FinTech Australia

Buy Now Pay Later regulatory reforms

Submission

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fintechaustralia.org.au

About this Submission

This document was created by FinTech Australia in consultation with its members.

In developing this Submission, interested members participated in roundtables and individual discussions to discuss key issues and provided feedback to inform our response to the consultation paper.

About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech sector, representing more than 420 fintech companies and startups across Australia. As part of this, we work with a range of businesses in Australia's fintech ecosystem, including fintechs engaging in Buy Now Pay Later, payments, consumer and SME lending, wealthtech and neobanking, the consumer data right and the crypto, blockchain and Web3 space.

Our vision is to make Australia one of the world's leading markets for fintech innovation and investment. This submission has been compiled by FinTech Australia and its members in an effort to advance public debate and drive cultural, policy and regulatory change toward realising this vision, for the benefit of the Australian public.

FinTech Australia would like to recognise the support of our Policy Partners, who assist in the development of our submissions:

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Introduction

FinTech Australia supports the Australian Government's proposal to undertake legislative reform in respect of Buy Now, Pay Later (**BNPL**) arrangements. The proposed legislative reform has been released in the form of a draft bill accompanied by an explanatory memorandum, and draft regulations accompanied by an explanatory statement (**Legislative Package**).

This follows the options paper released by the Australian Government in November 2022, "Regulating Buy Now, Pay Later in Australia" (**Options Paper**).

The draft legislation amends the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the *National Consumer Credit Protection Regulations 2010* (Cth) (**NCCPR**), with the effect that BNPL will be subject to the existing regulatory framework for other credit products.

We understand that the Government's aim is to introduce amendments to ensure that BNPL is regulated in a way that is:

- flexible;
- adaptable; and
- proportionate to the risk of consumer harm.

FinTech Australia supports the Government's aim to provide a framework which meets the above objectives, but at the same time, we submit that any legislative reform needs to ensure that the Australian fintech landscape can continue to foster and encourage innovation, and continue to remain competitive on a global scale. This is consistent with our vision to make Australia one of the world's leading markets for fintech innovation and investment.

In this sense, FinTech Australia would encourage the Government to take an approach to legislative reform in respect of BNPL arrangements that:

- protects consumers while ensuring appropriate guardrails are in place within which to safely foster innovation;
- adopts the approach of similar activity, similar risk, same regulatory outcome;
- remains technology neutral; and
- ensures consistency with the international community by bringing specific activities into the regulatory perimeter.

In this regard, we encourage the Government to spend appropriate time in developing a set of regulatory principles and guidance, to provide clarity and certainty to providers of BNPL products and arrangements in determining:

- whether they have made reasonable inquiries about the consumer's requirements and objectives and the consumer's financial situation; and
- whether they have taken reasonable steps to verify the consumer's financial situation.

Without this additional clarity and certainty, 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 providers of BNPL products and arrangements 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.

The proposed legislative reforms also contemplate broad regulation-making powers, in the context of the NCCPA and NCCPR. While we recognise and understand the need for regulation-making powers, as a means of efficient and effective administration of legislation – we encourage the Government to carefully consider the circumstances in which it would use these regulation-making powers.

In particular, we would encourage the Government to avoid 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 Legislative Package. Care should be taken to ensure regulatory intervention is balanced with providing an innovation enabling environment for novel fintech products which can offer consumers greater choice, flexibility and a better deal when managing their finances.

We have other suggestions in relation to the operational implementation of the Legislative Package – which are set out in detail below.

FinTech Australia looks forward to continuing to engage with the Government as the new regulatory framework develops.

1 Scope of Legislative Package

1.1 LCCCs

The Legislative Package proposes to amend the NCCPA and the Credit Code (ie Schedule 1 to the NCCPA) to provide the means for regulating "low cost credit contracts" (**LCCC**), which include "buy now pay later arrangements" and "buy now pay later contracts".

LCCCs are proposed to be defined by reference to new section 13C of the Credit Code, as having the following features:

- credit is, or may be, provided under the contract; and
- the contract is:
    - a buy now pay later contract; or
    - a contract prescribed by the regulations for these purposes; and
- the period during which credit is, or may be, provided under the contract is no longer than the period (if any) prescribed by the regulations for these purposes; and
- the contract satisfies any requirements prescribed by the regulations for these purposes that relate to fees or charges that are, or may be, payable under the contract; and
- the contract satisfies any other requirements prescribed by the regulations for these purposes.

