**FCCC Response to Standing Committee on Justice, Law and Human Rights Committee**

Paper Details : National Payment Bill

Subject : FCCC Submission to National Payment Bill

**Executive Summary**

1. The FCCC is an independent statutory body established under Section 7 of the Fijian Competition and Consumer Commission Act 2010 that promotes effective competition and informed markets, encourages fair trading and protects consumers and businesses from restrictive trade practices and controls prices of regulated industries and other markets where competition is lessened or limited.
2. Given the nature of FCCC’s powers under the FCCC Act 2010, continuous engagement with staff and stakeholders becomes necessary to maintain the responsibilities at all times as expected. The FCCC has a pivotal role in maintaining the integrity and welfare of the Fijian markets. We understand the impact our decisions have on businesses and consumers alike. We are also aware that businesses, as consumers and market players, benefit from our role in ensuring they are able to compete fairly and that markets with limited competition are regulated appropriately.
3. The FCCC believes that our mission to *“foster a competitive, efficient, fair and informed marketplace to ensure the wellbeing of all Fijians”* can be further exemplified through working hand-in-hand with our valued stakeholders. The FCCC is therefore quite pleased with the enactment of the National Payment Bill (hereon referred to as “the Bill”) which complements with Strategic Goal 4 in promoting transparency and justice for all Fijians.
4. In response to the invitation dated 19 January 2021 for submissions on the National Payment Bill, the FCCC The FCCC welcomes the proposed National Payment System Bill 2020, which contains many features which are aimed at the protection of consumer welfare. We note, furthermore, that there are some provisions of the Bill which are explicitly aimed at protecting competition. The FCCC welcomes, for example, Section 15.14, which permits the Reserve Bank to replace licensing requirements with a requirement for registration if and only the financial institution concerned does not threaten to “strongly compromise competition”.
5. We also welcome the Bill’s focus on requiring participants in this market to provide consumers with important information about the terms and conditions of their agreements with payment service providers, as well as provisions intended to guarantee the smooth functioning of the national payment system. For example, we note that provisions are made in the Bill to guarantee that participants have sufficient capital to ensure that they are able to manage the necessary volume of payments on any given day.[[1]](#footnote-1) This is important for consumer welfare and the functioning of the market in Fiji.
6. Nonetheless, we wish to recommend that some features of the Bill be reviewed. There are a number of provisions of this Bill which we recommend be reviewed before the Bill is presented to Parliament. The FCCC’s recommendations reflect a number of concerns about the Bill, in particular the current text of the Bill:
   1. Permits RBF to act as both regulator and participant in this market, which we do not consider to be conducive to optimal regulation of this market and which risks undermining competition;
   2. Uses some terms which are not adequately defined in the text of the Bill, creating ambiguity about the way the law would be enforced if enacted;
   3. Does not mandate the inclusion of independent, disinterested members on the National Payment Systems Council (i.e members of the council are determined by the Governor and does not direct the necessity of independent individuals to fill council positions);
   4. Does not include specific provisions relating to the promotion of competition in a market which can easily be dominated by larger players becoming highly concentrated.
7. Further comments on the bill are detailed in Annexure A of this submission.

**FCCC Recommendation to Standing Committee on Justice, Law and Human Rights Committee**

**Recommendation 1:** **Regulatory Impartiality and Independence**

1. The primary concern the FCCC wishes to express about the regulatory structure set out in this legislation is that Section 7.2(a) of the Bill makes provision for RBF to “establish, own, operate and participate in the ownership or operation of payment, clearing and settlement systems”, while a number of other sections of the same Bill make provisions for the regulation of the payment systems market to be predominantly executed by RBF. For example, the responsibilities of RBF, as set out in this Bill, include:
2. Developing and implementing policies for the modernization of the national payment system;[[2]](#footnote-2)
3. Licensing payment service providers and operators;[[3]](#footnote-3)
4. Appointing members of the National Payment System Council,[[4]](#footnote-4) which is responsible for regulation,
5. oversight and supervision of the national payment system, including:[[5]](#footnote-5)
   * 1. operational and technical standards;
     2. clearing and settlement of payments and securities; and
     3. other matters affecting payment services.
6. Specifying the responsibilities functions and procedures of the Council;[[6]](#footnote-6)
7. Issuing instructions and directions to the National Payment System Council;[[7]](#footnote-7)
8. Issuing, revoking and suspending licenses to operate payment systems, without which potential operators are not permitted to participate in this market;[[8]](#footnote-8)
9. The FCCC considers that the inclusion of a regulator with such extensive powers as a participant in this market may raise concerns about the impartiality of the regulator, unless the scale and scope of RBF’s participatory activities are more clearly delineated by the Bill. Currently, the Bill permits RBF to participate in providing payment system services, but overwhelmingly delegates regulatory oversight to RBF itself. We consider that this blurs the line between participant and regulator in a way which may undermine confidence in the regulatory regime. The FCCC considers that a clearer delineation must be made in the Bill concerning the scope of RBF’s permitted participation in this market or, if RBF wish to fully participate in the payment services market, a regulatory structure should be designed in which RBF’s role as regulator is more constrained.
10. Furthermore, it is recommended that the National Payment System Council is mandated to include at least one member who is not a participant in this market or represents consumer interests. Section 9.3(a) imposes the condition that the Governor “must ensure that the members represent banks, non-bank payment service providers and other payment system participants”. Given the likely existence of some common interests between these participants, which may not be shared in common with consumers, we consider that this regulatory structure creates a risk of regulatory capture. It is recommended, therefore, that the Bill mandate the inclusion of an independent party on the Council. This independent member should be specifically mandated to represent consumer interests.

