

2025

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

[HOUSE OF REPRESENTATIVES/SENATE]

PAYMENT SYSTEMS MODERNISATION

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ACCC	Australian Competition and Consumer Commission
ADI	Authorised deposit-taking institution
AFCA	Australian Financial Complaints Authority
AFS	Australian Financial Services
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
AUSTRAC	Australian Transaction Reports and Analysis Centre
CFR	Council of Financial Regulators
Corporations Act	<i>Corporations Act 2001</i>
NCP	Non-cash payment
PPF	Purchased payment facility
PSP	Payment service provider
PSRA	<i>Payment Systems (Regulation) Act 1998</i>
RBA	Reserve Bank of Australia
SVF	Stored value facility

Chapter 1: Payments system modernisation

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Outline of chapter

- 1.1 The Bill amends and enhances the regulatory framework for PSPs to create a more comprehensive and effective regulatory system that reflects the nature of modern payment products and services.
- 1.2 The Bill updates the regulatory architecture to capture new types of financial products and services and ensures the AFS licensing framework as applied to PSPs is tailored to the specific nature of the different PSPs operating in Australia and the financial products and services they provide.
- 1.3 The Bill will introduce four further reforms that enhance the regulation of payment services in Australia:

- Major SVF providers will be required to register with APRA, and APRA will be given new powers to monitor and regulate these entities to manage broader financial stability risks of the Australian financial system;
- The Minister will be empowered to make a new, mandatory ePayments Code to bind PSPs, ADIs, and payment participants under the PSRA to minimum standards of consumer conduct;
- New requirements to safeguard payment-related money will ensure payment-related money held by licensees is available to complete transfers or be returned to the person who is legally entitled to it; and
- A streamlined process for managing inactive and dormant money held in major SVF accounts will ensure major SVFs are able to deal with this type of unclaimed money in a streamlined manner.

Context of amendments

Regulation of PSPs in Australia

- 1.4 PSPs provide services that enable consumers and businesses to make and receive payments. In Australia, PSPs use a variety of technologies and business models to offer a diverse range of products and services.
- 1.5 The emergence of new technologies and business models has resulted in an increasingly large number of PSPs offering more specific payment services. Multiple PSPs may be involved in enabling a particular transaction to occur, effectively disaggregating traditional value chains.
- Other jurisdictions have experienced similar changes and have updated their regulatory frameworks accordingly. Notably, the UK, EU, Singapore and Canada have introduced modernised regulatory frameworks for PSPs.
 - All these frameworks regulate PSPs based on the activity they perform by using a discrete list of regulated payment activities. Generally, these frameworks include obligations relating to conduct, market integrity, consumer protection, safeguarding funds and additional prudential requirements.
- 1.6 The activities of PSPs may pose several types of risks to consumers, businesses, other PSPs, and to the Australian financial system more generally. These include consumer protection risks, operational risks and misconduct risks. If these risks materialise, they can adversely impact consumers, businesses, other PSPs and in extreme cases trust and stability in Australia's financial system. For example, a PSP's customer could experience a failed

transaction or loss of funds. Additionally, the failure of a large, interconnected PSP could impact the ability of other PSPs in the payment chain to perform their role and pose financial stability risks.

- 1.7 Australia's current regulatory framework for PSPs involves ASIC, APRA, AUSTRAC, the ACCC, and the RBA.
- ASIC is responsible for licensing financial service providers for the purposes of consumer protection and maintaining market integrity. PSPs that provide a non-cash payment facility are required to hold an AFS licence.
 - ASIC administers the ePayments Code. The ePayments Code is a voluntary framework that applies to consumer electronic payment transactions.
 - The RBA and APRA are responsible for authorising and regulating entities that provide PPFs in Australia. PPFs are a type of non-cash payment facility that allow funds to be stored for the purpose of making future payments.
 - AUSTRAC is responsible for registering remittance service providers that make money available to payees or accept instructions for transfer of money, and for overseeing Australia's anti-money laundering and counter-terrorism financing obligations.
 - The ACCC engages with PSPs in a range of regulatory contexts, including through its enforcement work addressing anti-competitive conduct, compliance and enforcement work on misleading surcharging practices, consumer protection actions combatting scams, authorisations and exemptions in the payments sector, and through its roles in relation to the Consumer Data Right.
- 1.8 Several reviews have examined the regulatory architecture for PSPs in Australia.
- The Review of the Australian Payments System (Payments System Review), released in 2021.
 - The Council of Financial Regulators, Regulation of Stored-Value Facilities in Australia, released in 2019.
 - Productivity Commission inquiry report, Competition in the Australian Financial System, released in 2018.
- 1.9 Together, these reviews found that the regulatory framework for PSPs is no longer fit-for-purpose and made several recommendations to address this. Most comprehensively, the Payments System Review made recommendations to modernise the licencing of PSPs and prudential regulation of PPFs. The review also recommended that the ePayments Code be updated and made mandatory.

ASIC licencing of PSPs

- 1.10 ASIC is responsible for licensing providers of financial services to ensure market integrity and consumer protection.
- 1.11 The definition of financial product under the Corporations Act includes ‘[a] facility through which, or through the acquisition of which, a person makes a non-cash payment’, also referred to as an NCP facility. This concept was introduced through the Financial Services Reform amendments in 2001.
- 1.12 Persons who provide financial services– including issuance, other forms of dealing services, and the provision of financial product advice – in relation to NCP facilities are required to hold an AFS licence.
- 1.13 The current approach for licensing PSPs is no longer fit-for-purpose. Key issues include:
 - The NCP facility product type and licence authorisation does not distinguish between different types of activities that are performed in relation to payments. The range of activities performed by different PSPs in modern payment chains pose different levels of risks, and the regulatory framework does not effectively account for these differences.
 - The NCP facility definition has not kept pace with changes in industry. This means that there are regulatory gaps. This has led to inconsistent regulatory treatment across PSPs in Australia.
 - Existing exemptions and exclusions are unclear and outdated. This results in uncertainty for licensees and an unlevel regulatory playing field.