As currently drafted, there are a number of amendments that should be considered to ensure the definitions capture the full range of BNPL providers in the market, while also ensuring that BNPL providers can service their customers using different products offered by the same provider. This latter point is expanded on further below.

Considering how fees and charges should be applied

FinTech Australia submits that the Government should (on an ongoing basis) have due regard to appropriateness of time periods, fees and charges – relative to industry standards and practice at the relevant time. A "set and forget" approach is not necessarily appropriate in our view, as this will inadvertently hamper the ability of providers of BNPL products and arrangements to maintain relevance and continue to provide products and arrangements that are beneficial to the lives of the Australian public.

On that topic, FinTech Australia would encourage the Government to carefully consider whether the fees and charges included in proposed Regulation 69E (Definition of low cost credit

contract—fees and charges) remain appropriate. This is explored in greater detail in section 3 below.

As a related matter, there currently does not appear to be any indexation contemplated in respect of the maximum fees and charges that can be charged by providers of BNPL products and arrangements. Without providing indexation of maximum fees and charges (or otherwise allowing a degree of flexibility for providers of BNPL products and arrangements, in determining the level of fees and charges that can be applied), this may have an impact from the perspective of those providers being able to continue to compete and innovate.

In addition, the demarcation of fees based on whether there is one, or more than one, contract in place with the relevant provider is not necessarily the most appropriate basis on which fees should be levied. In this regard, FinTech Australia would encourage the Government to consider whether the thresholds should be determined on a "per customer" basis – ie rather than different fees applying for multiple accounts, there should instead be a more holistic approach to be implemented in terms of the maximum fees and charges that can be charged to a customer, without having an impact on whether the arrangement is (or is not) captured by the Legislative Package. Similarly, we consider that it would be an inadvertent (and unintended) outcome if a provider of BNPL products and arrangements could selectively charge a different (ie higher) fee or charge, and have the relevant product or arrangement excluded from the Legislative Package altogether. For example, if such provider were to charge $1 higher than the maximum fee and/or charge contemplated under the Legislative Package and achieve an outcome where the relevant product or arrangement was no longer covered by the Legislative Package (and potentially not covered by any regulatory requirements at all), then this would be contrary to the policy outcome of seeking to protect consumers.

The "per customer" approach proposed above appears to be more consistent from the policy perspective of ensuring that a particular product is suitable for a particular customer – and depending on the time that elapses between the first and second contracts being entered into, there might be no material changes to the customer's financial circumstances during the interim period – so it might be more appropriate for the reasonable inquiries (about the customer's requirements, objectives and financial situation) and reasonable steps (to verify the customer's financial situation) to be determined by reference to the overall position as it relates to the customer, rather than being determined by reference to the second contract being entered into.

We are also concerned that the lack of flexibility within Regulation 69E, as it relates to the prescriptive nature of fees and charges that can be applied, fails to account for the different ways consumers use BNPL products - and that this would potentially damage the diversity of BNPL products offered by the same provider.

This lack of flexibility also fails to acknowledge that BNPL providers may offer consumers a range of BNPL products over a number of different time horizons. Providing for a prescriptive model of fees and charges, as is represented by maximum fees and charges per contract as set out in

Regulation 69E, does not give BNPL providers adequate flexibility to tailor different products to customers' specific needs in different circumstances. An increased level of flexibility in this regard would encourage BNPL providers to offer a range of products with different consumer use cases, which enhances the customer's ability to access affordable credit options in different circumstances.

Likewise, many BNPL providers offer a number of BNPL products to their customers to account for different use cases. Some BNPL contracts operate with monthly accounting fees with credit limits of under $2000 that consumers use instead of a credit card, while others offer longer repayment periods for higher-value purchases. Others, like the low-value and low-limit "Pay-in-4" model, generate the vast majority of revenue from merchants and allow customers to purchase generally discretionary products and services. Providers offer a range of BNPL products to serve the specific needs and requirements of their customers, depending on a range of factors, including their cash flow, the value of the purchase, and repayment periods.

