

2014

The Payment Industry after the Task Force Report: Can Canada Learn from the Experience of Others?

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Recommended Citation

Geva, Benjamin, "The Payment Industry after the Task Force Report: Can Canada Learn from the Experience of Others?" (2014).
Osgoode Legal Studies Research Paper Series. 46.
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OSGOODE HALL LAW SCHOOL

LEGAL STUDIES RESEARCH PAPER SERIES

Research Paper No. 25

Vol. 10/ Issue. 07/ (2014)

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Geva, B. (2012). The Payment Industry After The Task Force Report: Can Canada Learn From The Experience Of Others? *The Canadian Business Law Journal*, 53 (2), 180-197.

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Abstract:

In discussing the final report of the Task Force for the Payment System Review, 1 Bradley Crawford observes that "[t]he most significant achievement of the Report is the breadth of its vision." 2 I agree and endorse the tenor of his analysis. These comments look to the implementation of the Report in relation to access. On that point, the Task Force recommended the adoption of federal legislation to "[d]efine a discrete payments industry and require payment service providers to become members." Using as my baseline the Canadian present access regime and the changes envisaged by the Task Force, I will discuss the provisions on the subject in selected developed nations, i.e., the European Union (Eu), 3 Australia and the United States. I will address access regimes for both payment service providers and for payment and clearing systems.

Keywords:

Law, Money, payment, Value, Banking

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Canadian Business Law
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THE PAYMENT INDUSTRY AFTER THE TASK FORCE REPORT: CAN CANADA LEARN FROM THE EXPERIENCE OF OTHERS?

Benjamin Geva*

I. INTRODUCTION

In discussing the final report of the Task Force for the Payment System Review,¹ Bradley Crawford observes that “[t]he most significant achievement of the Report is the breadth of its vision.”² I agree and endorse the tenor of his analysis. These comments look to the implementation of the Report in relation to access. On that point, the Task Force recommended the adoption of federal legislation to “[d]efine a discrete payments industry and require payment service providers to become members.” Using as my baseline the Canadian present access regime and the changes envisaged by the Task Force, I will discuss the provisions on the subject in selected developed nations, *i.e.*, the European Union (EU),³ Australia and the United States. I will address access regimes for both payment service providers and for payment and clearing systems.

II. CANADA

The Canadian Payments Association (CPA) was established in 1980. At present, its objects, as stated in s. 5(1) of the Canadian Payment Act (“CP Act”),⁴ are to:

- * Professor of Law, Osgoode Hall Law School York University, Toronto, and Counsel to Torys LLP. I served as a member of the Regulatory Advisory Group of the Task Force. For research assistance I am grateful to Emma Sarkisyan J.D. 2013 candidate, Osgoode Hall Law School. The views expressed in this comment and any errors and misunderstandings are mine. The comments were presented at a session on the Future of Canada’s Payment System at the 42nd Annual Workshop on Consumer and Commercial Law, Dalhousie University, Schulich School of Law, Halifax, Nova Scotia, on October 12, 2012.
1. The Task Force for the Payments System Review (Department of Finance Canada). The Final Report was submitted in December, 2011 and released by the Minister of Finance (Canada) on March 23, 2012.
 2. B. Crawford, “Final Report of the Task Force for Payments System Review: Modernization to Promote E-Commerce” (2012), 53 C.B.L.J. 167.
 3. On this aspect see my earlier article, B. Geva, “The EU Payment Services Directive: An Outsider’s View” (2009), 28 Y.B. Eur. L. 177.
 4. R.S.C. 1985, c. C-21. In pursuing its objects, the CPA is mandated under s. 5(2) to “promote the efficiency, safety and soundness of its clearing and settlement systems and take into account the interests of users.” Previously, s. 5 of the

- (a) establish and operate national systems for the clearing and settlement of payments and other arrangements for the making or exchange of payments;
- (b) facilitate the interaction of its clearing and settlement systems and related arrangements with other systems or arrangements involved in the exchange, clearing or settlement of payments; and
- (c) facilitate the development of new payment methods and technologies.

Section 4(1) of the CP Act provides that,

- (1) The Association shall consist of the following members:
 - (a) the Bank of Canada;
 - (b) every bank;
 - (c) every authorized foreign bank; and
 - (d) any other person who is entitled under this Part to be a member and who, on application to the Association for membership in the Association, establishes entitlement to be a member.