Regulation of PPFs

- 1.1 APRA and the RBA are responsible for the regulation of PPFs.
 - APRA is responsible for authorising some large PPF providers whose facilities are widely available and accepted as a means of payment and are redeemable for Australian currency on demand by the user. APRA may determine that these large providers of PPFs are conducting banking business, and authorise and supervise them as a special class of ADI.
 - The RBA is responsible for all other PPFs that are not APRA-authorised. The RBA may either authorise or exempt these PPFs. The RBA has granted several class exemptions, including for limited-value and limited-participant facilities. The RBA has not authorised any PPFs to date.

- 1.14 The regulatory framework for PPFs is not fit-for-purpose. Key issues with the framework include:
- The involvement of multiple regulators without clear lines of responsibility has resulted in an overly complicated framework, regulatory uncertainty and delays.
 - The prudential regulation of APRA-authorised PPFs is onerous and can present a barrier to growth. The terms of the RBA exemptions also present additional regulatory costs and barriers to growth.
 - The definitions of core concepts for the PPF framework are unclear and outdated. This results in uncertainty for entities and an unlevel regulatory playing field. The terminology of ‘PPF’ is also outdated and not consistent with other jurisdictions.

ePayments Code

- 1.15 ASIC administers the ePayments Code. The Code is voluntary and provides protections for consumers that deal with a subscriber to the Code. Subscribers include most banks and credit unions, building societies and a small number of non-bank PSPs. The Code provides a framework for determining liability for unauthorised transactions, and for recovering mistaken internet payments. The Code includes several other requirements that cover topics such as terms and conditions, certain disclosure requirements and complaints handling.
- 1.16 ASIC reviewed the Code in 2021 and made several amendments in 2022. These were technical in nature and included changes to ensure payments made using the New Payments Platform were covered. ASIC’s review noted that these changes were interim measures, in anticipation of the Code being subject to a comprehensive review before being made mandatory as part of the Government’s payment system modernisation agenda.
- 1.17 The Payments System Review, CFR Review of SVFs, Productivity Commission Inquiry report – Competition in the Australian Financial System and the Financial System Inquiry have all recommended that the Code be made mandatory. These reviews and industry feedback have stated that the Code has areas of uncertainty, inconsistent application and gaps in coverage that should be addressed.

Summary of new law

- 1.18 This Bill implements reforms to amend and enhance the regulatory framework for PSPs to create a more comprehensive and effective regulatory system that reflects the nature of modern payment products and services by:

- Providing clarity regarding the entities and types of services intended to be regulated under the framework, including by defining tokenised SVFs as a regulated means of storing and transferring value;
- Applying proportionate and consistent regulation in relation to the various types of services performed by PSPs;
- Supporting safety and confidence in transactions made through the Australian payment system.

1.19 The focus of this exposure draft of the Bill is introducing new, defined types of financial products and services provided by PSPs, and updating the AFS licensing framework as applied to PSPs to ensure it is tailored to the specific nature of the different PSPs operating in Australia and the financial products and services they provide.

1.20 The reforms to enhance the regulatory framework for PSPs will also include the introduction of:

- New legislation to empower APRA to prudentially regulate providers of SVFs that operate at a scale that may present broader risks for stability of the Australian financial system. This prudential regulation will also apply to PSPs designated by the Minister and PSPs that voluntarily opt in.
- A rulemaking power for the Minister to make a new and mandatory ePayments Code.
- New requirements to safeguard payment-related money held by AFS licensees.
- Amendments to streamline the process for managing inactive and dormant money held in major SVF accounts to ensure major SVFs are subject to similar obligations as banks are when dealing with unclaimed money.

1.21 The additional elements of the reforms mentioned above, as well as amendments relating to exemptions and exclusions from the AFS licensing framework and transitional arrangements, are not included in this exposure draft of the Bill. However, descriptions of the proposed amendments have been included below, and an exposure draft of these amendments is expected to be the subject of future public consultation ahead of the legislation being finalised and introduced in the Parliament.

Detailed explanation of new law

Regulation of PSPs – overview of core concepts

1.22 The Bill introduces a number of key terms relevant to the regulation of PSPs, including:

- ‘SVF’;
- ‘tokenised SVF’;
- ‘payment instrument’;
- ‘payment initiation service’;
- ‘payment facilitation service’;
- ‘payment technology and enablement service’.

[Schedule 1, items 6, 7, 9 and 24, sections 9, 761A, 761EB, 761EC, 761EE, 761EF, 766DA, 766DB, 766DC and 766DD of the Corporations Act]

1.23 These key terms are fundamental to establishing the operation and scope of the reforms, providing:

- Activity-based and technology neutral definitions, which appropriately reflect the nature of the payments sector; and
- Clarity and certainty regarding the entities and types of services intended to be captured under the regulatory framework.

Meaning of transfer, funds and non-cash funds transfer

1.24 The Bill defines the following three terms, which are used to establish key elements of other core concepts relevant to these reforms:

- ‘transfer’;
- ‘funds’;
- ‘non-cash funds transfer’.

[Schedule 1, items 2, 4 and 6, section 9 of the Corporations Act]

1.25 The term ‘transfer’ covers any act or thing that could be reasonably seen as economically equivalent to a transfer of funds. This definition is intended to be broad and account for changes in technology.

