception, favoured retaining the current regulatory arrangements applying to the payments system. NBFIs as well as non-traditional participants supported wider participation in the payments system generally, controlled by relevant operational standards. Consumer groups supported lower transaction charges and greater competition while maintaining the security of payment services.

3.29 The major banks advocated restricting the ability to issue 'open system' stored value products to deposit-taking institutions supervised by the RBA. However at this stage, the RBA sees no reason to restrict the issuance of stored valued products to supervised entities. Non-traditional participants tend to favour a regime open to all market participants on equal terms with appropriate prudential guidelines. Consumer groups are concerned with safety issues arising from a wider application of stored valued technology and therefore would favour this proposal to regulate issuers of stores of value.

3.30 APCA and the Australian Bankers' Association have also been consulted on technical matters arising from a draft of this Bill.

Review

3.31 Various bodies will undertake ongoing review and assessment of the success and appropriateness of these regulatory arrangements.

(a) The PSB will be responsible for ensuring that it regulates the payments system in accordance with its charter; balancing efficiency, competition and stability objectives. It will be required to make regular, detailed public reports on its operations and sources and uses of funds and will also be answerable to the Parliament through the Treasurer as responsible Minister. This will not only enhance the accountability of the RBA, but will increase the degree of scrutiny on the effectiveness and continued relevance of its regulatory approach.

(b) The Treasury will continue to fulfil its role in advising the Treasurer on issues including the development, implementation and efficacy of regulation in the payments system.

(c) The Financial Sector Advisory Council will conduct a review of the regulatory framework five years after the commencement of these measures.

(d) The regulatory framework will also be reviewed ten years after the commencement of these measures as part of the Commonwealth's

legislative review programme.

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Summary of key measures proposed by the Bill

4.1 The key features of the new regulatory arrangements proposed by the Bill are —

- The role of the RBA as regulator of the payments system will be strengthened. While existing industry self regulation will be retained where it is operating satisfactorily, the RBA will be given additional legislative power to regulate payment systems, to control risk in the financial system and to promote efficiency, competition and stability, where necessary in the public interest.

- The philosophy of the Bill is, however, co-regulatory. Industry will continue to operate by self-regulation in so far as such regulation promotes an efficient, competitive and stable payments system. Where the RBA considers it in the public interest to intervene, the Bill empowers it to designate a payment system and develop access regimes and standards in close consultation with industry and other interested parties. Where a payment system is not designated, or where an access regime does not cover a specific matter, the ACCC will retain existing regulatory rights under the TPA.

- In considering the public interest, the RBA will take into account the financial safety of participants, efficiency, competitiveness, and systemic risk.

- The Bill will give the RBA the power to impose an access regime and standards on a designated payment system where it is in the public interest:

  - The RBA will have the power to vary or revoke the access regime and standards given the appropriate notification.

  - The Bill outlines the process of appeal to which a person who has been denied access to a designated payment system has recourse.

  - The Bill requires that the RBA consult with interested parties before imposing or varying access regimes and standards (except in certain limited circumstances). The RBA is also required to provide adequate notification of the adoption or variation of payment systems standards and access regimes.

- The RBA will have the ability to arbitrate disputes between participants in a designated payment system. This power will apply only where the parties to the dispute agree to the arbitration.

- The Bill provides the RBA with the power to issue directions to a participant of a designated payment system if the RBA considers that a participant has failed to comply with a standard or access regime. The Bill makes it an offence if a participant fails to comply with a direction. A person who has been denied access to a payment system (that may be due to an excessively high access price) may ask the RBA to issue a direction. Similarly, that person may apply to the Federal Court for a remedy.

- The RBA will be given increased oversight and regulatory control over purchased payment facilities (including travellers' cheques, stored value cards and stored value systems for use over the internet). The Bill proposes measures to ensure that the holders of the stored value behind purchased payment facilities operate in such a manner as to provide security to the store of value.

  - The Bill proposes that the holder of the stored value must be an authorised deposit-taking institution (ADI) or hold an authority or an exemption issued by the RBA.

