



RESERVE BANK OF AUSTRALIA

65 Martin Place
Sydney NSW 2000

GPO Box 3947
Sydney NSW 2001
T: +61 2 9551 8680
F: +61 2 9551 8644
turtont@rba.gov.au
www.rba.gov.au

2 December 2019

Australian Privacy Commissioner
Office of the Australian Information and Privacy Commissioner
GPO Box 5218
SYDNEY NSW 2001

Dear Ms Falk

APPLICATION FOR A PUBLIC INTEREST DETERMINATION IN RELATION TO COMPLIANCE WITH AUSTRALIAN PRIVACY PRINCIPLE 8 WHEN APPLIED TO INTERNATIONAL MONEY TRANSFERS

Under subsection 73(1) of the *Privacy Act 1988 (Cth)*, the Reserve Bank of Australia (**RBA**) makes an application for a public interest determination (**PID**) under subsection 72(2) of the Privacy Act to replace Privacy (International Money Transfers) Public Interest Determination 2015 (No. 2) (**PID 2015-2**) made under subsection 73(1) of the Privacy Act, which expires on 19 February 2020 (**Application**). The RBA also makes an application for a temporary public interest determination (**TPID**) under subsection 80A(2) of the Privacy Act in the event this Application for a PID is not able to be processed prior to the expiry of PID 2015-2.

The RBA also refers to Privacy (International Money Transfers) Generalising Determination 2015 (**GD 2015**) made under subsection 80B(3) of the Privacy Act.

The purpose of PID 2015-2 and GD 2015 is to permit the RBA and authorised deposit-taking institutions within the meaning of the *Banking Act 1959 (ADIs)* respectively to disclose the personal information of a beneficiary of an international money transfer (**IMT**) to an overseas financial institution when processing an IMT without breaching the Australian Privacy Principles (**APPs**) in the Privacy Act. In particular, the purpose is to ensure that the RBA and ADIs do not breach APP 8.1 when disclosing the beneficiary's personal information to the overseas financial institution, and are not held to breach another APP (other than APP 1) as a result of being held accountable for an act or practice of the overseas financial institution in relation to that information (in accordance with subsection 16C(2) of the Privacy Act).

The RBA is not an ADI but is authorised under the Banking Act (section 8(1)), and under the *Reserve Bank Act 1959* (sections 26 and 27), to carry on banking business. It provides payment and collection services for the Australian Government, various Australian government agencies, and a number of overseas central banks and official institutions. It also makes limited international payments relating to its staff. In the course of its banking business it processes IMTs for its customers in a similar way to the way that ADIs process IMTs for their customers.

The RBA submits that the public interest in the RBA processing IMTs outweighs to a substantial degree the public interest in adhering to APP 8 and being held accountable for any incidents of non-compliance of the APPs by an overseas recipient of the personal information.

Detail in support of this Application is set out below.

1. Background

The RBA was formed by statute in 1911 and was continued in existence as a body corporate by the Reserve Bank Act. It is Australia's central bank.

The RBA is obliged by section 27 of the Reserve Bank Act, in so far as the Commonwealth requires it to do so, to act as banker and financial agent of the Commonwealth. The RBA's banking services comprise two broad components: central banking services and transactional banking services. Both are provided with the common objective of delivering secure and efficient arrangements to meet the banking and payments needs of the RBA's customers, in particular the Australian Government and its agencies.

Central banking services include the core banking services the RBA provides to the Department of Finance and the Australian Office of Financial Management on behalf of the Australian Government. These services derive directly from the RBA's role as Australia's central bank. They require the RBA to manage the consolidation of Australian Government agency account balances – irrespective of which financial institution each agency banks with – into the Government's Official Public Accounts at the RBA on a daily basis and to provide a term deposit facility. In addition, the RBA provides banking and related services to a few Australian government agencies that cannot conduct their banking business with the private sector banks, state governments under the National Health Funding Pool arrangements, various overseas central banks and official institutions, as well as internal RBA customers.