[Schedule 1, item 6, section 9 of the Corporations Act]

1.26 The term ‘funds’ covers money, another medium of exchange prescribed by the regulations, or a right to redeem either of those things. A digital token that does not fall within these things is not intended to be covered, even if it has

value. For example, digital tokens connected to tokenised SVFs are intended to be covered as funds, as they would represent, or have attached to it, a right to claim money from the tokenised SVF provider.

[Schedule 1, item 7, section 761A of the Corporations Act]

- 1.27 A ‘non-cash funds transfer’ occurs when funds are transferred from a facility held by a payer to a payee on the instruction of either person, and the transfer does not involve the physical delivery of money in the form of notes or coins.

[Schedule 1, item 9, section 761EF of the Corporations Act]

- 1.28 A non-cash funds transfer also takes place when a payer transfers funds from one facility held by the payer to another facility held by the payer. In these cases, the payer is also the payee.

- 1.29 However, letters of credit, cheques drawn on by the issuing financial institution, and guarantees given by financial institutions are not considered to be non-cash funds transfers for the purposes of payment services.

[Schedule 1, item 9, subsection 761EF(3) of the Corporations Act]

- 1.30 A non-cash funds transfer is intended to cover the overall transfer of funds from a payer to the ultimate payee. However, in a transaction, funds may be transferred from one PSP to another in a chain before being transferred to the ultimate payee.

- 1.31 Accordingly, when working out who the payer and payee are in relation to a non-cash funds transfer, disregard any persons interposed between the initial payer and the ultimate payee/recipient of the non-cash funds transfer.

[Schedule 1, item 9, subsection 761EF(2) of the Corporations Act]

Meaning of SVF

- 1.32 An SVF is a facility that allows a person to store value by transferring funds to another person (the provider of the facility or another person nominated by the provider) without any onward payment instruction, and then subsequently redeem that value by making a non-cash funds transfer.

[Schedule 1, item 9, section 761EB of the Corporations Act]

- 1.33 Money and other forms of monetary value are fungible. An SVF allows for the funds that are transferred to the provider to be exchanged for rights to redeem an amount standing to the credit of the facility.

- 1.34 A facility may be an SVF regardless of how, and by who, the rights are redeemed. Rights to redeem amounts from the facility can be exercised by the person who initially acquired the rights (e.g. the holder of the facility), or other persons that subsequently possess the right, or who are nominated by that person. The rights could be used to make a non-cash funds transfer to another person (for e.g. to purchase goods or services, or transfer funds to friends or family) or to the holder of the facility (e.g. withdrawing value by transferring funds to another account held by the holder of the facility).

- 1.35 The ability to store funds without an onward payment instruction, and the ability to exercise the rights in the facility, are the key features defining an SVF, regardless of whether that feature is used in any particular moment.
- 1.36 The provision and operation of an SVF may involve multiple people and it is not necessarily the case that the person that the funds are transferred to, is the person the funds will be redeemed from.
[Schedule 1, item 9, paragraph 761EB(1)(b) of the Corporations Act]
- 1.37 The regulations may specify facilities that are taken to not be an SVF.
[Schedule 1, item 9, subsection 761EB(2) of the Corporations Act]

Meaning of tokenised SVF

- 1.38 A tokenised SVF is an SVF where the right to redeem a particular amount of funds is attached to, or exercisable by the possessor of, a digital token. The ‘right to redeem’ is transferred by, or the ability to exercise the right is enlivened by, transferring the digital token itself. The ‘right to redeem’ is exercisable by the person who possesses the digital token attached to that right (subject to the eligibility requirements of the provider).
[Schedule 1, item 9, paragraph 761EC(1)(a) of the Corporations Act]
- 1.39 Digital token will be defined as part of expected concurrent legislative reforms relating to the regulation of digital asset platforms.
- 1.40 A tokenised SVF is not transferred in practice. Rather, the digital token connected to the tokenised SVF (also known as a payment stablecoin) is the thing that is transferred. Transfer of the digital token is not intended to cause a person to acquire, dispose of, or transfer a tokenised SVF. It is intended that a person only acquires a tokenised SVF when it is issued to them. Issuance occurs when the person enters into the arrangement that constitutes the tokenised SVF as a client and effectively opens an account with the provider. A client disposes of a tokenised SVF when it closes its account with the provider. The ‘payment stablecoin’ is not itself regulated as a financial product as it is connected to the tokenised SVF, which is a financial product.
- 1.41 For a tokenised SVF, the amount that may be redeemed when exercising this right must be fixed, and denominated in a single currency.
[Schedule 1, item 9, paragraph 761EC(1)(b) of the Corporations Act]
- 1.42 The regulations may specify SVFs that are taken to not be a tokenised SVF.
[Schedule 1, item 9, subsection 761EC(2) of the Corporations Act]

SVF and tokenised SVF providers

- 1.43 SVF and tokenised SVF providers are constitutionally-covered corporations who carry on a financial services business that consists (wholly or partly) of issuing SVFs or tokenised SVFs respectively.
[Schedule 1, item 6, section 9 of the Corporations Act]

Meaning of payment instrument

- 1.44 A payment instrument is a facility where the issuer of the facility provides a method for a payer to make non-cash funds transfers using funds credited to that payer under a facility.
[Schedule 1, item 9, subsection 761EE(1) of the Corporations Act]
- 1.45 Payment instruments include such things as debit and credit card facilities (including virtual versions of those cards), and online account management facilities, such as direct debit or PayTo facilities, and BPay facilities. The funds used for transfers made using the payment instrument can be sourced from one or multiple sources of value associated with the payment instrument, including SVFs.
- 1.46 A payment instrument will often be provided by the issuer of the account or other facility that is the source of value. But in other cases, the provider of an account or facility that is the source of value may partner with another person to issue a payment instrument (such as a card).