If there is a concern that some providers may seek to circumvent the caps on fees by creating multiple contracts, then we submit that this risk is perhaps better addressed via the modified RLOs. For example, it may be that the proposed presumption that a BNPL contract for under $2,000 will meet the requirements and objectives of the consumer, should only apply to the first contract held by the consumer.

Impact of regulation-making powers

Regulation-making powers should only be used to provide for appropriate parameters in terms of (i) the period during which credit is (or may be) provided under the contract, and (ii) the level of fees or charges that are (or may be) payable under the contract.

FinTech Australia would encourage the Australian Government to avoid 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 Legislative Package.

Further detail is set out on this topic in section 4 below.

Further, we query the need for inclusion of the words "the contract is … a contract prescribed by the regulations for [these] purposes" – as this potentially goes beyond mere ease of administration of legislation, and potentially allows an avenue for inclusion of non-BNPL contracts to be included without proper consultation.

For similar reasons, we query the need for the words "the contract satisfies any other requirements prescribed by the regulations for [these] purposes". If there are legitimate categories of distinguishing features (along the lines of time periods, fees and charges – which are expressly provided for in the definition of "LCCC"), then it might be worthwhile to have separate sub-clauses for any such categories.

In addition, we query what requirements will be prescribed by the regulations in respect of fees and charges that are (or may be) payable under the contract, for the purposes of determining whether the relevant contract is an LCCC. In particular, if providers of BNPL products and arrangements were able to avoid being subject to the Legislative Package simply by charging higher fees and/or charges, then this should be an inadvertent outcome (and avoided). In this regard, we note that there are some definitions that currently do not appear to operate as intended in the context of other definitions. For example, while the definition of short term credit contract has been amended (i.e. s5(1) of the Act), the short term credit exemption from the Credit Code (in section 6(1) of the Code) remains. Careful consideration needs to be given to ensuring that providers of BNPL products and arrangements are not able to leverage any regulatory arbitrage left by inadvertent gaps between relevant definitions in the context of the Legislative Package. However, we also note there may be a benefit in retaining some form of short term exemption from the Code for highly innovative offerings which have been inadvertently captured by the LCCC definition. We are happy to separately provide examples of some of these edge cases.

Finally, we note that some products and arrangements that would typically be considered part of the BNPL landscape would potentially be excluded from the definition above, on the basis that they constitute a revolving line of credit. If there is a period prescribed by the regulations, as being the maximum period during which credit is (or may be) provided under the contract, then revolving lines of credit (and similar products with no end date or time period attaching to them) would be excluded from the definition of LCCC.

1.2 BNPL arrangements and BNPL contracts

BNPL arrangements and BNPL contracts are proposed to be defined by reference to new section 13D of the Credit Code, as set out below.

BNPL arrangements

A "buy now pay later arrangement" is an arrangement, or a series of arrangements:

- under which a person (the **merchant**) supplies goods or services to another person (the **retail client**); and
- under which a third person (the **BNPL provider**) directly or indirectly pays the merchant an amount that is some or all of the price for the supply by the merchant to the retail client mentioned above; and
- that includes a contract between the BNPL provider and the retail client under which the BNPL provider provides credit to the retail client in connection with the supply by the merchant to the retail client mentioned above.

For the purposes of the above definition, and to avoid doubt:

- it does not matter whether any fees or charges are payable by the retail client or the merchant in connection with the arrangement or series of arrangements; and
- it does not matter whether the payment by the BNPL provider occurs before, at or after the time when the goods or services are supplied by the merchant to the retail client; and
- it does not matter whether the contract between the BNPL provider and the retail client is a continuing credit contract; and
- it is not necessary for the arrangement or series of arrangements to include any contract to which the merchant, retail client and BNPL provider are all parties.

However, an arrangement or a series of arrangements of the kind described above is not a "buy now pay later arrangement" if the principal business of the merchant is the supply of administration, brokerage, management, collection or recovery services, or other incidental services, in connection with the provision of credit under credit contracts.

BNPL contracts

A contract is a "buy now pay later contract" if:

- it is part of a buy now pay later arrangement involving a retail client, a BNPL provider and a merchant; and
- it is a contract, between the retail client and the BNPL provider, under which the BNPL provider provides credit to the retail client in connection with the supply by the merchant to the retail client mentioned above.