The RBA's transactional banking services are similar to more traditional banking activities offered by ADIs. Principal among these are services for making payments from government agencies to recipients' accounts. The RBA processed some 312.1 million payments, totalling \$558 billion, for government agencies in 2018/19. Most of these were made via direct entry. The Australian Government also makes payments using a number of other payment systems, including the RTGS system, cheque, BPAY, New Payments Platform and prepaid cards. In line with broader industry trends, cheque payment volumes continue to decline. In addition to payments, the RBA provides its government agency customers with access to a number of services through which they can collect funds, including Electronic Funds Transfer, RTGS, New Payments Platform, BPAY, EFTPOS, cheque and card-based services via phone and internet. The RBA processed 39 million collections-related transactions for the Australian Government in 2012/13, amounting to around \$551 billion.

A principal difference between central banking services and transactional banking services is that the latter are offered on a contestable commercial basis. Since 1 July 1999, Government departments and agencies have been able to choose the transactional banking provider that can best meet their business needs in terms of cost and quality of service. The RBA's transactional banking business unit operates in competition with private sector banks and is subject to competitive neutrality principles. To deliver these services, the RBA must compete with private sector banks, in many instances bidding for business at tenders conducted by the agencies. It must also cost and price the services separately from the RBA's other activities, including its central banking services, and meet a prescribed minimum rate of return. Adjustments must also be made to the cost structure to eliminate any competitive advantages or disadvantages that may result as a consequence of government ownership (e.g. taxation, regulation). Approximately 90 government agencies are currently transactional banking customers of the RBA.

The RBA is an 'agency' for the purpose of the APPs. Its contestable transactional banking business constitutes commercial activity for the purposes of section 7A(3) of the Privacy Act. Accordingly, under section 7A(1), in respect of the RBA's commercial activities, it is also an 'organisation' for the purpose of the APPs.

2. APP 8

APP 8.1 requires that before the RBA discloses personal information to an overseas recipient, the RBA must take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the APPs. Exceptions in APP 8.2 include:

- the RBA reasonably believes that the overseas entity which will receive the information (potentially including the payment system operators, intermediate and correspondent banks and the beneficiary's bank) are subject to a law or binding scheme that protects the information in a way that is substantially similar to the Privacy Act, and there are mechanisms that would allow the beneficiary to enforce that law or binding scheme; or
- the RBA informs the beneficiary that if he or she consents to the disclosure of the information, APP 8 will not apply to the disclosure and being so informed, then beneficiary consents to the disclosure.

For reasons explained in more detail below, it is impracticable for the RBA to rely on any of the exceptions in APP 8.2 when processing IMTs. Therefore, in order to comply with APP 8.1, the RBA must take such steps as are reasonable in the circumstances to ensure that each overseas recipient of the beneficiary's personal information (which is necessary to process the IMT) does not breach the APPs in relation to that information. Whilst the RBA will continue to take steps to ensure the security and confidentiality of the IMT process, it seeks a PID in relation to compliance with APP 8.1 for the purposes of clarity as the RBA is uncertain whether current practices would be deemed reasonable in the circumstances. The RBA also seeks relief from being held accountable under section 16C(2) for a breach of the APPs by an overseas recipient involved in the IMT process given it is impracticable for the RBA to obtain contractual arrangements with every potential overseas recipient to ensure their compliance with the APPs.

3. RBA's International Money Transfer Process

For the purpose of this Application, IMT is the term used for any payment made by an Australian sender to a beneficiary outside of Australia and ancillary activities¹. IMTs handled by the RBA are typically processed:

- through in-country Automated Clearing Houses (ACH);²
- using the Society for Worldwide Interbank Financial Telecommunication (SWIFT) network;³ or
- Foreign currency cheques that are printed and dispatched from outside of Australia.