Under s. 4(2) of the Act:

- (2) Each of the following persons is entitled to be a member of the Association if they meet the requirements set out in the regulations and the by-laws:
 - (a) a central, a trust company, a loan company and any other person, other than a local that is a member of a central or a cooperative credit association, that accepts deposits transferable by order to a third party;
 - (b) [Repealed]
 - (c) Her Majesty in right of a province or an agent thereof, if Her Majesty in right of the province or the agent thereof accepts deposits transferable by order to a third party;
 - (d) a life insurance company;
 - (e) a securities dealer;
 - (f) a cooperative credit association;
 - (g) the trustee of a qualified trust; and
 - (h) a qualified corporation, on behalf of its money market mutual fund.⁵

At present, CPA members, as provided above, take part in the clearing carried out in the framework of the national payment system. At the same time, no licensing requirement exists for the provision of payment services.

original Act stated that "[t]he objects of the Association are to establish and operate a national clearings and settlements system and to plan the evolution of the national payments system." S.C. 1980-81-82-83, c. 40, s. 58.

5. Categories set out in paragraphs (d), (g), and (h) were not included in the original Act. *Ibid.*

The Task Force identified the need to broaden the scope of entities that are regulated. To accomplish this, the Task Force suggested that the function performed by an entity should be the criteria for subjecting the entity to regulation. A “payment service provider” would be defined broadly as one that facilitates the transfer of monetary value from one party to another. In an attempt to narrow the scope of such a broad definition, the Task Force proposed that how directly a firm’s activities relate to this function is what will determine whether it is a payment service provider for purposes of the legislation.

The Task Force’s Regulatory Advisory Group suggested that:⁶

- Traditional financial institutions, network operators, credit and debit card issuers and acquirers should be included in the new regime, as will new participants such as online payment networks.
- Issuers of financial cards for services offered only through their own retail outlets would not be included unless there was a large enough secondary market for their cards to give them general purchasing power.
- Parties that conduct payment services as independent contractors, or as agents for payment services providers, will generally not be required to be members; however, they will probably find voluntary membership valuable.

In an example of how directly an entity’s activities relate to facilitating the transfer of value, the Task Force observed that a network operator that sets rules for its payment system is clearly a more direct facilitator than a telecommunications company that merely supplies the technical means by which the payment information is transferred.⁷ Similarly, in a table of various payments participants, the Regulatory Advisory Group listed telecommunications firms under the heading “Users and other stakeholders,” and described their status within the scope of new payments legislation as “Optional (unless providing a payment service as per above).”⁸

The power to regulate network operators in Canada is not novel. Thus, under Part II of the *CP Act*, the Minister of Finance has the power to “designate” a payment system, thereby bringing it under the Minister’s authority. To date, the Minister has not exercised this power which nevertheless merits discussion. In order

6. Task Force for the Payments System Review, “Policy Paper C: Legislation – Establishing the Payments Industry” (December, 2011), p. 6.

7. *Ibid.*

8. *Ibid.*, at para. 47.

to designate a payment system, the Minister must consider that it is in the public interest to do so, and the payment system must be national or substantially national in scope, or play a major role in supporting transactions in Canadian financial markets or the Canadian economy. Under s. 37(2), the Minister is required to consider the following factors in determining whether it is in the public interest to designate a payment system:

- (a) the level of financial safety provided by the payment system to the participants and users;
- (b) the efficiency and competitiveness of payment systems in Canada; and
- (c) the best interests of the financial system in Canada.

Under s. 36, “payment system” is defined to mean:

a system or arrangement for the exchange of messages effecting, ordering, enabling or facilitating the making of payments or transfers of value.

Once a system is designated, the Minister is authorized to require information and to issue directives and guidelines. Thus, under CP Act, s. 40(1), and following consultations:

The Minister may issue a written directive to the manager or a participant of a designated payment system in respect of

- (a) the conditions a person must meet to become a participant in the designated payment system;
- (b) the operation of the designated payment system;
- (c) the interaction of the designated payment system with other payment systems; or
- (d) the relationship of the designated payment system with users.

As well, under s. 40(3):

The Minister may specify in a directive that a manager of a designated payment system or a participant shall, within such time as the Minister considers necessary,

- (a) cease or refrain from engaging in an act or course of conduct;
- (b) perform such acts as in the opinion of the Minister are necessary in the public interest; or
- (c) make, amend or repeal a rule.

“Participant” is defined in s. 36 to mean “a party to an arrangement in respect of a payment system.”

The reference to a participant being a party to an arrangement suggests that participants are in contractual relations with one

another, and thus a reasonable interpretation is also that participants will be members of the payment system.

III. PAYMENT SERVICE PROVIDERS UNDER THE EUROPEAN UNION PAYMENT SERVICES DIRECTIVE

The scope of the directive on payment services in the internal market ("the Directive")⁹ is described in art. 2(1) as applying to "payment services provided within the Community," that is, both national as well as domestic and cross-border payment services. The Directive is designed to govern the business activity of carrying out payment through the services of one or two payment services providers,¹⁰ each acting for a "payment service user";¹¹ the latter is described as being either the payer or payee and who may be either natural or legal persons.¹² The payment service may be carried out for business or consumer purposes, and for whatever amount.