  - The RBA may choose to grant an authority where it is satisfied that the holder of the stored value will be able to meet its obligations. The authority is revokable at any stage where the RBA is no longer satisfied in this respect.

  - Authority granted by the RBA may be subject to conditions that can be varied or revoked at any time. The RBA may issue directions to corporations that fail to comply with conditions attached to an authority. Failure to comply with a direction will be an offence.

  - The Bill will empower the RBA to issue/revoke individual or class exemptions with respect to the authorisation requirements.

- The RBA will also have the capacity to request a participant within a payment system (whether designated or not), or a holder of the stored value of a purchased payment facility, to supply information. It will be an offence to fail to comply with a request. Information gathered under this power is subject to the RBA's secrecy provisions.

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Explanation of clauses

Part 1 - Preliminary

Part 1 contains the necessary formal clauses underpinning the Bill. These include details on commencement of the Bill, application of the Bill to external territories, and the application of the *Criminal Code* to all offences against provisions of the Bill.

Clause 1 - Short title

5.1 Upon enactment, the Bill will be known as *the Payment Systems (Regulation) Act 1998.*

Clause 2 - Commencement

5.2 The Bill, once enacted, will commence on the commencement of the *Australian Prudential Regulation Authority Act 1998.*

Clause 3 – Crown is bound by this Act

5.3 The Crown is bound in all its capacities, but is not liable to be prosecuted for an offence.

Clause 4 – Application of this Act to external Territories

5.4 The Bill extends to all external Territories of Australia.

Clause 5 - Application of the Criminal Code

5.5 The *Criminal Code* applies to all four offences in this Bill.

Clause 6 - Overview of the Act

5.6 This clause provides a brief overview of the various parts of the Bill. Part 2 defines terms used in the body of the Bill. Part 3 outlines the details of the powers conferred by the Bill on the RBA. These are the designation of payment systems, the imposition of access regimes, the determination of standards, the arbitration of disputes, and the issuing of directions. Part 4 deals with the regulation of the holders of the stored value of purchased payment facilities. Finally, Part 5 deals with miscellaneous matters including information-gathering powers.

Part 2 - Interpretations

Part 2 provides the necessary definitions and interpretations used throughout the body of the Bill. The definitions describe the types of payment facilities to which the Bill applies, the parties to whom regulation applies, and the decision criteria that the RBA is to apply in its regulatory practices under the Bill. The key definitions in this part are:

- Access is defined to mean an entitlement to become a participant in a designated payment system on a commercial basis that is fair and reasonable. This means that access rights are not imposed on non-commercial terms that do not take appropriate account of the costs and interests of current participants in a payment system.
- Holder of the stored value – defines the party to a purchased payment facility to which regulation is ultimately to apply. That party is responsible for making payments against the stored value.
- Payment system is defined broadly to mean a funds transfer system that facilitates the circulation of money. This is not meant to refer merely to bilateral transactions, or mechanisms established for them, but rather to systems for funds transfers used by third parties, generally in arrangements held open to use on commercial terms by a diverse range of users.
- Public interest - defined to capture considerations such as financial safety, efficiency, competitiveness and systemic risk. RBA decisions must be in the public interest.
- Purchased payment facility – defined with sufficient flexibility to remain abreast with technological developments in the payments field. An example of a purchased payment facility is a smart card.

Clause 7 - Definitions

5.7 This clause of the Bill defines various words and phrases used throughout the body of the Bill, including a payment system and access.

Clause 8 - Meaning of ***Public Interest***

5.8 This clause defines the intended meaning of the phrase **public interest** so as to include considerations such as safety, efficiency and competitiveness. In balancing these factors, the RBA will ensure that there is no material increase in systemic risk, but it is not limited to these factors.

Clause 9 - Meaning of ***purchased payment facility*** *and* ***holder of the stored value***

5.9 A **purchased payment facility** is purchased by one person from another and is intended to be used for making payments in accordance with agreed conditions. Examples of purchased payment facilities are smart cards and e-cash. The **holder of the stored value** is a corporation that accepts responsibility for making payments from the purchased payment facility. In the case of a smart card, the holder of stored value is the company that accepts money from an individual for the purchase of value on a smart card and thereby has an obligation to make good valid payments from the smart card.