Annual volumes are approximately [REDACTED], [REDACTED] and [REDACTED] respectively. Individuals are the beneficiaries of more than [REDACTED] per cent of these IMTs. IMTs are delivered to approximately [REDACTED] countries, with [REDACTED], paid through transactional banking services provided by the RBA to the [REDACTED] or the [REDACTED], accounting for more than [REDACTED] per cent of payments by volume.

3.1. Initiating the IMT process and personal information involved

The IMT process commences when the sender (an RBA customer) provides IMT information. This is done predominantly by electronic means, but may also on occasion be done in person. As part of this initial step, the sender provides their account details and street address. The sender will also need to provide details about the beneficiary. The only mandatory information required is the beneficiary's name, account number and street address. However, several countries impose additional requirements and the beneficiary's bank may require further identifying information including account name, residential address, telephone number or additional details about the sender or the beneficiary. Generally, this additional information is requested because of an in-country regulatory requirement in the beneficiary's jurisdiction or to allow anti-money laundering and counter-terrorism financing checks as well as sanctions checks to be performed.

The sender may also choose to include additional remittance information (e.g. a greeting or an invoice reference number).

3.2. RBA sends the IMT to a foreign bank

Once the sender has completed the IMT request, the RBA will send the IMT to the beneficiary's bank either

¹ The ancillary activities include secondary messages or communications which contain personal information (but not necessarily value) which relate to non-receipt, confirmation of receipt, requests for further information to facilitate processing, or return of payments which can flow backwards and forwards along the same chains of communication.

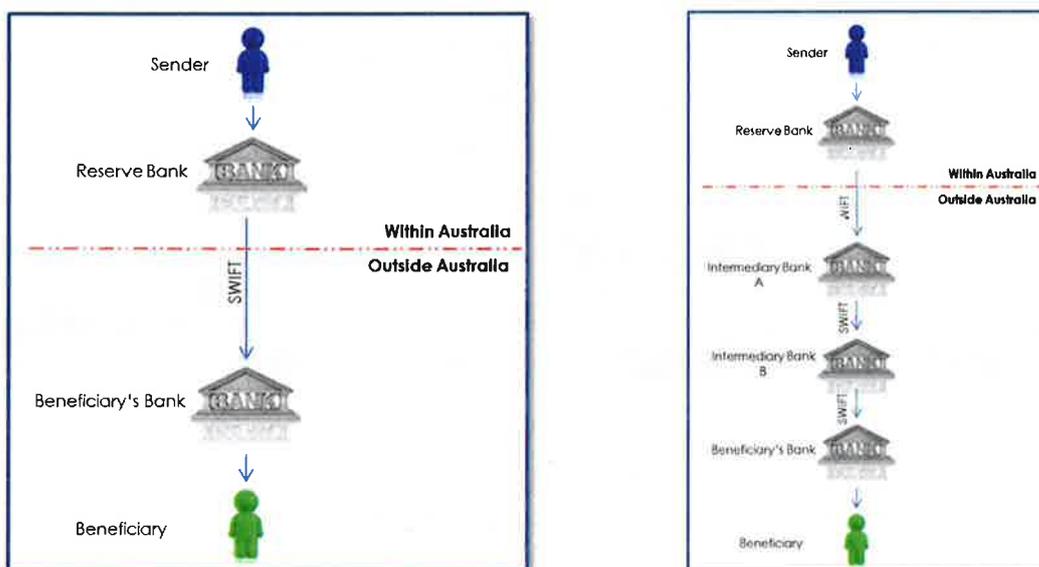
² Similar to the Australian Low Value Clearing Service (LVCS) or Direct Entry system.