Title II governs payment service providers. It contains arts. 5-29, which are divided into two unequal chapters. Chapter 1, containing arts. 5-27, covers payment institutions licensed under the Directive. Chapter 2, consists of two common provisions, *viz.* arts. 28-29, applicable to all providers of payment services. These two common provisions deal respectively with access to payment systems and prohibit persons other than payment service providers from providing payment services. "Payment services" (to which the Directive applies under art. 2(1)) are defined in art. 4(3) to mean business activities listed in the Annex. "Payment services" listed in the Annex¹³ are cash deposits and withdrawals in and from

9. "Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC," *Official Journal* L319 of 5.12.2007, p. 1-36 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:319:0001:01:EN:HTML>>.

10. Defined in art. 4(9) to mean "bodies referred to in Article 1(1) and legal and natural persons benefiting from the waiver under Article 26."

11. Defined in art. 4(10) to mean "a natural or legal person making use of a payment service in the capacity of either payer or payee, or both."

12. See definitions of "payer" and "payee" respectively in art. 4(7) and (8).

13. The list, however, is quite disorganized and repetitive; for example, three items (card payments, direct debits, and credit transfers) are enumerated separately according to whether they are used in connection with a "payment account" or a credit line.

payment accounts;¹⁴ execution of payment transactions¹⁵ in funds¹⁶ held on deposit in a payment account; execution of direct debits; execution of payment transactions through a payment card (or similar device); execution of credit transfers (including standing orders); execution of payment transactions in funds covered by a credit line; execution of direct debits (including one-off direct debits);¹⁷ issuing of payment cards; execution of payment transactions in e-money;¹⁸ money remittance services in funds accepted for the sole purpose of carrying out the payment transaction;¹⁹ and execution of certain payment transactions by means of any telecommunication, digital, or I.T. device.²⁰

14. Under art. 4(14), "payment account" is defined to mean "an account held in the name of one or more payment service users which is used for the execution of payment transactions." The proposal required the account to be used "exclusively" for the execution of payment transactions which was unnecessarily restrictive.
15. "Payment transaction" is defined in art. 4(5) to mean "an act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and payee."
16. "Funds" are defined in art. 4(15) to mean "banknotes and coins, scriptural money and electronic money as defined in Article 1(3)(b) of Directive 2000/46/EC."
17. "Direct debit" is defined in art. 4(28) to mean:

[A] payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee on the basis of the payer's consent given to the payee, to the payee's payment service provider or to the payer's own payment service provider.

"Credit transfers" is not defined, which is unfortunate. The same applies to "payment card." Cf. art. 4(23) defining "payment instrument" to mean:

[A]ny personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment order.

According to art. 4(16), "payment order" means "any instruction by a payer or payee to his payment service provider requesting the execution of a payment transaction."
18. According to art. 1(3)(b) of "Directive 2000/46/EC of the European Parliament and the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions," "electronic money" is defined to mean:

[M]onetary value as represented by a claim on the issuer which is:

 - (i) stored on an electronic device;
 - (ii) issued on receipt of funds of an amount not less in value than the monetary value issued;
 - (iii) accepted as means of payment by undertakings other than the issuer.
19. Art. 4(13) defines "money remittance" to mean:

[A] payment service where funds are received from a payer, without any payment accounts being created in the name of the payer or the payee, for the sole purpose of transferring a corresponding amount to a payee or to another payment service provider acting on behalf of the payee, and/or where such funds are received on behalf of and made available to a payee.
20. Conversely, under Article 3(1), "[p]ayment transactions executed by means of any

According to art. 4(3), such "payment services" consist of all business activities listed in the Annex. In particular, art. 28(1) requires member states to ensure that "rules on access of authorised registered payment service providers . . . to payment systems shall be objective, non-discriminatory and proportionate." Art. 28(1) further requires

that those rules do not inhibit access more than is necessary to safeguard against specific risks such as settlement risk, operational risk, and business risk and to protect the financial and operational stability of the payment system.

For its part, "payment system" is defined in art. 4(6) to mean "a funds transfer system with a formal and standardised arrangement and common rules for the processing, clearing and/or settlement of payment transactions."²¹

According to art. 4(9), "payment service provider" means [*sic*] "bodies referred to in Article 1(1) and legal and natural persons benefiting from the waiver under Article 26." Art. 1(1) enumerates "six categories of payment service provider":

- (a) credit institutions within the meaning of Article 4(1)(a) of Directive 2006/48/EC, those being effectively deposit taking institutions or commercial banks;
- (b) electronic money institutions within the meaning of Article 1(3)(a) of Directive 2000/46/EC;
- (c) post office giro institutions which are entitled under national law to provide payment services;
- (d) payment institutions within the meaning of this Directive;
- (e) the European Central Bank and national central banks when not acting in their capacity as monetary authorities or other public authorities; and
- (f) Member States or their regional or local authorities when not acting in their capacity as public authorities.