5.10 This clause also gives the RBA the power to declare a specified facility to be exempt from the provisions of this Bill. Notification of such a determination is to be published in the *Gazette*. In making this determination, the RBA will consider the number or types of people that have access to that facility; the number or types of people to whom payments may be made using this facility; and any other matters the RBA deems relevant. This clause is related to subclause 25(3) except this provision applies to very small and/or isolated facilities that operate within a closed environment.

Part 3 - Regulation of payment systems

The clauses described in Part 3 provide a comprehensive framework for regulation of participants in various payment systems.

In particular, Part 3 empowers the RBA to designate particular payment systems where it is in the public interest. The process of designation is at the very heart of this Bill as it signifies the RBA's intention to apply regulation consistent with the goals of promoting efficiency and competition while minimising risks associated with systemic instability and financial safety. Part 3 subsequently confers a range of additional powers on the RBA to facilitate regulation, including the power to impose an access regime, to make standards, and to give directions to participants in a designated payment system.

Division 1 - Overview

Clause 10 - Overview of the main regulatory provisions

5.11 This clause provides an overview of the main regulatory provisions of the Bill in regard to payment systems. The clause indicates that the RBA has the power to designate payment systems; to impose access regimes; make standards; arbitrate disputes; and give directions to participants in designated systems.

Division 2 – Designation of payment systems

Clause 11 – RBA may designate payment systems

5.12 Clause 11 provides the RBA with the power to designate a payment system where it is in the public interest. Designation will occur by notice published in the *Gazette* and would have effect until it is revoked. The RBA may revoke a designation where it is no longer in the public interest to be designated. Revocation will also occur by notice published in the *Gazette*. It is expected that a sizeable proportion of payment systems will not be designated.

5.13 While not required by law, it is expected that designation generally will occur only after substantial consultation with participants and after consideration of alternative regulatory approaches and voluntary arrangements have been exhausted.

Division 3 – Access to designated systems

Subdivision A – Access regimes

Clause 12 – Imposition of an access regime

5.14 Clause 12 provides the RBA with the capacity to impose an access regime on the participants in a designated payment system. The access regime must be one that the RBA considers appropriate having regard to the public interest, the interests of current participants in the system, the interests of people who in the future may want access to the system, and any other matters the RBA considers relevant.

5.15 The clause stipulates that the RBA is not to impose an access regime unless it has first undertaken public consultation (see clause 28 for consultation procedures). The RBA's decision to impose an access regime is to be in writing and the RBA is to provide public notification as soon as practicable after imposing the access regime; in particular to ensure that the text of the access regime is readily available (see clause 29 for notification procedures). It is normally expected that there will be close consultation between the RBA and interested parties concerning the development of access regimes.

5.16 It is intended that the RBA will consult closely with the ACCC when preparing access regimes.

Clause 13 - When access regimes are in force

5.17 Clause 13 provides that an access regime will come into force on the day in which the decision to impose the access regime is made, unless the decision itself specifies a later day. The regime remains in force unless revoked in clause 15.

Clause 14 – Variation of an access regime

5.18 Clause 14 provides the RBA with the capacity to vary an access regime where appropriate, having due regard to the public interest, the interests of current participants in the system, the interests of people who in the future may want access to the system, and any other matters the RBA deems relevant.

5.19 The RBA will be required to consult publicly prior to implementing a variation. Consultation may be dispensed with where the variation is of a minor technical nature. The RBA's decision to vary an access regime must be issued in writing and the RBA will be required to provide public notification as soon as practicable after varying an access regime.

5.20 The clause provides that a variation to an access regime will come into force on the day that the decision to do so is made, unless the decision itself specifies a later day.

Clause 15 – When access regimes cease to be in force

5.21 Clause 15 indicates the circumstances under which an access regime will cease to be in force. These include situations where an expiry date has been included in the access regime; where the RBA revokes the regime (either on its own initiative or on the request of the participants in a designated payment system); or where the payment system concerned ceases to be designated or ceases to exist.

