

Chapter 2

Views on the bill

2.1 While most of the stakeholder feedback centred on the reforms to the FinTech regulatory sandbox (Schedule 1), some views were expressed on the minor amendments to the venture capital tax concessions (Schedule 2).

Views on the enhanced FinTech regulatory sandbox (Schedule 1)

2.2 All the stakeholders who participated in the inquiry were supportive of the general intent of the enhanced regulatory sandbox for FinTech innovation, given that the existing sandbox was seen to be limited. For example, Mr Stuart Stoyan, Chair of FinTech Australia, noted that the existing regulatory sandbox was ineffective in terms of the conditions placed on potential users of the regime:

Limiting the operation and the oversight that ASIC would have on the sandbox meant that it was very prescriptive, and a number of exclusions were put in place which meant it was just ineffective. Therefore, most fintechs in the fintech community hadn't really contemplated seriously using the sandbox.¹

2.3 However, Mr Stoyan, when reflecting on the proposed enhanced regulatory sandbox, concluded that:

We believe the legislation is a step towards providing this new, more flexible environment, and, at the same time, introduces new safeguards to help protect consumers which don't exist in the current sandbox.²

2.4 Similarly, the Australian Private Equity and Venture Capital Association Limited (AVCAL) supported:

...efforts to create a policy environment conducive to the development of a thriving FinTech ecosystem in Australia.

...

Accordingly, AVCAL supports initiatives such as the development of an enhanced regulatory sandbox. Such steps are critical, not only to ensure the financial services industry continues to make a major contribution to our economy, but also that in an increasingly global marketplace for ideas and capital Australia is able to compete effectively.³

2.5 Ms Erin Turner, representing CHOICE, provided qualified support for the bill:

1 Mr Stuart Stoyan, FinTech Australia, *Proof Committee Hansard*, 6 March 2018, p. 5.

2 Mr Stuart Stoyan, FinTech Australia, *Proof Committee Hansard*, 6 March 2018, p. 5.

3 Australian Private Equity and Venture Capital Association Limited, *Submission 3*, pp. 1–2.

We think the intent of the legislation...is great. It's just about making sure that loopholes can't be used to harm consumers.⁴

2.6 A variety of stakeholders, including consumer groups and FinTech Australia, considered that there should be greater consumer protections in the enhanced regulatory sandbox. CHOICE, the Consumer Action Law Centre (CALC) and the Financial Rights Legal Centre (FRLC) noted that:

We need to ensure that innovation leads to services that genuinely meet the needs of Australian consumers rather than simply selling a toxic product in a more effective way.⁵

2.7 CHOICE, CALC and FRLC advocated for ASIC to assess whether services are innovative and good for consumers before a regulator exemption is granted:

Our first preference...would be for ASIC to assess applicants before they're granted a regulatory exemption or entry into the sandbox, similar to the approach used in the UK, Singapore and Hong Kong.⁶

2.8 But this view was not shared universally. AVCAL supported the proposed approach to not require users of the sandbox to seek ASIC approval:

This is a well-considered approach, rather than requiring firms to proactively seek ASIC approval...It will also be an improvement on the current law which does not specifically provide for *conditional* exemptions from the AFSL or ACL licensing conditions, thereby creating regulatory and legal uncertainty.⁷ (emphasis in original)

2.9 Indeed, both Treasury and ASIC discussed the issue of setting objective criteria for 'innovative' and 'consumer benefit'. When questioned about how consumer benefit could be demonstrated, Mr John Price, ASIC Commissioner, commented that:

These sorts of concepts, while easy to state, may be very difficult to apply in practice. I'd have a similar comment in relation to what's innovative and what's not innovative. There are people who would argue that blockchain technology is not particularly innovative; it is just a distributed nature of a database. The database is like any other but it is distributed on many computers. Again, these are areas where reasonable minds might differ and that's one of the reasons why some of these policy issues are so challenging.⁸

2.10 Mr Price discussed issues surrounding the definition of concepts such as 'consumer detriment':

Are we talking about hypothetical detriment or actual detriment over a certain period? How is that detriment measured? You can always create

4 Ms Erin Tuner, CHOICE, *Proof Committee Hansard*, 6 March 2018, p. 2.

5 CHOICE, CALC and FRLC, *Submission 1*, p. 2.

6 CHOICE, CALC and FRLC, *Submission 1*, pp. 3-4.

7 Australian Private Equity and Venture Capital Association Limited, *Submission 3*, p. 2.

8 Mr John Price, ASIC, *Proof Committee Hansard*, 6 March 2018, p. 12.

rules around those things. But the question is: do those rules lock you into a position that is actually not that helpful or will lead to unintended consequences?⁹

2.11 Similarly, Treasury also considered these issues in relation to coming up with an appropriate definition of 'innovation'. Ms Shellie Davis, Senior Adviser from Treasury, indicated that:

Those issues are being very actively considered in terms of providing advice to government on the final design arrangements.¹⁰

2.12 In addition to concerns about consumer protection and innovation, Mr Stoyan noted that FinTech Australia had raised a variety of concerns in relation to the proposed regulations as part of the Treasury consultation process, including:

- transaction limits for most products are too low and would exclude many potential clients from using services offered in the sandbox;
- the retail client limit of 100 will mean that low-value, high-transaction volume products and business models cannot test effectively in the sandbox;
- the \$85 000 sum insured limit for retail general insurance is not necessarily workable and should be replaced by a cap based on gross premium; and
- duly authorised product providers would be excluded, thereby limiting the majority of Australian insurtech businesses from entering the market.¹¹

