THE SENATE

Senate Economics References Committee

Inquiry into Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024

Answers to written questions on notice from Fintech Australia, asked by Senator Andrew Bragg on 24 July 2024

Question 1: How is industry placed to implement the proposed reforms?

Answer: We anticipate that there will be a demarcation in terms of ease of compliance – based on (i) existing regulatory compliance resources available to BNPL providers, and (ii) whether BNPL providers also currently provide traditional forms of credit in other divisions of their business.

For those with sizeable regulatory compliance resources available to them (eg personnel dedicated to regulatory compliance matters) and/or where the relevant company is also providing traditional forms of credit in other divisions of their business, we anticipate that the legislative reforms will only require a modest level of input to achieve best practice compliance, after the initial transitional phase.

In some cases, there will be some BNPL providers who are already achieving best practice regulatory compliance even in advance of the legislative reforms taking effect – eg undertaking partial credit checks when required to only undertake a negative credit check.

On the other hand however, where a BNPL provider has little (or no) regulatory compliance resources available to it (eg where it does not have a regulatory compliance team internally), and/or where they do not provide traditional forms of credit in other divisions of their business, we anticipate it will be a significant undertaking to achieve best practice regulatory compliance. This will likely require a significant level of investment to achieve regulatory compliance at the outset (including reviewing and considering any new laws, seeking advice on their interpretation and application to their business, time and expense of applying for and maintaining an Australian credit licence, etc), as well as on an ongoing basis. In many cases, this will likely include hiring or expanding the size of any internal regulatory compliance function.

Question 2: What is required to ensure an ordered transition?

Answer: Significant lead-times to any legislative reform taking effect, and detailed and comprehensive guidance from the Australian Securities and Investments Commission (ASIC).

On lead-times, it will be important that BNPL providers (particularly those that do not currently provide traditional forms of credit in other business divisions, and/or those with modest (or no) internal regulatory/compliance functions available to them) are not taken by surprise in terms of when any legislative reforms are to take effect. We note that the draft legislative materials were recently amended to provide for phased transitional arrangements – to require a person to apply for, rather than obtain, an Australian credit licence by a certain date. This would no doubt have been a welcome change – particularly for smaller, more nimble BNPL providers – especially to the extent that they do not provide traditional forms of credit and/or don't have comprehensive regulatory/compliance resources available to them. In addition, these BNPL providers would no doubt also appreciate sufficient advance notice (in some cases, up to 12 months) of any legislative reforms taking effect.

On ASIC guidance, as outlined in our previous submissions – without additional clarity and certainty from ASIC, there is some concern as to whether the modified responsible lending obligations (RLO) framework effectively provides any relief from the requirement to adopt a full-scale approach to RLOs. In other words, without sufficient clarity and certainty, some BNPL providers will err on the side of caution and adopt a full-scale approach to RLOs – thereby negating what would otherwise be the potential benefit of offering an opt-in RLO framework. A full-scale approach to RLOs would also be a significant undertaking – especially where a BNPL provider does not provide traditional forms of credit and/or has minimal comprehensive regulatory/compliance resources available to them.

Beyond ASIC guidance, FinTech Australia also previously submitted that the Australian Financial Complaints Authority should provide updated guidance regarding its approach to complaints involving BNPL products and arrangements, to assist industry to manage these appropriately – again, this would assist in terms of managing transitional arrangements for BNPL providers.

Question 3: What else needs to be done to support fintech and innovation in financial services, like BNPL, once this regulation is in place?

Answer: We expect that ASIC resources will likely be stretched upon the legislative reforms becoming effective. In particular, ASIC guidance is vital to the efficient operation of the legislative reforms – and this will require such guidance to be prepared well in advance, and then interpreted/understood by ASIC personnel responsible for administration of policies and guidance in the area of BNPL. In addition, we expect a significant increase in the volume of applications for new Australian credit licences (and applications for variations to existing Australian credit licences) – which will put further strain on the resources that ASIC has

available to deploy in this regard. Accordingly, more ASIC resources will likely be required for deployment in this regard.

In addition, FinTech Australia recommends an urgent review of the Enhanced Regulatory Sandbox (ERS), with the aim of increasing uptake and ensuring it is suitable for innovative lending products – including those which will now be considered low cost credit contracts (LCCCs). A review would provide an opportunity to address current limitations and to consider new cohorts which could benefit from this model, particularly those previously benefiting from Credit Code exemptions that will be captured as LCCC providers (if the draft legislation is enacted into law). Fintech Australia believes the ERS regime can be expanded, improved and better promoted – and further detailed comments are set out in its previous submission.

Finally, upon commencement of the legislative reforms, it will be relevant to consider how the ASIC Industry Funding Model (IFM) applies to this new cohort of regulated LCCC providers. FinTech Australia supports the proposal in the recent Review of the Australian Securities and Investments Commission Industry Funding Model - Final Report that *"costs relating to regulating emerging sectors and providers should be allocated across and recovered from all of ASIC's regulated population in recognition of the wider industry benefits of ASIC's regulatory activity"*.

When next reviewed and updated, the IFM regime should consider the novel nature of BNPL businesses and the significant increase in compliance which has been undertaken previously to comply with the existing AFIA Code and to commence operations under this new regime. The cost burden of applying the new levy arrangements, particularly for small, innovative providers, should be carefully considered and calibrated to ensure innovation by new entrants is not stifled.

Question 4: A lot of detail is left to delegated legislation. Do you think it would've been better had it been put in the primary legislation?

Answer: FinTech Australia recognises that delegated legislation has a significant and important role to play in terms of administration of a complex legislative package such as that under current consideration. As such, FinTech Australia has no concern or objection in-principle, in the context of use of delegated legislation – especially as it relates to ensuring that financial thresholds, fee/charge levels, etc remain fit for purpose. Further detailed submissions have been previously provided, relating to attempting to ensure that there is sufficient flexibility on these points and to ensure that the legislation does not adopt a "set and forget" approach in circumstances where it would be more appropriate for Parliament to have more flexibility on these points. In this respect, FinTech Australia has no concern with the use of regulation-making powers for the purposes of ensuring continued appropriateness of fees, charges and interest levels, as well as time periods that apply in the context of the *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) and the *National Consumer Credit Protection Regulations 2010* (Cth) (NCCPR). However, to the extent that regulation-making powers would be proposed as a means of expanding the application of the NCCPA and NCCPR to different sub-sectors, this would be problematic.

For example, the options paper previously released by the Australian Government referred to other types of consumer credit (in addition to BNPL) that fall outside of the current scope of NCCPA, including wage advance products, certain types of bridging finance, certain types of invoicing facilities and in-house instalment payment plans, certain types of finance for marketing costs for the sale of residential property, and certain loans for rent payments and rental bonds.

We would encourage the Australian Government to avoid the use of regulation-making powers to bring other types of consumer credit (in addition to BNPL) within the scope of the NCCPA, without proper consultation along the lines undertaken in connection with the options paper and the draft legislative materials previously made available in respect of BNPL.