³ SWIFT is a member-owned cooperative established in 1973. It is used by more than 10,000 banking organisations, securities institutions and corporate customers in 212 countries. It is a highly confidential and secure network that facilitates the transfer of payments and other financial messages between users. High levels of confidentiality are imposed and security is reinforced through encryption of messages. SWIFT is also subject to a governance structure and publicly available data retrieval policies that enable SWIFT to meet the security commitments required by users. There are three categorised groups of users: supervised financial institutions, non-supervised entities active in the financial industry and closed user groups/corporate entities. SWIFT users are only able to send financial messages within their user category. Therefore, the RBA is only able to send financial messages via SWIFT to other supervised financial institutions. SWIFT has documented, neutral and risk based processes in place to validate SWIFT users on an ongoing basis.

directly (which, for the purposes of this analysis, is located in a foreign country) or through the RBA’s agent, a foreign bank whose Australian branch is an ADI (the **Agent**) (which, for the purposes of this analysis, is also located in a foreign country) in one of the following ways:

3.2.1. *Using the SWIFT network for the entire process – without Agent*

Once a bank becomes a SWIFT user, it establishes commercial relationships (either by contract or through the SWIFT Relationship Management Application) with other users that allow for the processing of IMTs.⁴ A relationship that allows banks to make payments to one another is referred to as an ‘Account Relationship’. If the RBA has an Account Relationship with the beneficiary's bank, the RBA may send payment instructions directly to the beneficiary's bank, as shown on the following page (Left Diagram).⁵



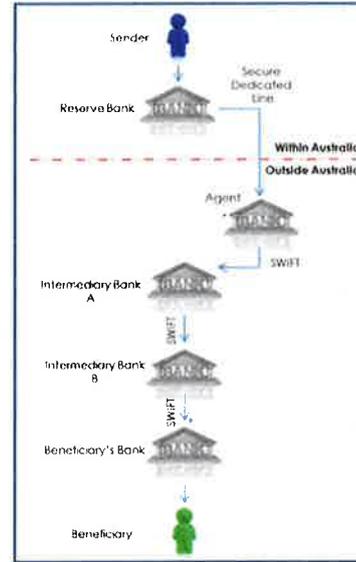
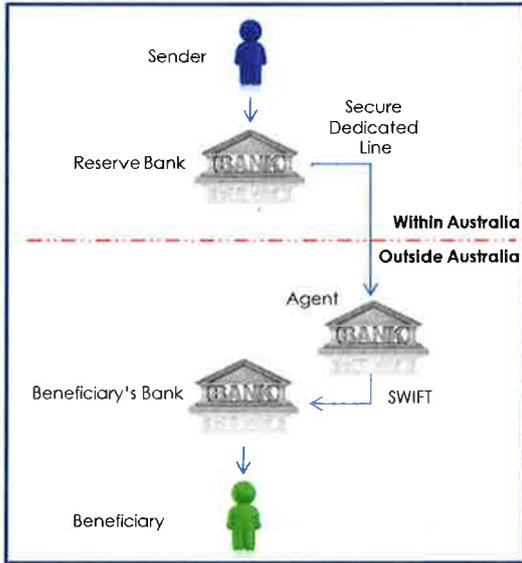
If the RBA does not have an Account Relationship with the beneficiary's bank, it is still possible to transfer money using SWIFT. In this case, the RBA will send the payment instructions to an ‘intermediary’ bank (also member of SWIFT), which will then route the instructions to the beneficiary's bank. Typically, the intermediary bank will be a bank located in the same country as the beneficiary's bank, and will be a bank with which the RBA has established an Account Relationship. More than one intermediary bank may be involved in the process before the funds reach their final destination. The diagram (above right) shows an example where two intermediary banks are used.

⁴ The Relationship Management Application (**RMA**) is a service offered by SWIFT that allows users to manage their business relationships on the network. The application allows users to control the types of messages that may be exchanged between it and other users. Users with an RMA relationship will not typically have a contractual relationship.

⁵ Although the Bank may have an RMA with the beneficiary's bank, on occasion the Bank may opt to send payment instructions to an intermediary bank.