The "waiver under Article 26" referred to in the above-captioned definition of "payment service provider" is a waiver of the authorization requirements of "payment institutions" making

telecommunication, digital or IT device" are to be excluded from the Directive, "where the goods or services purchased are delivered to and are to be used through a telecommunication, digital or IT device", but only as long as "the telecommunication, digital or IT operator does not act only as an intermediary between the payment service user and the supplier of the goods and services."

21. "Payment transaction" is defined in art. 4(5) to mean "an act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee." "Payer" and "payee" are respectively defined in art. 4(7) and (8).

the fourth category listed in art. 1(1), and will be discussed below as part of the discussion on payment institutions forming that fourth category.

Chapter 1 of Title II deals with the fourth category. It establishes a legal framework for a single licence for all businesses providing payment services which are not connected to taking deposits or issuing e-money, and are regulated under existing EU directives²² under which they require a licence.²³ Two types of entities do not fall within the ambit of this fourth category. First excluded are credit and electronic money institutions, which are licensed other than under the Payment Services Directive. Second, post office giro institutions, central banks, and member states, all of which do not require to be licensed in order to provide and execute payment services throughout the community, are not included in this fourth category. Payment service providers falling into this fourth residual category governed by Title II to this Directive are referred to in the Preamble and the head-note to Chapter 1 of Title II as “payment institutions.”²⁴ Title II is designed to “create a level-playing field, to encourage more competition in national markets and reflect market developments in recent years, triggering market entry of a new generation of providers.” To that end, it is further designed to harmonize market access, also with the view of facilitating “the gradual migration of . . . providers from the unofficial economy to the official sector.”²⁵ In the language of para. 11 of the Preamble:

The conditions for granting and maintaining authorisation as payment institutions should include prudential requirements proportionate to the operational and financial risks faced by such bodies in the course of their business. In this connection, there is a need for a sound regime of initial capital combined with ongoing capital which could be elaborated in a more sophisticated way in due course depending on the needs of the market. . . .

22. Directive 2006/48/EC, and 2000/46/EC, respectively.

23. To a large extent, the U.S. parallel provision will be art. 2 of the Uniform Money Services Act, covering money transmission licences.

24. Defined in art. 4(4) to mean “a legal person that has been granted authorisation in accordance with art. 10 to provide and execute payment services throughout the Community.”

25. Explanatory Memorandum, to COM (2005) 603 final; 2005/0245 (COD), Implementing the Community Lisbon programme: Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC (presented by the Commission) (SEC(2005) 1535): <http://ec.europa.eu/internal_market/payments/framework/index_en.htm>, under “Legal Elements of the Proposal.”

The requirements for the payment institutions should reflect the fact that payment institutions engage in more specialised and limited activities, thus generating risks that are narrower and easier to monitor and control than those that arise across the broader spectrum of activities of [deposit-taking] credit institutions. In particular, payment institutions should be prohibited from accepting deposits from users and permitted to use funds received from users only for rendering payment services.²⁶ Provision should be made for client funds to be kept separate from the payment institution's funds for other business activities.²⁷ Payment institutions should also be made subject to effective anti-money laundering and anti-terrorist financing requirements.

Authorization by the competent national authority of a member state will be effective in all member states.²⁸ For small institutions, authorization requirements may be modified. Thus, to prevent the forcing into the black economy of those unable to meet all conditions for authorization as payment institutions, provision is made for the registration "of payment institutions while not applying all or part of the conditions for authorisation," but only as long as derogation is limited to the provision of payment services within the member state of registration and is "subject to strict requirements relating to the volume of payment transactions."²⁹

This waiver is implemented by art. 26. It permits member states to waive the application of all or part of the "procedure and the conditions" set out for the authorization of payment institutions. Enumerated exceptions that cannot be waived relate to the designation of competent authorities for the authorization and prudential regulation of payment institutions under art. 20; professional secrecy under art. 22; access to courts under art. 23; and the exchange of information among competent authorities under art. 24. This waiver may benefit only payment institutions for which "the average of the preceding twelve months' total amount of payment transactions executed . . . does not exceed EUR 3 million per month" and of which managers have not been

26. To that end, art. 16(2) clarifies that:

[F]unds received by payment institutions from payment service users with a view to the provision of payment services shall not constitute a deposit or other repayable funds within the meaning of Article 5 of Directive 2006/48/EC, or electronic money within the meaning of Article 1(3) of Directive 2000/46/EC.

The former Directive governs deposit taking by credit institutions and the latter governs electronic money institutions.

27. A point codified in art. 10(2).

28. Art. 10(9). For some procedural aspects, see art. 25.

29. Preamble, at para 15.

convicted of financial crimes. The activities of payment institutions benefiting from this waiver are restricted to the territory of the member state which conferred on them the benefit of the waiver.