FinTech Australia has the following comments on the definitions referred to above:

- **Merchants providing BNPL services:** We suggest that there should be clarity in the definitions of "buy now pay later arrangement" and "low cost credit contracts", to the effect that merchants that offer a BNPL service are potentially captured as LCCC providers. The definition of "buy now pay later arrangement" describes a BNPL provider as a 'third person' that indirectly or directly pays the merchant an amount that is some or all of the price for the supply of goods and services.

  Under this definition, merchants that provide a BNPL service directly to their customers appear to be exempt, and could continue to offer an unregulated BNPL product. Examples could include offshore players selling goods directly to consumers and, consumer finance providers offering BNPL products, and retailers seeking to introduce in-house BNPL offerings. It would seem to be an unintended consequence for these

providers to be inadvertently excluded from the definitions of LCCC and BNPL arrangement.

On the other hand, if this is to be permitted – there should be clear guardrails within which it should be allowed – eg on the basis of a short-term maximum duration during which credit may be made available. As part of this regulatory and policy analysis, we submit that Treasury should bear in mind that more established players in this area will more easily be able to sustain the compliance costs in connection with an Australian credit licence – however smaller merchants will not be able to do so, so this will create a competitive disadvantage and may drive poor competition outcomes.

In addition, on the basis of the definition as currently proposed, merchants could potentially offer their own BNPL arrangement as part of a pre-agreed debt-factoring arrangement where there is an intention upfront that a third party BNPL provider (or any other third party, for that matter) will immediately buy the debt on its creation – in other words, this is a BNPL arrangement from an operational perspective, but it does not meet the definition of "buy now pay later arrangement" on the basis of a technicality; the BNPL provider never provides credit to the customer, but the customer still ends up owing the BNPL provider because the merchant provides credit and then the BNPL provider "buys" the debt from the merchant so that the consumer then owes the BNPL provider. In these circumstances, we would submit that merchants should not be able to leverage any such regulatory arbitrage in this regard – as this would seem contrary to the policy objective underpinning the Legislative Package, based on our interpretation and understanding.

FinTech Australia recognises however, that there is a policy question at play as to whether merchants being captured as LCCC providers would affect their ability to offer terms of trade and/or lay-by arrangements, and whether this would then consequently affect their ability to compete (and whether this would have flow-on effects for consumers). Similarly, we also recognise that in some cases, it would be cost-prohibitive for merchants to obtain an Australian credit licence – which could also compound the difficulties that merchants would face in this regard.

It is also possible for some BNPL providers to have multiple arrangements with customers, some of which fall within the definition of LCCC and some that do not meet the definition (for example, because there is no payment to the merchant) but otherwise fall within the existing short-term credit exemption or continuing credit exemption. In such circumstances, it would be beneficial to confirm that a BNPL provider can continue to have both arrangements and that the fee caps and late fee caps will continue to operate independently.

- **Providers inadvertently caught by the requirements:** On the other hand, there are various products and arrangements that are currently exempt under the short-term credit exemption in the context of the NCCPA. However, with the new LCCC definition, there could potentially be an inadvertent capturing of products and arrangements that are likely not the target area of the market to be regulated.

  It seems that this creates a strange policy outcome where ordinary credit arrangements (which potentially strategically leverage an inadvertent loophole in the definitions and charge higher fees and charges, and thereby remove themselves from the operation of the Legislative Package) would still remain exempt, while other (usually more innovative, shorter term and lower cost) providers might inadvertently be brought within scope of the NCCPA and NCCPR – and these providers would then require credit licensing and compliance with the new obligations. We recommend Treasury pay close attention to these "edge cases" where some providers might be inadvertently brought within the scope of the proposed amended NCCPA and NCCPR (while other, more traditional, arrangements are allowed to exclude themselves from the operation of the Legislative Package – simply by charging higher fees and charges than are contemplated as being the outer limits applicable to LCCCs).

- **Multiple uses of the term "retail client":** The use of the term "retail client" is potentially going to create confusion and ambiguity across multiple different legislative references. For example, there are discrepancies against what would constitute a "retail client" for the purposes of the *Corporations Act 2001* (Cth), what would constitute a "retail client" for the purposes of design and distribution obligations (**DDO**) in respect of relevant financial products (in particular, credit products), and what would constitute a "retail client" in everyday usage. In these circumstances, we submit that a reference to a "customer", rather than a "retail client", would be more appropriate in relation to LCCCs to avoid further ambiguity in the use of "retail client".