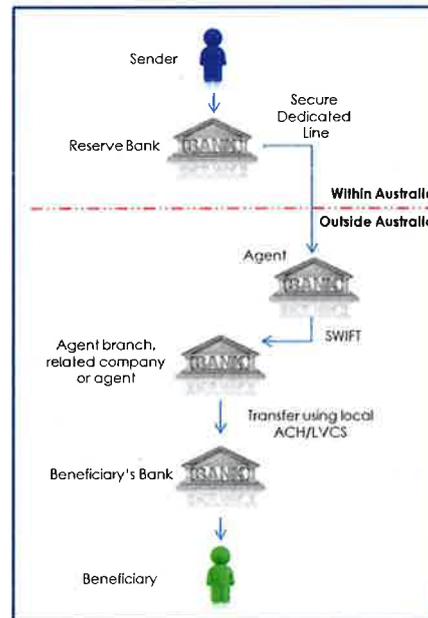
3.2.2. Using a Secure Connection and the SWIFT network for the remainder process – with Agent

This option broadly follows the process outlined in 3.2.1 above, however, the Agent is added to the chain. The RBA transfers the IMT data to the Agent via a dedicated secure line. The Agent then distributes the IMTs via the SWIFT network (see 3.2.1 for an explanation of these processes). The diagrams below illustrate the process.



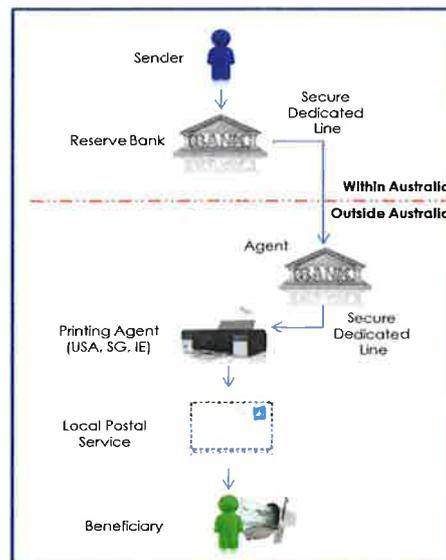
3.2.3. Automated Clearing House IMTs – with Agent

The bulk of the RBA's IMTs (by volume) are dispatched via a secure dedicated line to the Agent. The Agent subsequently may transfer funds to an offshore branch or related entity (or its agent, if no member of the corporate group to which the Agent belongs has a presence in a jurisdiction) and that branch, related entity or agent arranges for the payment to the beneficiary bank within that jurisdiction by means of the local payment and settlement system (i.e. that jurisdiction's equivalent of the low value clearing system (LVCS)). In Australia, the equivalent would be the Direct Entry System. These types of settlement system payments operate in a regulated and secure environment in which transfers are completed.



3.2.4. Using the SWIFT network for part of the IMT process – with/without Agent

In some instances, the beneficiary's bank is not a member of SWIFT, but SWIFT may still be relevant to the processing of an IMT. In this case, the RBA would typically use an intermediary bank in the same way as described in 3.2.1 above with the payment instructions routed through the SWIFT network in the usual way until they reach an intermediary bank that has a commercial relationship with the beneficiary's bank. That intermediary bank would then complete the IMT outside the SWIFT network (e.g. through a domestic payment and settlement system in the beneficiary bank's jurisdiction). This arrangement, with or without the Agent, is shown in the diagram to the right.



3.2.5. Foreign Currency Cheques – Printed and Dispatched Overseas by Agent

The RBA also delivers IMTs by foreign currency cheques. Data for the production of these items is dispatched via a secure dedicated line to its Agent. The Agent subsequently arranges for distribution of this data to one of its three regional sites (located in Singapore, Ireland or the United States), depending upon the final destination of the cheque. Printed cheques are dispatched to the beneficiary through the local postal service.