Meaning of payment service

- 1.47 The reforms introduce the term ‘payment service’, which means any of the following services:
- payment initiation service;
 - payment facilitation service; and
 - payment technology and enablement service.
- [Schedule 1, item 24, section 766DA of the Corporations Act]*
- 1.48 These defined payment services cover the various activities involved in a non-cash funds transfer. Although a non-cash funds transfer involves the movement of funds in accordance with relevant instructions, it is intended that a payment service is provided even if a transfer is made that is not in accordance with a valid instruction.
- 1.49 A person only provides one of the defined payment services if the person is a constitutionally-covered corporation, or a representative of a constitutionally-covered corporation.
[Schedule 1, item 24, paragraphs 766DB(1)(c), 766DC(1)(c) and 766DD(1)(c) of the Corporations Act]

Meaning of payment initiation service

- 1.50 A payment initiation service covers the activities undertaken by a provider to initiate a transaction involving a non-cash funds transfer.
[Schedule 1, item 24, section 766DB of the Corporations Act]

- 1.51 This service can be provided to either the payer or the payee under a non-cash funds transfer, depending on who the provider has an arrangement with for performing these activities.
- 1.52 For example, this service will cover PSPs that provide ‘PayTo’ services and direct debit services to merchants. These services enable merchants to offer the ability for their customers to pay directly from their bank account. To do this, the PSP initiates the transfer of funds from the bank account of the merchant’s customers (payer) to the merchant’s (payee) bank account. In this example, the service is provided to the merchant (payee). The merchant’s customer (payer) is still required to provide authority for the transaction to occur, but the initiation service is not provided to them (however, the payer’s own financial institution will be providing services to them by issuing the account and the instruments that relate to the account).
- 1.53 A person is only the provider of a payment initiation service if they are not:
- the issuer of the account or facility holding the funds that are subject to the transaction;
 - the payer or payee for the non-cash funds transfer; or
 - another person interposed between the payer or payee for the non-cash funds transfer.

[Schedule 1, item 24, paragraph 766DB(1)(b) of the Corporations Act]

- 1.54 A person captured by one of the above criteria may still engage in conduct covered by one of the other types of payment services.
- 1.55 The provider provides the service each time they take action to initiate a non-cash funds transfer.
- 1.56 A payment initiation service is still provided even if the non-cash funds transfer is not completed. For example, if a provider acting for a payee takes action to obtain, on behalf of their client, authority from the payer to initiate one or more non-cash funds transfers but does not successfully initiate the transfer in accordance with the instructions and authority given, that person has still provided a payment initiation service.
- 1.57 The regulations may prescribe specific instances where a service is not a payment initiation service.

[Schedule 1, item 24, subsections 766DB(3) and (4) of the Corporations Act]

Meaning of payment facilitation service

- 1.58 A payment facilitation service is provided if certain circumstances exist in the context of an arrangement between the provider and another person. These circumstances are that funds are transferred to the provider in connection with making a non-cash funds transfer, and this transfer is on the basis that the provider will further transfer the funds in accordance with instructions for that

non-cash funds transfer.

[Schedule 1, item 24, section 766DC of the Corporations Act]

- 1.59 The arrangement the provider has could be with the payer, the payee or another PSP that is interposed between the payer and the payee for that non-cash funds transfer. The service is taken to be provided to the person with whom the provider has the arrangement, and is deemed to be provided each time the provider receives funds and each time they further transfer funds.

[Schedule 1, item 24, subsection 766DC(2) of the Corporations Act]

- 1.60 Payment facilitation services can be provided to either the payee or payer and encompass a variety of different types of offerings. For example:

- Merchant acquiring services, that are provided to merchants (payees) and enable them to accept payments from their customers. These services will generally receive funds from the merchant's customer (payer) and transfer these funds into an account on behalf of the merchant. The acquirer receives funds for the purpose of transferring them onwards to the payee.
- Remittance services that are provided to payers. For example, remittance providers receive funds from a payer, for the purpose of transferring them to another person on the instruction of the payer. These services include both domestic and cross-border transfers.

- 1.61 Payment facilitation services may also be provided by one PSP to another PSP. For example, this may occur where a PSP performs some parts of a non-cash funds transfer for another PSP but does not have an arrangement directly with either the payer or payee.

- 1.62 The regulations may prescribe specific instances where a service is not a payment facilitation service.

[Schedule 1, item 24, subsections 766DC(3) and (4) of the Corporations Act]

Meaning of payment technology and enablement service

- 1.63 A payment technology and enablement service covers the activities undertaken by a provider to support or enable non-cash funds transfers – in particular verification of a person's identity or transmitting an instruction in connection with a non-cash funds transfer.

[Schedule 1, item 24, section 766DD of the Corporations Act]

- 1.64 These services can be provided to the payer, payee or in certain cases to other institutions that are involved in making non-cash funds transfers. Examples include:

- Digital wallet services, where virtual cards can be added to a wallet application held by the customer and then used to make payments.
- Payment gateways that enable payees to accept payments. These services are considered payment technology and enablement services,

as they allow payees, such as merchants, to accept payments by collecting and transmitting relevant payment information, such as card credentials, to other service providers. These services can be used in both in person (card present) transactions and for accepting online payments.