Activities permitted to payment institutions are enumerated in art. 16(1). They consist of (i) the provision of payment services; (ii) the provision of operational and related ancillary services such as the guaranteeing of the execution of payment transactions, foreign exchange services, safekeeping activities, and storage and processing of data; (iii) operating payment systems; and (iv) business activities other than the provision of payment services, having regard to applicable community and national law.³⁰

Specific provisions deal with capital requirements;³¹ the safeguarding by segregation of funds placed for payment transactions;³² the authorization process, the maintenance as well as the withdrawal of authorization, and the registration of authorized payment institutions;³³ compliance with accounting and statutory audit requirements;³⁴ the use of branches and third parties by payment institutions;³⁵ record-keeping requirements;³⁶ and professional secrecy.³⁷ They also provide for the designation of competent authorities for prudential regulation and supervision as well as their activities and exchange of information;³⁸ and right to apply to the courts.³⁹

IV. AUSTRALIA⁴⁰

Oversight of the payment system in Australia is in the hands of the Payment System Board, which is established within the

30. The fourth category replaced art. 10(3) of the proposal, under which permitted activities "shall not be restricted to payment services, having regard to the applicable national and Community law."

31. Arts. 6-8 providing for initial capital, own funds, and two alternative methods for calculation of own funds.

32. Art. 9.

33. Arts. 5 and 10-14.

34. Art. 15.

35. Arts. 17-18.

36. Art. 19.

37. Art. 22.

38. Arts. 20-21 and 24.

39. Art. 23.

40. For more on the subject see *e.g.*, A.L. Tyree and A. Beatty, *The Law of Payment Systems* (Sydney, Butterworths, 2000); A.L. Tyree, "The Australian Payments System" (2001-2002), 17 B.F.L.R. 39; A. Wardrop, "Credit Card Regulation, Interchange Fees and the Meaning of 'Payment System' in Australia" (2004), 19 J. Intl. Bank. L.R. 68; A. Wardrop, "Payments System Reform in Australia: Central Bank Regulation of Credit and Debit Card Interchange Fees, Access

framework of the Reserve Bank of Australia (RBA). The leading regulatory role in the payment system previously given to the RBA has been substantially superseded by powers given to other bodies. The Australian Payments System Board was established under s. 10A and is provided for in Part IIIA of the Reserve Bank Act 1959. The latter Act provides a clear delineation between the Payments System Board, which has responsibility for the RBA's payments system policy, and the Reserve Bank Board, which has responsibility for the RBA's monetary and banking policies and all other policies except for payments system policy.⁴¹ The responsibilities and powers of the Payments System Board are set out in four separate Acts.⁴²

Section 10B of the Reserve Bank Act 1959 provides for the functions of the Payments System Board as follows:

- (1) The Payments System Board has power to determine the Bank's payments system policy.⁴³
- (2) The Payments System Board has power to take whatever action is necessary to ensure that the Bank gives effect to the policy it determines.
- (3) It is the duty of the Payments System Board to ensure, within the limits of its powers, that:
 - (a) the Bank's payments system policy is directed to the greatest advantage of the people of Australia; and
 - (b) the powers of the Bank under the Payment Systems (Regulation) Act 1998 and the Payment Systems and Netting Act 1998 are exercised in a way that, in the Board's opinion, will best contribute to:
 - (i) controlling risk in the financial system; and
 - (ii) promoting the efficiency of the payments system; and
 - (iii) promoting competition in the market for payment services, consistent with the overall stability of the financial system; and

Regimes and Card Association Rules" (2006), 21 *J. Intl. Bank. L.R.* 535; R. Bollen, "A Review of Developments and Legal Nature of Payment Facilities" (2005), 16 *J. Bank. Fin. L. & Prac.* 130; and R. Bollen, "A Review of the Regulation of Payment Facilities" (2005), 16 *J. Bank. Fin. L. & Prac.* 325. For input to this section, I am grateful to Ann Wardrop and Rhys Bollen.

41. The Reserve Bank Act 1959, s. 10 <http://www.austlii.edu.au/au/legis/cth/consol_act/rba1959130/index.html>

42. These are: Reserve Bank Act 1959; Payment Systems (Regulation) Act 1998; Payment Systems and Netting Act 1998; and Cheques Act 1986.

43. Defined in s. 5(1) of The Reserve Bank Act 1959 to mean:

[P]olicy for the purposes of the Bank's functions or powers under:

- (a) the Payment Systems (Regulation) Act 1998; and
- (b) the Payment Systems and Netting Act 1998; and
- (c) Part 7.3 of the Corporations Act 2001.

- (c) the powers and functions of the Bank under Part 7.3 of the Corporations Act 2001⁴⁴ are exercised in a way that, in the Board's opinion, will best contribute to the overall stability of the financial system.