5.22 In revoking an access regime, clause 15 will require the RBA to give due consideration to the public interest, the interests of current participants in the system, the interests of people who in the future may want access to the system, and any other matters the RBA considers relevant. A decision to revoke an access regime must be in writing and the RBA will be required to provide notification of the revocation as soon as is practicable.

5.23 A decision by the RBA to revoke an access regime will come into force on the day in which the decision to do so is made, unless the decision itself specifies a later day.

Subdivision B – Enforcement of access regimes

Clause 16 – Right to ask the RBA to give a direction

5.24 Clause 16 provides a person who is denied access to a designated payment system with the capacity to request that the RBA take actions to remedy the situation (the RBA would use its power to direct participants as described in clause 21). Denial would include an unfair or exorbitant price/cost of access; that is, other than on fair commercial terms. The RBA will consider whether there has been a breach of an access regime in determining whether to exercise its power to direct.

Clause 17 – Right to apply to the Federal Court

5.25 Clause 17 indicates that a person denied access to a designated payment system may take the matter to the Federal Court. The Federal Court, if satisfied that there has been a breach of an access regime, may make an order directing the participant to comply with the access regime, and/or to compensate any other person who has suffered loss or damage as a result of the breach, and/or any other order the Court considers appropriate. The clause provides that the Federal Court may discharge or vary an order made under this clause. The RBA has the right to become a party to such proceedings.

Division 4 – Standards for designated systems

Clause 18 – The RBA may make standards for designated systems

5.26 Clause 18 provides the RBA with the capacity to determine standards to be complied with by participants in a designated payment system. Standards may only be imposed where they are in the public interest and must be issued in writing. Standards

may (in writing) be varied or revoked by the RBA. In determining a standard, or subsequently varying or revoking a standard, the RBA must provide notification as soon as is practicable (in accordance with clause 29). Except for urgent or minor technical matters, the RBA will consult widely in developing or varying standards (see clause 28).

5.27 A standard comes into force on the day that the determination of the standard is made, unless the determination itself specifies a later day.

Division 5 – Arbitration of disputes relating to designated systems

Clauses 19 and 20 – Disputes to which Division Applies and Arbitration of Disputes

5.28 Clauses 19 and 20 provide that the RBA may arrange for the arbitration of a dispute between parties to a designated payment system where the dispute raises concerns related to the safety, efficiency or competitiveness of payment systems or indeed raises systemic risk concerns for the financial system as a whole.

5.29 RBA involvement in arbitration would be limited to disputes between 2 or more participants within a designated payment system (and the dispute is connected with the system) or between a person and 2 or more participants in a designated payment system (and the dispute is over whether the access regime is being complied with). All parties to a dispute must agree to the RBA's participation prior to arranging the arbitration.

5.30 Even if the dispute is being settled by arbitration, this does not prevent a person from taking the matter to court unless otherwise ordered by the court. The purpose of the proposed division is merely to provide a lower cost means for resolving disputes.

Division 6 – Directions to participants in designated systems

Clause 21 - Directions

5.31 If the RBA considers that a participant in a designated payment system has either failed to comply with a standard or has failed to comply with an access regime, the RBA may give a direction to that participant. The direction is to be in writing.

5.32 The direction is to require that the participant take (or refrain from) a particular action that the RBA considers appropriate. Such a direction should be consistent with any applicable access regime or standard. The direction may specify a date by which, or a period over which, the direction must be complied with.

5.33 Failure to comply with a direction is an offence and may attract a penalty of up to 50 penalty units per day of non-compliance. Note 2 specifies that when the party is a body corporate the fine may be up to five times that applying to a person; that is 250 penalty units. (This only applies if at the time the body corporate is still a participant in the designated payment system.)

5.34 A direction comes into force on the day it is issued or on a day specified in the instrument by which the direction is issued. The direction continues to be in force until it is revoked by the RBA.