1.65 However, this definition does not cover conduct connected with the making of a particular non-cash funds transfer that is performed under an arrangement with another PSP (and not the payer or payee for the transfer), unless the provider also has some kind of arrangement with the payer or payee that more broadly relates to non-cash funds transfers. This means that entities that perform these kinds of activities for other PSPs, but do not have any engagement with the payer or the payee in relation to the relevant non-cash funds transfer (i.e. purely ‘back-end’ service providers) are not providing a payment technology and enablement service.

- This exclusion does not apply to digital wallet providers as they have arrangements with the payer for the general use of a digital wallet. Although this arrangement may not be an arrangement to perform the regulated activities for the payer (and so the provider may not provide this service to the payer), the broader arrangement does have a connection to the making of non-cash funds transfers.

[Schedule 1, item 24, subsection 766DD(2) of the Corporations Act]

1.66 The provider provides the service each time they take the relevant action.
[Schedule 1, item 24, paragraph 766DD(3)(b) of the Corporations Act]

1.67 The regulations may prescribe specific instances where a service is not a payment technology and enablement service.
[Schedule 1, item 24, subsections 766DD(4) and (5) of the Corporations Act]

Regulatory framework for PSPs

1.68 The reforms apply the AFS licensing framework to the provision of payment services and financial services relating to SVFs and payment instruments with appropriate adjustments to reflect the nature of these types of services.

1.69 The AFS licensing framework covers provision of these services by adding:

- SVFs and payment instruments as new kinds of financial product; and
- Payment services as a new kind of financial service.

[Schedule 1, items 21 and 23, sections 764A and 766A of the Corporations Act]

1.70 These amendments to the definitions of ‘financial product’ and ‘financial service’ in the Corporations Act mean providers of the payment services and financial services relating to SVFs and payment instruments are required to

hold an AFS licence and comply with the general obligations that apply to other AFS licensees.

- 1.71 However, conduct relating to an SVF or payment instrument is only a financial service if the conduct is engaged in by a person that is a constitutionally-covered corporation, or a representative of a constitutionally covered-corporation.

[Schedule 1, item 25, section 766J of the Corporations Act]

- 1.72 Similarly, a person only provides a payment service if the person is a constitutionally-covered corporation, or a representative of a constitutionally-covered corporation.

[Schedule 1, item 24, paragraphs 766DB(1)(c), 766DC(1)(c) and 766DD(1)(c) of the Corporations Act]

- 1.73 This means PSPs, and the representatives of such PSPs, are only subject to regulation under the AFS licensing framework and these reforms if the PSP is one of the following types of entity:

- a foreign, financial or trading corporation;
- a company;
- any body corporate (whether incorporated in this jurisdiction or elsewhere);
- an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose.

[Schedule 1, item 2, section 9 of the Corporations Act]

- 1.74 The financial products and services introduced under the reforms replace the existing concept of ‘makes a non-cash payment’ under the general definition of financial product, which applied the AFS licensing framework to providers of financial services relating to NCP facilities.

[Schedule 1, items 5 and 16, sections 9 and 763A of the Corporations Act]

- 1.75 The change to use new, specific financial products and services under the reforms has three key objectives:

- address existing uncertainty about the scope of the definition of NCP facility;
- extend the scope of regulated activities to service providers that perform a key role in the payment chain, but that are not covered by NCP facility;
- recognise that some activities are more appropriately regulated as financial services rather than financial products.

- 1.76 The targeted, specific definitions provide greater clarity and enable PSPs to determine whether they are subject to regulation and identify what obligations will apply to them.
- 1.77 The introduction of payment services as a new type of financial service also means that some existing NCP facilities will cease to be financial products and instead will be regulated as financial services. This treatment of payment services is intended to support proportionate regulatory obligations under the AFS licensing framework.
- 1.78 Some consequential amendments will be made to existing provisions of the Corporations Act to support this change and assist in the interpretation of the payment services definitions. This includes an additional provision to ensure that multiple arrangements for the performance of relevant activities relating to payment services can be considered together if it is reasonable to assume that the parties to the arrangements regard them as constituting a single scheme. A similar provision already applies to assist the interpretation of the financial product definition and prevent avoidance of regulation.
[Schedule 1, item 8, subsection 761B(3) of the Corporations Act]

AFS licensing obligations – application and adjustments

- 1.79 Generally, PSPs are subject to the same obligations as other AFS licensees, including:
- general licensee obligations that apply in relation to all financial services, such as the obligations to act efficiently, honestly and fairly, maintain competence, have adequate resources, arrangements for managing conflicts of interest and risk management systems, and comply with licence conditions and the financial services laws;
 - additional obligations that apply when providing financial services to retail clients, including obligations to have internal dispute resolution systems, membership to AFCA and adequate compensation arrangements, and obligations to disclose information about products and services to retail clients.
- 1.80 These licensee obligations will apply to PSPs in relation to the ongoing performance of relevant activities, and not just at the time of entering into an arrangement for the provision of the service. Financial services disclosure obligations will only apply before, or at the time of, the first provision of the service under the relevant arrangement (unless information previously provided needs to be updated).
- 1.81 However, these reforms include some adjustments to the existing AFS licensing framework to address the potential risks posed to customers and the wider financial system by PSPs.