The wide-ranging powers of the RBA in the payments system are set out in the Payment Systems (Regulation) Act 1998. The RBA may:⁴⁵

- “designate” a particular payment system as being subject to its regulation. . . .⁴⁶
- determine rules for participation in that system, including rules on access for new participants . . . ;
- set standards for safety and efficiency for that system. These may deal with issues such as technical requirements, procedures, performance benchmarks and pricing;
- direct participants in a designated payment system to comply with a standard or access regime; and
- arbitrate on disputes in that system over matters relating to access, financial safety, competitiveness and systemic risk, if the parties concerned wish.

The Payment Systems (Regulation) Act 1998 also gives the RBA extensive powers to gather information from a payment system or from individual participants. As well, Part 4 of the Payment Systems (Regulation) Act 1998 provides for the regulation of “purchased payment facilities.” These are stored-value instruments such as smart cards and digital cash. An issuer must be either (i) an ADI⁴⁷ or, (ii) a “constitutional corporation”⁴⁸ which was specifically approved by the RBA and which must act under conditions that may be imposed on it by the RBA.⁴⁹

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44. Powers “Part 7.3 of the Corporations Act 2001,” discussed further below, are in relation to the licensing of clearing and settlement facilities.
45. Reserve Bank of Australia, “Payments System Board”, online: <<http://www.rba.gov.au/payments-system/policy-framework/psb-board.html>>.
46. In order to designate it suffices for the RBA to consider “that designating the system is in the public interest.” Payment systems (Regulation) Act 1998, s. 11. Unlike in Canada, designation does hinge on systemic risk.
47. ADI stands for an “Authorized Deposit-Taking Institution.” See *e.g.*, s. 5 of the Banking Act 1959. An ADI is not exclusively an Australian-owned bank; particularly, it could also be an Australian incorporated subsidiary of a foreign bank, a branch of a foreign bank, a building society, or a credit union.
48. This is a “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth” with respect to which federal jurisdiction exists in Australia under Commonwealth of Australia Constitution Act. s. 51(xx).
49. See Payment systems (Regulation) Act 1998, Part 4 — Regulation of purchased payment facilities, particularly ss. 22-23.

Licensing and prudential regulation of ADIS⁵⁰ and other "holders"⁵¹ of purchased payment facilities available as a means of payment "on a wide basis,"⁵² is in the hands of the Australian Prudential Regulation Authority (APRA). The RBA accordingly exempted such facilities, as well as those that do not pose risk, from its approval requirements.⁵³

Under s. 10B of the Reserve Bank Act 1959 (reproduced above) RBA's powers in relation to the payment system fall under the oversight of the Payments System Board. The latter also acquired additional responsibilities for the regulation of securities clearing and settlement systems with the passage of the Financial Services Reform Act in August, 2001.

With the enactment of the Payment Systems (Regulation) Act 1998, there is an onus on the Reserve Bank and the Australian Competition and Consumer Commission (ACCC) to take a consistent approach to policies involving access to, and competition in, the payments system. This has been facilitated through an ACCC and RBA Memorandum of Understanding (MOU).⁵⁴ Its effect is that the ACCC retains responsibility for competition in, and

50. Licensing and prudential supervision of ADIS is governed by ss. 8-9 and 11AF respectively of the Banking Act 1959.

51. "Holder" is the provider of the facility or a person acting under an arrangement with the provider, who is to make payment thereunder. See Payment systems (Regulation) Act 1998, s. 9(1)(c) and (2).

52. Section 3(b) of Banking Regulations 1966, S.R. 1966 No. 157, as am., expanding the definition of "banking business," as authorized by s. 5(1) of the Banking Act 1959. Guidelines on authorization of providers of purchased payment facilities were issued by APRA in August, 2010.

53. The authority to exempt is under ss. 9(3) and 25 of the Payment Systems (Regulation) Act 1998. Exemptions are listed in "Purchased Payment Facilities" (Reserve Bank of Australia, 2012), online: <<http://www.rba.gov.au/payments-system/legal-framework/purchased-payment-facilities/index.html>>.

54. The MOU signed on September 8, 1998 makes it clear that:

- the ACCC is responsible for ensuring that payments system arrangements comply with the competition and access provisions of the Competition and Consumer Act 2010, in the absence of any specific Reserve Bank initiatives. Under its adjudicative role, the ACCC may grant immunity from court action for certain anti-competitive practices, if it is satisfied that such practices are in the public interest. It may also accept undertakings in respect of third-party access to essential facilities; and
- if the Reserve Bank, after public consultation, uses its powers to impose an access regime and/or set standards for a particular payment system, participants in that system will not be at risk under the Competition and Consumer Act 2010 by complying with the Bank's requirements.