2.13 Despite the final regulations not being released with the introduction of the bill, stakeholders indicated their confidence that the regulations would address their concerns. For example, Mr Stoyan concluded that:

We believe that the new regulations and legislation proposed, with a rider assuming the ongoing discussions we've had with Treasury over the last couple of months have come into effect, will not only encourage greater participation but lead to better outcomes, because you see more FinTechs wanting to innovate in the sandbox. We're a strong proponent of the belief that it's much better to do this in the sandbox than outside the sandbox, because that potentially leaves the opportunity for businesses to conduct themselves in an entirely unregulated way.¹²

2.14 That said, AVCAL warned that the regulatory conditions will be central to how many firms potentially use the enhanced sandbox:

...the success of the proposed regulatory sandbox will depend on the relevant conditions being legally and commercially viable for market participants. If the conditions are too onerous, the sandbox is unlikely to be

9 Mr John Price, ASIC, *Proof Committee Hansard*, 6 March 2018, p. 12.

10 Ms Shellie Davis, Treasury, *Proof Committee Hansard*, 6 March 2018, p. 17.

11 Mr Stuart Stoyan, FinTech Australia, *Proof Committee Hansard*, 6 March 2018, p. 7; and FinTech Australia, *Submission to the Treasury Consultation on the Enhanced Regulatory Sandbox*, [pp.1–2].

12 Mr Stuart Stoyan, FinTech Australia, *Proof Committee Hansard*, 6 March 2018, p. 7.

used (as appears to be the case with the existing model), thereby denying innovative FinTech firms the valuable opportunity to market test their products and services in a systematic, controlled manner.¹³

2.15 As an alternative to an assessment process to enter the sandbox, CHOICE, CALC and FRLC advocated for proposed Product Intervention Powers (PIPs) to be extended to the enhanced regulatory sandbox so that ASIC can intervene proactively if they find sandbox participants offering harmful products or services:

A sandbox-specific PIP should allow ASIC to act quickly if harmful products or services are sold. This should allow ASIC to impose additional disclosure obligations, mandate warning statements, require amendments to advertising, or in extreme cases restrict or ban the distribution of any product or service in the sandbox.¹⁴

2.16 While not directly addressing the proposal for extending PIPs to the regulatory sandbox, Mr Price outlined the investor protections and mechanisms in the existing sandbox which would be extended to the enhanced sandbox:

...there are a variety of important investor protection mechanisms...there are various conduct and disclosure obligations that are retained and...there is a professional indemnity insurance requirement...Also very important is membership of an external dispute resolution body so, if there is a dispute, there's a quick and easy mechanism by which consumers can seek recourse.¹⁵

2.17 Ms Greenall-Ota, Principal Adviser from Treasury, further indicated that the consumer protections were adequate and appropriate:

We are satisfied the protections in place that are required to be maintained—the internal dispute resolution procedures, membership with external dispute resolution and adequate compensation arrangements, which include professional indemnity insurance with a run-off period of additional months—in addition to the ongoing protections that are also included to be within the sandbox, including best-interest duties, client money obligations and responsible lending obligations, are adequate protections to address the products that have been considered to be within the scope of the sandbox.¹⁶

Stakeholder views on the venture capital tax concession amendments (Schedule 2)

2.18 AVCAL was the only stakeholder that commented on the amendments to the venture capital tax concessions:

AVCAL strongly supports the Government's proposed technical amendments to clarify certain aspects of the tax rules relating to ESVCLP and VCLP investment. We are pleased that a number of the issues that

13 Australian Private Equity and Venture Capital Association Limited, *Submission 3*, p. 2.

14 CHOICE, CALC and FRLC, *Submission 1*, p. 4.

15 Mr John Price, ASIC, *Proof Committee Hansard*, 6 March 2018, p. 14.

16 Ms Greenall-Ota, Treasury, *Proof Committee Hansard*, 6 March 2018, p. 16.

AVCAL has raised with Treasury over the course of 2017 have been appropriately addressed in the bill.¹⁷

2.19 That said, AVCAL raised concerns that some aspects of the venture capital tax concession regime were still not consistent with the policy intent of the legislation:

For example, the current drafting of the bill appears to affirm that the ESIC [early stage innovation company] tax offset amount that can be claimed through a partnership or trust is capped at \$200,000 annually—for example, if a trust has ten members with an equal share, only \$20,000 could be flowed-through to each of them per year. However, this does not appear consistent with our understanding of the policy intent—i.e. that the monetary cap should apply at an individual taxpayer level, and that there should be the same effect whether investment takes place directly or indirectly.¹⁸

2.20 As such, while not withstanding their support for the bill, AVCAL indicated that further amendments could be made to reduce uncertainty for the private equity and venture capital industry.¹⁹

Committee view

2.21 The committee notes that Schedule 1 sets the framework for the enhanced regulatory sandbox for financial innovation. The details of how the enhanced regulatory sandbox is implemented will be largely contained in the associated regulations which have yet to be finalised. However, as these regulations will be a disallowable instrument, the committee notes that the Parliament will have an opportunity to review them when they are finalised.

2.22 In relation to the minor amendments in Schedule 2, the committee is satisfied that these amendments are required to ensure the tax concessions for venture capital and early stage investors are operating as originally intended.

Recommendation 1

2.23 The committee recommends that the bill should be passed.

Senator Jane Hume

Chair

17 AVCAL, *Submission 3*, p. 2.

18 AVCAL, *Submission 3*, p. 2.

19 AVCAL, *Submission 3*, p. 3.