**Recommendation 2:** **Clarity of Provisions of Bill**

1. A number of provisions in the Bill are not clearly defined, and these terms should be clarified before the Bill is presented to Parliament. In particular, the nature of the “public interest” test set out in Sections 15.5(i) and 16.3(a) is unclear and is not defined anywhere in the text of the Bill. While we acknowledge that the nature of the public interest is broad, and cannot always be clearly defined in legislation, we consider the ambiguity of this term to increase the risks associated with RBF’s dual status as both regulator and participant.
2. We note also that Section 15.5(i) permits RBF to suspend or revoke licenses on the grounds that they “in the opinion of the Reserve Bank, the operation of the payment system … no longer represents the interests of its participants”. Such a provision is unusual, in that it appears to empower RBF to revoke the license of the of a participant for those participants’ own good. This “representing the interests of participants” must be more clearly defined in the text of the Bill, especially if RBF also intends to participate in this market.

**Recommendation 3: Additions to Bill**

1. The nature of a market for payments systems provision is such that it is likely to be relatively uncompetitive without active pro-competition intervention by regulators. The existence of “network effects” – whereby customers generally wish to use the same system as everyone else – tends to reduce the number of players in the market. Given these pressures on competition, it is recommended that regulators are specifically empowered to intervene to promote competition in this market. In so far as there are provisions relating to competition – for example, the “strongly compromising competition” provision noted above - it is recommended that the FCCC be asked to assist in implementing these provisions.
2. We wish, furthermore, to recommend that provisions be made in the Bill to minimize the risk to consumers of events which could render Payment Systems inoperative. For example, we note that the Bill does not currently make any provision for what happens to the customers of a payment service provider whose license is revoked. We consider this to constitute a risk to consumers, and provisions should be made for addressing this risk in the text of the Bill.
3. Provisions to protect the privacy of payment system users should also be considered. We note that Section 48.2(j) states that **“*the terms and conditions of electronic funds transfers involving a customer’s account must be disclosed by a bank or other payment service provider in a manner clearly understood by the customer…the circumstances under which the bank or other payment service provider may in the ordinary course of business disclose information concerning the customer’s account to third parties*”**. This does not appear to preclude the inappropriate sharing of information by payment system providers with third parties. While competitive pressure can normally be relied upon to ensure that full disclosure of terms and conditions of use is sufficient to safeguard consumer interests, the existent of network effects may limit the extent of competition in this market. We recommend that consumer privacy safeguards are included in the final legislation.

**Concluding Remarks**

1. The FCCC is committed to fostering a competitive, efficient, fair and informed market with initiatives to modernize the regulatory environment through the culture of excellence, while growing our presence at a national and regional level.