3.3. Beneficiary's bank pays the beneficiary

In all cases, the ultimate transfer of funds to the beneficiary is completed by the beneficiary's bank. The relationship between the beneficiary and his or her bank will be regulated by the account terms and conditions relevant to the beneficiary's account and banking laws applicable in the relevant jurisdiction (and, in the ordinary course, the beneficiary's bank will be appropriately licensed and prudentially regulated according to local laws and applicable international banking obligations).

4. RBA's IMT Process and Compliance with APP 8

4.1. Compliance with APP 8.1

APP 8.1 requires the RBA to take such steps as are reasonable in the circumstances to ensure that an overseas recipient of a beneficiary's personal information does not breach the APPs in relation to that information.

The APP Guidelines issued by the Office of the Australian Information Commissioner (OAIC) in relation to APP 8.1 note that in considering what will constitute 'reasonable steps', it is generally expected that the relevant APP entity should enter into an enforceable contractual arrangement with the overseas recipient that requires the recipient to handle the personal information in accordance with the APPs (other than APP 1).⁶ The APP Guidelines qualify this by stating that the requirement to obtain a contract with a foreign recipient will depend on the circumstances, including the practicability of taking particular steps.

It is impracticable for the RBA to obtain contractual arrangements with every potential overseas recipient to ensure their compliance with the APPs. In the majority of IMTs, the RBA relies on the relationships created between the relevant parties within the SWIFT network and it is not practical for the RBA to alter, or attempt to alter SWIFT, to impose contractual obligations on other SWIFT users to comply with the APPs in relation to the personal information of IMT beneficiaries.

⁶ OAIC, APP Guidelines, paragraph 8.16-8.18.

As indicated above, the RBA uses an agent to process many IMTs (see sections 3.2.2 to 3.2.5 inclusive). The agency services are supplied by the Agent to the RBA under a contract which contains obligations on the Agent in relation to the handling of personal information. The current contract has been in place since November 2015 and obliges the Agent, among other things, to use and disclose personal information only for the purposes of the contract, not to breach the APPs (subject to what follows about APP 8), to comply with any request reasonably made by the RBA to comply with the Privacy Act and any other relevant privacy law and to ensure that its representatives are made aware of and comply with the Agent's obligations in relation to personal information. The contract recognises the difficulties in complying with APP8 that are discussed in this Application and provides that the Agent will not be taken to be in breach in connection with an outwards payment and the disclosure of personal information of a payment beneficiary for the purpose of remitting funds to the payment beneficiary's financial institution for payment. This exception in the contract between the RBA and the Agent recognises:

- that it was not reasonable to expect that the Agent would accept an obligation to ensure that all organisations in the payment chain agree to comply with the APPs; and
- the terms of GD 2015 which commenced on 25 February 2015, before the current contract between the RBA and the Agent was entered into (as indicated above, the Agent is a foreign bank whose Australian branch is an ADI).

We note that in the context of IMTs, most financial institutions that receive information as part of an IMT transaction operate under their own privacy regime (whether mandatory or voluntary) and would have minimal incentive to agree to a separate set of privacy standards to process IMTs initiated by customers of the RBA.

The RBA takes steps to ensure the security and confidentiality of information that needs to be sent overseas in order to process an IMT. We believe these are in line with the practices of private sector banks in Australia. The RBA is subject to confidentiality and/or privacy requirements under its contracts with its external customers. Whether the transfer of funds occurs as part of the SWIFT network or other mechanism, there are security mechanisms in place to ensure the integrity and confidentiality of the information is maintained. However, as noted above, the RBA is uncertain whether current practices would be deemed reasonable in the circumstances and therefore comply with APP 8.1 and accordingly whether in the absence of PID 2015-2 and the PID sought in this Application it may have breached, or may in the future breach, APP 8.1.