Part 4 - Regulation of purchased payment facilities

Part 4 outlines the framework for regulation of purchased payment facilities (such as smart cards and electronic cash). Purchased payment facilities embody the unique characteristic that consumers pay for the facility using conventional means (cash for instance) and rely on the holder of the stored value backing that facility to subsequently redeem that value. Part 4 proposes regulation designed to provide security to the store of value in the interests of protecting consumers and to promote public confidence in these systems while increasing the level of competition and efficiency.

The central regulatory provision of Part 4 is the requirement that holders of the stored value backing purchased payment facilities be an ADI or have an authority or exemption issued by the RBA.

A transitional provision (in the Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998) provides that corporations (that are not ADIs) which are holders of the stored value of a purchased payment facility are taken to be granted an authority under clause 23 on the commencement of this Bill. This prevents such corporations being in breach of this Bill immediately it commences.

Clause 22 - Holder of stored value must be an ADI or authorised or exempted under this Part

5.35 A holder of the stored value of a purchased payment facility is guilty of an offence if it: (1) is not an ADI, and (2) it has no authority (under clause 23), and (3) it has no exemption (under clause 25). Penalty: 200 penalty units per day of non-compliance. Note 2 specifies that when the party is a body corporate the fine may be up to five times that applying to a person; that is 1000 penalty units.

Clause 23 - Authority to be a holder of the stored value

5.36 A corporation may apply to the RBA for the authority to be a holder of the stored value of a class of purchased payment facilities. The application process is outlined in clause 27. The RBA may grant the authority if it believes that the corporation will be able to meet its obligations as holder of the stored value of the relevant class–that is, if it believes that the applicant will be able to make payments against the purchases made by users of the purchased payment facilities. The RBA is to advise the corporation in writing when such an authority is issued. The RBA may impose, vary or revoke conditions on the authority. These conditions would be directed at ensuring the corporation is able to meet its obligations.

5.37 An authority issued by the RBA comes into force on the day specified in the written authority, or on the day that the authority is granted if no day is specified. The authority continues to be in force until it is revoked.

5.38 The RBA may revoke the authority if it no longer believes the corporation will be able to meet its obligations as holder of the stored value, or if it considers that the corporation has contravened a condition of the authority, or if the corporation applies to the RBA for a voluntary revocation, or if the corporation ceases to be a holder of the stored value of the class of purchased payment facilities. The application for the revocation of an authority must comply with clause 27.

Clause 24 - Directions on failure to comply with conditions

5.39 The RBA may issue directions to a corporation that has been granted authority (under clause 23) if it considers that the corporation has failed to comply with any condition attached to that authority. The direction would require the corporation to take (or refrain from) action consistent with remedying the failure to comply with the condition. The direction may specify the time or time frame for which the direction applies. The direction would be by notice in writing to the corporation.

5.40 Failure to comply with the direction would constitute an offence. Penalty: 50 units per day for non-compliance. Note 2 specifies that when the party is a body corporate the fine may be up to five times that applying to a person; that is 250 penalty units.

5.41 A direction imposed by the RBA comes into force on the day specified by the instrument giving the direction or, if no day is specified, on the day that the direction is given and remains in force until it is revoked.

5.42 A direction may be revoked by the RBA if it deems the direction no longer necessary and/or appropriate. Revocation is to be done in writing to the corporation concerned.

Clause 25 - Exemptions

5.43 Clause 25 empowers the RBA to grant exemptions to a corporation, or a class of corporations, which are ADIs or which have not been granted authority by the RBA under clause 23. This exemption allows the entity to be a holder of the stored value backing a specified class of purchased payment facilities. Corporations may apply to the RBA for such an exemption. The application must comply with the conditions in clause 27.

5.44 The RBA may grant an exemption if it considers that the corporation or class of corporations will be able to meet their obligations as holder of the stored value – that is if it believes that the applicant will be able to meet payments against the purchases made by the users of the class of purchased payment facilities. Notification of the granting of an exemption would be in writing in the case of a single corporation, or by the *Gazette* in the case of a class of corporations. Large holders of stored value that

meet these conditions will use this clause. Very small and isolated facilities that operate in a closed environment may be exempted under subclause 9(3).

5.45 An exemption granted by the RBA comes into force on the day specified in the written exemption or on the day that the exemption is granted if no day is specified.