- 1.82 The adjustments made by these reforms largely relate to the circumstances in which a payment service is taken to be provided to a retail client and the obligations owed in relation to services provided to retail clients.
- 1.83 The definitions of ‘retail client’ and ‘wholesale client’ have been adjusted to ensure that these terms apply appropriately in relation to the new financial products and payment services. The circumstances in which a financial service is treated as being provided to a ‘wholesale client’ are amended to clarify that a payment service is not provided to a person as a retail client if the value of the payment service provided exceeds the amount specified in regulations.
[Schedule 1, items 10 and 11, subsections 761G(7) and (10) of the Corporations Act]
- 1.84 Where payment services are provided to another PSP that is a licensee, the existing concept of ‘professional investor’ means that the service is treated as being provided to the PSP as a wholesale client.
- 1.85 However, the existing exemption applying to the provision of financial services to sophisticated investors does not apply to the provision of SVFs, payment instruments or payment services.
[Schedule 1, items 12 and 13, section 761GA of the Corporations Act]
- 1.86 This means that PSPs are required to have appropriate dispute resolution systems in place in relation to SVFs, payment instruments and/or payment services provided to persons that could otherwise be considered sophisticated investors for the purposes of the AFS licensing framework. This shift recognises the unique risks posed to consumers by these new types of financial products and services.
[Paragraph 912A(1)(g) of the Corporations Act]
- 1.87 The reforms also apply new obligations to PSPs that operate as intermediaries for other PSPs.
- 1.88 If:
- an AFS licensee (the ***intermediary licensee***) provides a payment service or a financial service relating to an SVF or payment instrument to another licensee (the ***other licensee***), and
 - the service is provided for the purposes of the other licensee providing a payment service or financial service relating to an SVF or payment instrument to a retail client,
- the intermediary licensee must comply with the new obligations.
[Schedule 1, item 27, paragraph 912A(1)(ga) of the Corporations Act]
- 1.89 Licensees that do not comply with the new obligations are subject to a civil penalty provision consistent with other general obligations of financial services licensees.
[Schedule 1, item 29, subsection 912A(5A) of the Corporations Act]
- 1.90 Under the new obligations, relevant intermediary licensees must:

- take reasonable steps to cooperate with AFCA in relation to any complaint under the AFCA scheme that relates to the provision of the service by the other licensee; and
- cooperate with the other licensee for the purposes of the other licensee applying its internal dispute resolution procedures in relation to the provision of the service by the other licensee and cooperating with the AFCA.

[Schedule 1, item 28, subsection 912A(3AAA) of the Corporations Act]

- 1.91 These new obligations support PSPs that provide payment services and financial services relating to SVFs or payment instruments to retail clients, and enter into agreements with intermediary licensees, under which the intermediary licensee carries out a service to enable the provision of the services to retail clients. In these circumstances, non-cooperation by the intermediary licensee could impede the initial licensee's processes for resolving complaints made by retail clients.
- 1.92 Similarly, non-cooperation could impact AFCA's ability to effectively consider complaints that proceed to external dispute resolution.

Additional obligations for tokenised SVF providers

Ongoing disclosure obligations

Material changes or significant events

- 1.93 Tokenised SVF providers must publish on the internet a notice of any material change or significant event that may reasonably affect either the provider's ability to meet its redemption obligations, or the value of the reserve assets held to meet those obligations.

[Schedule 1, item 36A, subsection 1017BAA(1) of the Corporations Act]

- 1.94 Such a notice must be published either before, or as soon as practicable after the change or event occurs. Major SVF providers, however, must publish the notice either before or immediately after the change or event occurs.

[Schedule 1, item 36A, subsection 1017BAA(2) of the Corporations Act]

- 1.95 Failure to publish a notice is an offence carrying a maximum penalty of 5 years imprisonment.

[Schedule 1, item 52, schedule 3 of the Corporations Act]

- 1.96 Consistent with existing provisions in the Corporations Act, providers are not required to provide clients with an updated product disclosure statement in addition to the publication of the notice.

[Schedule 1, item 35, subsection 1012D(2) of the Corporations Act]

Monthly disclosure regarding reserve assets and outstanding liabilities

- 1.97 Tokenised SVF providers must also, within the first seven days of each calendar month, publish on the internet information relating to reserve assets and outstanding liabilities, as may be required by the regulations.
[Schedule 1, item 36A, subsections 1017BAA(3) and (4) of the Corporations Act]
- 1.98 If the regulations do require such information to be published, failure to publish is an offence carrying a maximum penalty of 2 years imprisonment, as well as civil penalties.
[Schedule 1, items 39 and 50, subsections 1021NAA(1) and 1317E(3) and Schedule 3 of the Corporations Act]
- 1.99 It is a defence to the offence of failing to publish, if the tokenised SVF provider took reasonable steps to obtain the required information for publication but were unable to obtain the information. The provider bears an evidential burden in demonstrating that they took reasonable steps.
[Schedule 1, item 39, subsections 1021NAA(5) of the Corporations Act]
- 1.100 Publishing information that is misleading or deceptive, or has an omission, is an offence. If the tokenised SVF provider knows that the information is misleading or deceptive, or has an omission, they have committed an offence carrying a maximum penalty of 5 years imprisonment. A lesser maximum penalty of 2 years imprisonment applies if the tokenised SVF provider does not know that the information is misleading or deceptive, or has an omission. Strict liability applies to the physical element of the offence.
[Schedule 1, items 39 and 53, subsections 1021NAA(2) to (4) and Schedule 3 of the Corporations Act]
- 1.101 It is a defence to the offence of publishing information with an omission, if the tokenised SVF provider was unable to obtain the information that was an omission, after taking reasonable steps, or if the information omitted would have been misleading or deceptive, and the provider took reasonable steps to obtain information that would not have been misleading or deceptive. The provider bears an evidential burden in demonstrating that they took reasonable steps.
[Schedule 1, item 39, subsection 1021NAA(6) of the Corporations Act]
- 1.102 It is a defence to the offence of publishing information that is misleading or deceptive, if the tokenised SVF provider took reasonable steps to ensure the information would not be misleading or deceptive. Again, the provider bears an evidential burden in demonstrating that they took reasonable steps.
[Schedule 1, item 39, subsections 1021NAA(7) of the Corporations Act]
- 1.103 Consistent with existing provisions in the Corporations Act, where published information is defective, meaning it is misleading or deceptive or contains an omission, ASIC may place a stop order on the relevant tokenised SVFs.
[Schedule 1, items 36 to 38, subsections 1020E(1), (2) and (11) of the Corporations Act]