4.2. Exceptions in APP 8.2

Given the nature of the IMT process (as outlined above), the RBA is unable to rely upon any APP 8.2 exceptions. Specifically, under APP 8.2(a) it would be impractical for the RBA to obtain current and ongoing legal advice in relation to the privacy regimes of all [REDACTED] jurisdictions to which IMTs initiated by RBA customers are sent. Even if such legal advice was obtained, those jurisdictions with inferior privacy schemes would fall outside the APP 8.2(a) exception.

Under APP 8.2(b) the RBA would not be able to obtain consent from the beneficiary as its role is limited to collecting the information on the beneficiary from the sender. It has no contract with, and no opportunity to communicate with, the beneficiary. Transaction volumes would make obtaining consent impracticable even if there was a way for the RBA to communicate with beneficiaries.

5. Weighing of Public Interest; PID

The public benefit associated with adhering to APP 8 when processing IMTs is to ensure the security and confidentiality of personal information of beneficiaries. As noted above, in line with the practices of other Australian banks, the RBA is currently protecting the security and confidentiality of any personal information that needs to be sent overseas in order to process an IMT.

Public benefits in processing IMTs include:

- IMTs allow the government to meet its obligations to overseas beneficiaries ([REDACTED]) in a timely and secure manner.

- IMTs provide payment security and transaction certainty. This assists government to better enforce anti-money laundering and counter-terrorism financing requirements.
- The IMT process in its current form is one component of the global financial system, and Australia is a significant contributor to that system. Maintaining the certainty, reliability and efficiency of the IMT processing serves an important public interest within the context of Australia's role within the global community.

If the RBA were not granted a PID for IMTs in the same terms as PID 2015-2, and as GD 2015 and any new PID made in relation to ADIs to replace GD 2015, any additional compliance costs to the RBA resulting from the operation of APP 8 would represent a competitive disadvantage for the RBA's transactional banking business in relation to which it competes with private sector banks.

The RBA respectfully submits that the analysis in the [Explanatory Statement](#) for PID 2105-2 and GD 2015 continues to apply and that the public interest in the RBA processing IMTs substantially outweighs the public interest in adherence to the APPs that might be breached.

The RBA understands that the Australia and New Zealand Banking Group Limited (ANZ) will be making an application for a PID to replace the Privacy (International Money Transfers) Public Interest Determination 2015 (No. 1) (PID 2015-1) when it expires. The RBA also understands that the Commissioner will consider expanding any PID it makes to replace PID 2015-1 to include a general determination covering all ADIs to replace GD 2015. The RBA supports the making by the Commissioner of a PID to replace PID 2015-1 and a generalising PID in substantially the same terms as GD 2015. The same public interest considerations as set out in this Application apply to ADIs that process IMTs and the RBA believes that it is in the public interest that there be a generalising PID covering all ADIs to replace GD 2015 when it expires.

6. TPID

In the event this Application for a PID is not able to be processed prior to the expiry of PID 2015-2, the RBA seeks a TPID to enable the RBA to continue to process IMTs as required under its contracts with its customers without certainty that current practices would be deemed reasonable in the circumstances.

All of the considerations raised in this Application in relation to the PID the RBA is seeking apply equally to the necessity for a TPID. If required, the TPID would take effect from the date of expiry of PID 2015-2 for such period as is determined by the Commissioner to be necessary for the Commissioner to make a final assessment of this Application and make and register any determination the Commissioner determines to be appropriate.

7. Conclusion

The RBA takes the privacy of personal information very seriously. Despite steps taken to ensure the security and confidentiality of the IMT process, the RBA is uncertain whether current practices would be deemed reasonable in the circumstances.

Accordingly, this Application seeks a PID that the RBA is taken not to have contravened section 15 of the Privacy Act even if it breaches APP 8.1, or another APP as a result of the application of section 16C(2), when processing an IMT.

Yours sincerely

Terence Turton
 Privacy Officer
 Risk and Compliance Department

cc: Chris Aylmer, Head of Risk and Compliance
 Catherine Parr, General Counsel