5.46 The exemption continues to be in force until it is revoked. The RBA may revoke the exemption if it no longer believes that the corporation will be able to meet its financial obligations.

Part 5 - Miscellaneous

Part 5 contains a number of miscellaneous provisions important to the operation of the Bill.

The RBA's ability to effectively regulate the payments system will depend critically on the type and quality of information it is able to collect from payment systems participants. To this end, Part 5 outlines the RBA's information collection powers applicable to participants in payment systems (whether designated or not) and corporations authorised or exempted to hold the stored value of purchased payment facilities. The RBA may collate this information and publish aggregated statistics to better inform the market of prices and costs with the intention of promoting transparency, competition and lower prices. However, individual data is subject to the RBA's secrecy provisions.

Transparency and clarity are desirable characteristics of good regulation. Reflecting this, Part 5 outlines comprehensive consultation and notification requirements applying to the RBA under the Bill.

Clause 26 - Persons to give Reserve Bank information

5.47 The RBA will be able to require a participant in a payment system (whether or not it is designated) to provide information relating to that system and its participants. Likewise, the RBA will be able to require a corporation that has been granted authority or an exemption to hold the stored value backing a purchased payment facility to provide information relating to that facility. In both cases the RBA has the capacity to specify the form in which information is to be received. The information may be used to determine, for example, whether a payment system should be designated and to determine the nature of the access regime that may be imposed.

5.48 Failure to provide the requested information will constitute an offence under the Criminal Code. Penalty: 200 penalty units per day of non-compliance. Note 2 specifies that when the party is a body corporate the fine may be up to five times that applying to a person; that is 1000 penalty units. The date specified by the RBA to provide the information shall be reasonable given the nature of the information requested. A body corporate is not excused from providing the required information even if doing so would incriminate that body corporate or make that body corporate liable to a penalty.

Clause 27 - Power to determine requirements for applications

5.49 The RBA may determine, in writing, the requirements for applications made in relation to this Bill. These requirements may include the means by which an application is made, or the information or documentation required in the application. The RBA may also require verification of an application or the information contained therein. The clause permits the RBA to accept electronic applications.

Clause 28 - Consultation obligations

5.50 This clause outlines the obligation for consultation that must be undertaken by the RBA when imposing or varying an access regime or a standard of a designated payment system. These obligations include publication in the *Gazette* of proposed impositions or variations with summaries of the purpose and predicted effects of such impositions or variations. The *Gazette* notification must also invite people to make submissions to the RBA within a specified time.

5.51 Moreover, the RBA must take reasonable attempts to make available to people the full text of the proposed imposition or variation and to consider any submissions received within that time limit. It is expected that the text will be available on the internet.

Clause 29 - Notification obligations

5.52 Clause 29 outlines the notification obligations of the RBA with regard to the determination or variation of a standard, or imposition or variation of an access regime. These actions, their purpose and effects must be published in the *Gazette.* Additionally, the RBA will take reasonable steps to ensure that the participants in a payment system are informed of this action and that the full text of the access regime or standard is readily available to the public, including on the internet.

5.53 Notification of a revocation of a standard or access regime under this Bill should also appear in the *Gazette*. The clause also requires the RBA to take reasonable steps to ensure that the participants in the payment system are informed of such actions.

Clause 30 - Power to publish by other means

5.54 Where, in the Bill, the RBA is required or permitted to publish notification of some matter in the *Gazette*, the RBA may in addition publish this material in any other way it deems appropriate, including electronically such as on the internet.

Clause 31 - Delegation

5.55 The RBA, may in writing, delegate all or any of its functions or powers given under this Bill to senior officials of the RBA.

5.56 Additionally, the Governor may delegate the functions and powers of the Governor of the RBA to senior officials of the RBA.

5.57 Any so delegated powers under this clause must comply with the directions of the delegator.

Clause 32 - Regulations

5.58 The Governor-General may make regulations prescribing matters required by, or permitted to be prescribed by, this Bill and/or prescribing matters that are necessary or convenient for carrying out or giving effect to this Bill.