**Annexe A: FCCC Submission - National Payment System Bill**

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| **Sections** | **Comments** |
| *7 (2): The Reserve Bank may—*  *(a) establish, own, operate and participate in the ownership or operation of payment, clearing and settlement systems;* | This gives total power to the Reserve Bank to not only own/participate in the operation and settlement of payment systems which according to 13(1) they also grant license(s) for. Does this mean that they can grant themselves a license to operate as in 7(2)(a)? This might be an issue of conflict of interest. |
| *9(1): This section establishes the National Payment System Council which is to be chaired by the Governor.*  *(2) There must be at least 4 members of the Council who are to be appointed by the Governor.* | The Bill automatically appoints the head of the regulator of the bill (Governor) as the chairman of the council who is responsible of selecting his own council members. In best practice, can the council members be appointed by the Minister whom then can select council members as per section 9(3)? Having the Governor as chairman selecting its own council members can incite collusion within the council or conflict of interest. |
| *12.(1) The Reserve Bank may issue instructions specifying the procedures and functions of the Council.* | As per Section 9(1) the Governor chairs the council, hence to have “Reserve Bank issue instructions to detail the procedures and functions of the council can raise governance issues. Recommend that instructions as per section 12(1) are issued by the line Minister. |
| *13(2)(a): An application made in accordance with subsection (1) must—include any information that the Reserve Bank requires* | This clause is pretty vague considering that it does not detail the information that will be required hence can lead to privacy issues which the applicant will have less to no choice but to oblige. Recommend that:   * Either the clause is amended to include certain information that will be required to be submitted with applications; * Clause included to safeguard information that is submitted with applications and/or restrict regulators from sharing information submitted as per application requirements; and * Should include clause that should the reserve bank require further information beyond the detailed prerequisites, such requests must be accompanied with proper/good reasons. |
| *15(5): A licence granted by the Reserve Bank in accordance with subsection (1) may be renewed by the Reserve Bank on such terms and conditions as the Reserve Bank deems necessary.* | Section 15(6) details the circumstances to which an active license may be revoked or suspended. If the Bill goes into detail on grounds of revocation or suspension of a license(s) it is recommended that this be reciprocated through the detailing of the terms and conditions for renewal of license.  Recommend that clause detailing the terms and conditions of renewal of license be included in the Bill. |
| *15(6)(i): A licence granted in accordance with subsection (1) may be suspended or revoked by the Reserve Bank in any of the following circumstances— in the opinion of the Reserve Bank, the operation of the payment system is no longer in the* ***public interest*** *or the payment system no longer represents the interests of its participants.*  *16(3): The Reserve Bank may vary or revoke any rules made under subsection (1), where it considers appropriate to do so, having regard to—*  *(a) whether the variation or revocation is in the public interest* | Recommend that the term “public interest” be added into the *interpretation* section of the billto avoid ambiguity nor juxtaposing of similarities to fit ones purpose of gain. |
| *15(9):* *A licence or any right acquired in accordance with this Act is not transferable except as may be prescribed by the Reserve Bank, and any transfer in contravention thereof is void.* | Conditions for transferring of licenses is recommended to be detailed for unison purposes. Failing to detail conditions to transfer licenses can result in double standards and an inconsistent system. |
| *18(1): The Reserve Bank may at any time adopt and implement general standards and criteria for the conduct of payment service activities or the operation of systems.* | Recommend that there should at least be an interpretation of general standards |
| *45(2): If a cheque is presented for payment under this section, presentment does not have to be made at the proper place or at a reasonable hour on a business day.* | Recommend that presentation of cheques for payment be done within business hours due to the following:  - This is because the presenter of the cheque is entitled to a receipt of payment (to complement section 55A of the FCCC Act 2010) which is unlikely to be obtained if business dealings occurs past business hours; and  - most consumer complaints that are lodged at the FCCC occur from business dealings that happen outside the office with imposters claiming to be agents of the service provider. Consumers must always be on their toes when doing business outside the business premises and hours. |
| *49(1)(e): In addition to general requirements established by this Act for obtaining a licence as a payment service provider, for the issuance of electronic money, at a minimum an applicant must prove that the following conditions are met—clearing and settlement mechanisms must facilitate the provision of final settlement not more than* ***24 hours after a payment instruction has been initiated;*** | * Should specify whether this condition overlaps into weekends as well. |
| *51: Customer complaints*  ***51.****—(1) Any customer whose financial transaction is routed through a payment system may, if the customer is aggrieved, lodge a written complaint with the customer’s payment service provider.*  *(2) A payment service provider that receives a complaint under subsection (1)—*  *(a) may request any information related to the customer’s financial transaction from the Reserve Bank or another participant; and*  *(b) must address the customer’s grievance in accordance with the relevant complaints management policy.* | * Should include subsection that allows the customers to raise their complaints to the Reserve Bank should they feel that service provider has not done its due diligence in conducting thorough investigation with grievances raised. |

1. Section 15.3 [↑](#footnote-ref-1)
2. Section 6.1(a) [↑](#footnote-ref-2)
3. Section 6.1(a) [↑](#footnote-ref-3)
4. Section 9 [↑](#footnote-ref-4)
5. Section 10 [↑](#footnote-ref-5)
6. Section 12.1 [↑](#footnote-ref-6)
7. Section 12.2 [↑](#footnote-ref-7)
8. Sections 13-15 [↑](#footnote-ref-8)