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17 October 2018

SVF Submissions  
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Dear Sir / Madam,

**Issues Paper - Review of Retail Payments Regulation: Stored-value Facilities**

**Stored value facilities**

There is an artificial distinction sometimes drawn between stored value products and other payment (eg funds transfer) products. The concept of a 'stored value' card is a misnomer. Value is no more stored on a microchip-based 'smart' card or in an electronic 'wallet' than it is on an debit / EFTPOS card used to make payments from an underlying savings or cheque account.

It would be preferable to regulate all non-cash payment products consistently, regardless of the technology being used. The Issues Paper<sup>1</sup> contrasts stored value facilities with credit cards, debit cards and bank accounts (p10). There is no fundamental difference between stored value and other payment products - all involve a contractual debtor/creditor relationship where the client's balance increases and decreases over time as outgoing payments or withdrawals are made and incoming payments or deposits are received. Some are prepaid (eg deposit, debit, stored value) and others are post-paid (eg credit cards). Some use centralised record-keeping (eg internet banking) and others decentralised (stored value cards, passbooks, blockchain-based services). This has been discussed in further detail in a range of articles.<sup>2</sup>

**PPF regime**

The purchased payment facility regime in Part 4 of the Payment Systems (Regulation) Act 1998 is no longer necessary. Since that regime was

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<sup>1</sup> Review of Retail Payments Regulation: Stored-value Facilities, An Issues Paper by the Council of Financial Regulators, September 2018

<sup>2</sup> Eg Bollen "A Review of the Development and Legal Nature of Payment Facilities" (2005) 16 *Journal of Banking and Finance Law and Practice* 130

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introduced amendments have been made to the Corporations Act and Banking Act (and their supporting regulations) that now are capable of covering the field sufficiently.

In 2001 the *Financial Services Reform Act* introduced the concept of a non-cash payment facility into Chapter 7 of the Corporations Act. This broad concept covers all facilities through which a person may “make payments, or cause payments to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins” (s763D).

ASIC is the relevant regulator for Chapter 7 of the Corporations Act and has the power to licence or exempt issuers of non-cash payment facilities. Once licensed, they are subject to a range of licensing, conduct and disclosure requirements.

Those non-cash payment facilities that have deposit-like features should be prudentially regulated under the Banking Act. The current regulation (reg 6 Banking Regulation 2016) that refers to purchased payment facilities that are widely used and repayable on demand could be redrafted to simply refer to non-cash payment facilities that are widely used and repayable on demand.

### **Future regulatory approach - tiered approach**

As the Issues Paper identifies, most peer jurisdictions have a tiered approach where:

- lower value / low risk facilities are exempt from all but general consumer law (eg Australian Consumer Law / ASIC Act requirements).
- moderate value / risk facilities - subject to licensing, conduct and disclosure obligations under a market conduct regulator only.
- higher value / risk facilities - subject to a market conduct regime as above as well as banking-style prudential regulation.

The tiering is typically based on a combination of total value at risk and maximum individual client balances. I have looked at this in more detail in a couple of articles.<sup>3</sup>

The Banking Act and Corporations Act regimes provide the framework for such a tiered model, which the Government could implement via regulations and / or instruments issued by the regulators. This would provide for flexibility over time to define the lower, moderate and higher value/risk facilities. It would also allow for other criteria to be added, such as how widely the facility can be used, whether or not balances are repayable on demand, whether the

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<sup>3</sup> Eg Bollen “Best practice in the regulation of non-cash payment services” (2011) 22 *Journal of Banking and Finance Law and Practice* 147

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facility is incidental to another product from outside the financial services industry and so on.

As the Issues Paper notes, the Financial System Inquiry and Productivity Commission both recommended that the ePayments Code should be made mandatory for non-cash payment services (p8). This should be implemented for products in each of the above tiers.

Sincerely,

Dr Rhys Bollen

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