Recovering loss or damage due to a failure to meet disclosure obligations

- 1.104 Under existing section 1022B of the Corporations Act, a person may recover from the tokenised SVF provider for any loss or damage suffered as a result of a tokenised SVF provider failing to meet its obligation to publish notifications of material changes or significant events, failing to publish a required monthly disclosure, or publishing a required monthly disclosure that is misleading or deceptive or has an omission. However, the provider will not be liable if they took reasonable steps to ensure that the information would not be misleading, deceptive, or have an omission.

[Schedule 1, items 40 to 46, section 1022B of the Corporations Act]

Things that are excluded from being an SVF, payment instrument or payment service, or exempted from the requirement to hold an AFS licence

- 1.105 The AFS licensing framework uses a range of exclusions from the definitions of ‘financial product’ and ‘financial service’ and exemptions from the licensing requirements to ensure that the framework applies in a proportionate way, and that regulatory obligations do not apply to products and services that involve more limited risks or that are regulated under other regulatory regimes.
- 1.106 A number of the exclusions and exemptions contained in Chapter 7 of the Corporations Act apply specifically to NCP facilities and related financial services. Others apply more broadly but are relied on in relation to NCP facilities and related financial services.
- 1.107 It is intended to continue the effect of some of these exclusions and exemptions for the purposes of these reforms. For example, exclusions that are included in the definition of ‘when a person makes non-cash payments’ will continue to apply, and where appropriate extended to apply to payment services as well as to facilities that are financial products.
- This includes the ‘single payee facility’ exclusion and the licensing exemption that covers the issue of facilities for making payments to the issuer of the facility and its related bodies corporate.
- 1.108 Changes will be made to some of the existing exclusions and exemptions to either limit or clarify their application. For example, the exclusion that currently covers certain electronic transaction facilities will no longer apply, and the application of the credit facility exclusion will be restricted to ensure that the new payment services apply to a non-cash funds transfer that is debited from a credit facility.

ASIC as the regulator of PSPs

- 1.109 Amendments will also be made to the ASIC Act to support the application of the AFS licensing framework to PSPs, and ASIC’s regulation of PSPs. Note,

amendments to the ASIC Act required as part of these reforms will be included in a later exposure draft.

Extension of information gathering powers

- 1.110 ASIC has existing information gathering powers in the Corporations Act to require AFS licensees to provide information about their financial services businesses. This power is extended by the reforms to allow ASIC to request information from persons that it reasonably suspects of providing payment services or financial services relating to SVFs or payment instruments without the relevant authorisation. The extension will allow ASIC to properly investigate potential unlicensed conduct.

[Schedule 1, item 31, section 925J of the Corporations Act]

- 1.111 Regulations may specify other forms of information required to be provided to ASIC.

[Schedule 1, item 31, section 925K of the Corporations Act]

Additional regulatory framework for major SVF providers

- 1.112 In addition to the AFS licensing requirements, prudential requirements administered by APRA will apply to SVF providers and PSPs that operate at a scale that represents broader risks for stability of the Australian financial system.

- For SVF providers, a provider will become an APRA-regulated body that is subject to prudential requirements from the time it reaches the prescribed scale of stored value. SVF providers may also be able to ‘opt-in’ to APRA supervision, or could be designated by the Minister, despite not reaching the prescribed scale.
- For PSPs, the Minister may designate a PSP for prudential regulation, on the basis that the PSP raises broader risks for stability of the Australian financial system.

- 1.113 The scale threshold will be prescribed in regulations. It is intended that the threshold will be \$200 million in stored value calculated by reference to funds held in relevant SVFs, on a group aggregate basis.

- This threshold will only take into account funds held in SVFs for which the issuers are required to hold an AFS licence. Funds held in SVFs that are covered by exclusions or licence exemptions will not be counted. This threshold represents a significant increase to the dollar threshold for additional regulation under the PPF framework (which is specified by an RBA instrument to be \$10 million).

- 1.114 Major SVF providers will no longer be treated as a form of ADI. They will be required to register with APRA, and comply with prudential standards, but will not be required to be licensed by APRA. APRA will recalibrate its prudential standards to reflect the more limited role and usage of SVFs and risks for broader financial stability, compared to banking business.

Meaning of major SVF provider

- 1.115 A major SVF provider is a person that provides one or more SVFs (referred to as ‘relevant facilities’) across which the total stored value is greater than the scale prescribed in the regulations. Total stored value is intended to mean the amounts standing to the credit of relevant facilities issued by the provider as well as relevant facilities issued by related bodies corporate of the provider. The words ‘standing to the credit of’ will take their ordinary meaning, such as to mean the balance of funds credited to relevant facilities.

[Schedule 1, item 9, subsection 761ED(1) of the Corporations Act]

- 1.116 ‘Relevant facilities’ means those SVFs where the amounts stored can be denominated and redeemed in Australian currency, and the provider is required to hold an AFS licence that covers the issue of the facility. If the provider can rely on a licensing exemption in relation to the issue of the facility, such as those exemptions under subsection 911A(2), 926A(2) or 926B(1) of the Corporations Act, then that facility is not a ‘relevant facility’ for the purposes of the major SVF provider definition.