The MOU is available online: <<http://www.rba.gov.au/media-releases/1998/pdf/jmr-98-acc-rba-mou.pdf>>. The quoted language is from Reserve Bank of Australia, "Payments System Board," online: <<http://www.rba.gov.au/payments-system/policy-framework/psb-board.html>>, which takes into account the current statutory position.

access to, a payment system, unless the bank designates that system and follows up the designation by imposing an access regime and/or setting standards for it. If the RBA makes such a designation, its requirements are paramount. Designation does not, by itself, remove a system from the ACCC's coverage.

In terms of the MOU, the Reserve Bank and the ACCC staff are in close contact with each other on relevant matters. The Governor and the Chairman of the ACCC also meet at least once a year to discuss issues of mutual interest in the payments system.

Market integrity and consumer protection in the payments area are entrusted to the Australian Securities and Investments Commission (ASIC). The role of this national regulator in payment systems can be traced to a 1999 report prepared by the RBA and the Committee on Payment and Settlement Systems (CPSS) of the central banks of the Group of Ten countries. The report stated:⁵⁵

The Australian Securities and Investments Commission (ASIC) was established on 1 July 1998, as the successor to the Australian Securities Commission. It has responsibility for market integrity and consumer protection across the financial system, including payments transactions. It administers the Corporations Law and regulates Australian corporations and securities markets. The major functions of ASIC include the regulation of securities markets, licensing of securities dealers and advisers, registration of auditors and liquidators, and investigating and enforcing corporate and securities law. Some of ASIC's consumer protection responsibilities for payments transactions were previously undertaken by the Australian Payments System Council, which was disbanded in June 1998.

The Financial Services Reform Act 2001 reinforced ASIC's role in the payment market. At the moment, ASIC is responsible for market integrity and consumer protection in the financial system, including payment transactions. Chapter 7 of the Corporations Act 2001 deals with financial services and markets. Its stated object is set out in s. 760A to promote:

- (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products; and

55. Reserve Bank of Australia and Committee on Payment and Settlement Systems, *Payment Systems in Australia*, 2nd ed. rev. (Basel, Switzerland, Bank for International Settlements, June, 1999), at p. 9.

- (d) the reduction of systemic risk⁵⁶ and the provision of fair and effective services by clearing and settlement facilities.

Section 763A contains the following general definition of financial product:

- (1) For the purposes of this Chapter, a *financial product* is a facility through which, or through the acquisition of which, a person does one or more of the following:
- (a) makes a financial investment (see section 763B);
 - (b) manages financial risk (see section 763C);
 - (c) *makes non-cash payments* (see section 763D). [Emphasis added]

A “non-cash payment” is then a “financial product.”

Under s. 763D (1):

For the purposes of this Chapter, a person makes non-cash payments if they 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.

In principle under s. 911A(1):

. . . . a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

Dealing in (including issuing of: see s. 766C(1)(b)) a financial product includes the provision of a financial service (s. 766A(1)(a)). Accordingly, quoting from s. 763A(1)(c) reproduced above, an issuer of “a facility through which, or through the acquisition of which, a person makes non-cash payments,” namely, the issuer of a non-cash payment facility, whether or not it is an ADI, is required to be licensed. The granting of such licenses falls under the jurisdiction of ASIC (ss. 913A-913C). Extensive rules are set out in relation to obligations and conduct of financial service providers and ASIC’s supervision and oversight.

When the dust settles, the picture becomes as follows. Licensing and prudential regulation of ADIS and “constitutional corporations” holding⁵⁷ widely used purchased payment facilities is in the hands of APRA. Licensing and prudential regulation of other “constitutional corporations” holding purchased payment facilities

56. In other jurisdictions, including Canada, the reduction of systemic risk is provided for in a separate statute. This aspect of Canada’s payment system was not addressed by the federal Task Force and is outside the present discussion.

57. See footnote 51, *supra*.

is by RBA which nevertheless exempted those holders that pose no risk. ASIC licenses and regulates market activity of all non-cash service payment providers. Payment systems policy and financial system risk is under the responsibility of the RBA. The ACCC plays a role in matters of access and competition.

The licensing of clearing and settlement (CS) facilities, as arrangements for clearing and settlement of transactions effected through financial markets,⁵⁸ is governed by Part 7.3 of the Corporations Act 2001. License application is to be submitted to ASIC which is to advise the Minister. It is, however, the Minister who grants the applicant an Australian CS facility license. Under s. 827D(1), the Reserve Bank of Australia may, in writing, determine standards for the purposes of ensuring that CS facility licensees conduct their affairs in a way that causes or promotes overall stability in the Australian financial system. Supervision on, as well as oversight over, licensed CS facilities are by ASIC (often together with the Minister) and RBA, each in its respective area.