[Schedule 1, item 9, subsection 761ED(2) of the Corporations Act]

- 1.117 SVFs that store funds that are redeemable in Australian currency as well as other foreign currencies may be relevant facilities for the purposes of determining the total stored value and, by extension, whether the provider is a major SVF provider.

- 1.118 The regulations will be able to prescribe kinds of persons that are not to be considered major SVF providers. This may only occur after the Minister has consulted APRA and ASIC.

[Schedule 1, item 9, subsections 761ED(3) and (4) of the Corporations Act]

ePayments Code – Rulemaking Power

- 1.119 The reforms will introduce a Ministerial rulemaking power to enable the Minister to create a new, mandatory ePayments Code.
- 1.120 The rulemaking power will apply to AFS licensed PSPs (those that fall within the scope of the amendments in this Bill), ADIs, and participants under the PSRA. Not all entities subject to the rulemaking power will necessarily be required to comply with the new ePayments Code.
- 1.121 The rulemaking power will also apply to the unlicensed population of PSPs as defined by the new financial products and services. ASIC will be able to

commence civil proceedings if an unlicensed PSP does not comply. For licensed PSPs, compliance with the ePayments Code will be a statutory licence condition. This includes licensed PSPs that also hold an existing credit licence.

- 1.122 The rulemaking power will require that the ePayments Code sets out core obligations for unauthorised transactions and mistaken payments. It will also allow the Minister to prescribe additional matters for the Code to address.
- 1.123 ASIC will be responsible for enforcing the new ePayments Code. This will include exemption and modification powers in respect to the Code.

Safeguarding money

- 1.124 The reforms will introduce new requirements to safeguard payment-related money. The safeguarding requirements are intended to be regulated through separate frameworks for entities regulated by ASIC and entities regulated by APRA. These requirements will be based on the client money regime in Division 2 of Part 7.8 of the Corporations Act, but with adjustments to apply effectively for money that is being held in, or transferred through, SVFs, payment instruments and payment services.
- 1.125 The purpose of the safeguarding requirements is to ensure payment-related money held by licensees will be available to complete transfers or be returned to the person who is legally entitled to it (whether that person is the payer or payee under non-cash funds transfers that are being made). These circumstances can arise where a licensee becomes insolvent or otherwise ceases business. In the former circumstances, the safeguarding provisions will also protect payment-related money that is being held by a licensee from claims of other creditors of the licensee.
- 1.126 The primary method of safeguarding for licensees will be segregating payment-related money in a trust account with an Australian ADI. However, ASIC's safeguarding framework – which covers providers of SVFs (other than major SVFs) and other non-SVF PSPs – will allow some flexibility for non-SVF PSPs to use other safeguarding methods with approval from ASIC.
- 1.127 The requirements administered by APRA for major SVF providers and designated PSPs will similarly allow flexibility for other safeguarding methods to be used; however, approval from APRA will not be required to use these other methods.
- 1.128 These 'other safeguarding methods' will include the provider holding an insurance policy or a guarantee from an ADI or APRA-regulated insurer, as well as any other method prescribed by the provider's regulator. Other safeguarding methods may be required to ensure funds are adequately protected.

Unclaimed money

- 1.129 The reforms will establish a streamlined process for managing money held in SVFs issued by major SVFs that have become inactive or dormant over an extended period of time.
- 1.130 The framework will address three core functions:
- Setting out criteria for determining when funds in a major SVF account are considered unclaimed, based on inactivity over a defined period,
 - Providing a legal pathway for major SVF providers to transfer unclaimed funds to the Commonwealth, and
 - Establishing a process through which individuals can identify unclaimed money they are entitled to and have it returned to them, with the process varying depending on the provider's operational status.

Table 1.1 Proposed treatment of unclaimed money

Entity status	Who assesses the claim	Who returns the money
Still a major SVF provider	The entity	ASIC returns funds to the entity; the entity returns to customer
No longer a major SVF provider but holds AFS licence	The entity	ASIC returns funds to the entity; the entity returns to customer. Only applies to funds submitted while it was a major SVF provider.
No longer exists or holds an AFS licence	ASIC	ASIC assumes full responsibility for assessing and returning funds directly to claimants
SVF businesses sold to another AFS licensee, ADI or major SVF provider	The acquiring entity	The acquiring entity assumes full responsibility for assessing and returning funds directly to claimants

- 1.131 Entities transitioning from the PPF regime to major SVF regulation will have existing unclaimed balances preserved, and periods of inactivity accrued under

the PPF regime recognised, ensuring continuity of consumer protections and dormancy calculations.

Other consequential amendments

- 1.132 The Bill makes minor amendments to the Corporations Act to ensure consistency of references to the Bill's substantive amendments.
- 1.133 The Bill replaces various references in the Corporations Act to be consistent with the new or updated definitions of 'arrangement', 'non-cash funds transfer', 'payee', 'payer', 'SVF', 'tokenised SVF', 'SVF provider', 'tokenised SVF provider', 'payment instrument', 'payment service', 'payment facilitation service', and 'payment initiation service'.
- 1.134 The Bill also removes all references in the Corporations Act to NCP facility.

[Schedule 1, items 1, 3, 4, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 30, 32, 33, 34, 42, 43, 45, 46, 47 and 48, sections 9, 761G, 761GA, 763A, 763D, 763E, 764A, 766A, 911B, 916F, 941C, 946B, 961F, 1022B, 1041H, and 1041K of the Corporations Act]

Commencement, application, and transitional provisions

- 1.135 The commencement, application and transitional provisions for these reforms will be included in a later exposure draft.