V. UNITED STATES

In the United States, the licensing of money transmitters is governed by state law, usually as part of a broader statute covering money services. The National Conference of Commissioners on Uniform State Law (NCCUSL)⁵⁹ has also adopted a comprehensive Uniform Money Services Act (UMSA), which defines in s. 102(13) “money services” to mean “money transmission, check cashing, or currency exchange.” According to its Prefatory Note:

UMSA is a state safety and soundness law that creates licensing provisions for various types of money-services businesses (“MSBS”). While many States have laws that deal with the sale of payment instruments, state regulation of money transmission, check cashers and currency exchangers is extremely varied. Furthermore, only a few States have attempted to create statutory frameworks which tie together the various types of MSBs in a manner that assists regulators and attorneys general in terms of law enforcement and the prevention and detection of money laundering.

The UMSA creates a framework that connects all types of MSBs and sets forth clearly the relationship between a licensee and its sales outlets. Uniformity should create a level playing field with respect to the entry of

58. For details, see Australian Securities & Investments Commission, “Clearing and settlement facilities: Australian and overseas operators,” Regulatory Guide 211 (Victoria, April, 2010).

59. Now renamed as the Uniform Law Commission (ULC). See *e.g.*, <<http://www.uniformlaws.org/>>.

MSBs into various States. More generally, the uniformity of the reporting and record keeping requirements should enable industry to comply with multiple state requirements in a uniform and cost-effective manner. Uniform licensing, reporting and enforcement provisions for MSBs will serve as a larger deterrent to money laundering than will a host of varying state laws.

The Prefatory Note to the UMSA explains the meaning of a money service business (MSB) in the following passage:⁶⁰

MSBs are nonbank entities *that do not accept deposits or make loans like traditional banks or financial institutions*. Rather, they provide alternative mechanisms for persons to make payments or to obtain currency or cash in exchange for payment instruments. MSBs engage in the following types of financial activities:

- money transmission (e.g., wire transfers);
- the sale of payment instruments (e.g., money orders, traveler's checks, and stored-value);
- check cashing; and
- foreign currency exchange.

MSBs have also been referred to as nonbank financial institutions ("NBFIs") or nondepository providers of financial services ("NDPs"). The so-called "core" customers of MSBs are "unbanked" consumers or persons that do not maintain formal relationships with banks/depository institutions. MSBs also are attractive to a growing range of customers because they offer a wide range of services under one roof (e.g., consumer financial services, travel-related services, postal and packaging services, etc).

The Prefatory Note goes on to explain, that:

In order to engage in money transmission, a person must first obtain a license under Article 2 of [UMSA]. Money transmitters that obtain a license pursuant to Article 2 of [UMSA] are also permitted to engage in check cashing and currency exchange without obtaining a separate license for those activities. The licensing requirements for money transmission are greater than for check cashing or currency exchange. Therefore, it is possible for an Article 2 money transmitter to engage in check cashing and currency exchange without obtaining a separate license. This is because the regulator will have obtained sufficient information under Article 2 to satisfy the requirements for check cashing and currency exchange licenses. . . .

Entities that serve as authorized delegates (i.e., sales agents) for money transmitters are allowed to engage in money transmission without obtaining a separate money transmission license so long as they do not engage in money transmission outside of the scope of their contract with the principal

60. The UMSA (National Conference of Commissioners on Uniform State Laws, 2000) (hereafter UMSA), can be found in <www.law.upenn.edu/bll/archives/ulc/money-serv/UMSA2004Final.htm>.

transmitter. In other words, if the authorized delegate starts to offer money transmission on its own behalf, then it needs to obtain its own license.

Under UMSA s. 102(14):

“Money transmission” means selling or issuing payment instruments,⁶¹ stored value,⁶² or receiving money or monetary value for transmission. The term does not include the provision solely of delivery, online or telecommunications services, or network access.

UMSA art. 2 covers the licensing of money transmitters. Under s. 201:

- (a) A person may not engage in the business of money transmission or advertise, solicit, or hold itself out as providing money transmission unless the person:
 - (1) is licensed under this [article]; or
 - (2) is an authorized delegate of a person licensed under this [article].
- (b) A license under this [article] is not transferable or assignable.

The balance of the article’s provisions deal with applications for licenses, the security to be provided, and renewal of licenses.

VI. FINAL OBSERVATION

In recent years, federal jurisdiction covering the national payment system in Canada has gradually expanded. Licensing money transmitters may become another step in that direction. In my view, the time has come for the federal government to assume jurisdiction over the whole area and thereby avoid duplication and conflicts. How to move in this direction is beyond the scope of this paper, which focuses on the legislative frameworks governing payment and clearing services.

61. Defined in s. 102(16) to mean:

[A] check, draft, money order, traveler’s check, or other instrument for the transmission or payment of money or monetary value, whether or not negotiable. The term does not include a credit card voucher, letter of credit, or instrument that is redeemable by the issuer in goods or services.

62. Defined in s. 102(21) to mean “monetary value that is evidenced by an electronic record.”