- **Reference to "indirect" payments to merchants:** We query the use of the word "indirectly" in the context of the definition of "buy now pay later arrangement", as being a mechanism by which BNPL provider can pay a merchant for some or all of the price for the supply by the merchant to the retail client mentioned above. While we appreciate the need for flexibility and expansiveness in terms of legislative application, we are not aware of any providers of "indirect" credit in the context of BNPL products or arrangements. In those circumstances, we would encourage closer scrutiny of the use of the word "indirectly" – to avoid unintended consequences in terms of application of the definition of "buy now pay later arrangement".

- **Interaction with continuing credit contracts:** In determining whether an arrangement is a "buy now pay later arrangement", the Legislative Package provides that it does not matter whether the contract between the BNPL provider and the retail client is a continuing credit contract. While we do not necessarily have any objection to this

exclusion (and we agree that if something satisfies the definition of a "buy now pay later arrangement", then it should not necessarily be excluded from the application of the relevant provisions simply on the basis that it is also a continuing credit contract), we would encourage a detailed review to ensure that an arrangement of this type does not become inadvertently subject to more onerous obligations than if it were either a BNPL arrangement or a continuing credit contract (but not both). It may be that the solution here is to insert a prevailing clause – by which there is legislative certainty that the Credit Code applies to LCCCs notwithstanding the application of (what would otherwise be) the continuing credit contract exemption in section 6(5) of the Credit Code or the short term credit exemption in section 6(1) of the Credit Code. We would welcome the opportunity to review proposed drafting in respect of proposed new section 13B of the Credit Code in this regard.

- **Debt factoring:** Finally, we would be interested in discussing whether Treasury has given consideration to how providers might use debt factoring as a model for BNPL arrangements. In particular, the key question is whether any such providers would be covered by the above definitions, given that they do not provide credit to the consumer, rather they purchase the debt at a discount from the merchant.

  If that is the case, then the question becomes whether they should be included in the first instance, because they are active participants in the BNPL industry – and if they are not captured by the definitions, whether this gives rise to a risk of anti-avoidance. Debt factoring is often used for purposes like white-labelling (ie merchants offering the facility under their own name), which could become an example of a product or service inadvertently being left out of the operation of the Legislative Package.

  As a related point, it would be worth considering whether arrangements such as this should be the subject of a transitional arrangement of some description (eg the Legislative Package only applies in respect of new merchants being signed up to the relevant platform), assuming that the underlying debt factoring arrangements were set up legitimately and in full compliance with all legislative requirements that existed at the relevant time.

2 Responsible Lending Obligations

2.1 Insufficient guidance in respect of modified RLO framework

As outlined above, FinTech Australia notes that there is currently further scope for development of a set of regulatory principles and guidance, to provide clarity and certainty to providers of BNPL products and arrangements in determining:

- whether they have made reasonable inquiries about the consumer's requirements and objectives and the consumer's financial situation; and
- whether they have taken reasonable steps to verify the consumer's financial situation.

Without this additional clarity and certainty, there is some concern as to whether the modified RLO framework effectively provides any relief from the requirement to adopt a full-scale approach to RLOs.

In particular, RLOs are already scalable. The only difference with the new RLO framework proposed to apply in respect of BNPL arrangements is that the new framework is proposed to be scalable by reference to a specific set of matters to be prescribed in legislation – however, because RLOs are already scalable, there is arguably no meaningful difference between the scaleability of the different frameworks, and therefore no substantive difference as against the existing RLO framework as it applies to entities licensed under the Credit Code. The current approach will create uncertainty, make it difficult to implement compliant procedures and leave much of the 'heavy lifting' to ASIC guidance (which will come much later in the implementation timeline).

The Australian Securities and Investments Commission (**ASIC**) has released ASIC Regulatory Guide 209 (**RG209**), which sets out ASIC's approach in respect of responsible lending conduct in credit licensing. In particular, ASIC notes in RG209:

- Credit licensees must comply with certain responsible lending obligations. The key concept of these obligations is that credit licensees must not enter into or assist a consumer with a credit product that is unsuitable for them.
- Credit licensees must decide how they will meet the responsible lending obligations, and RG209 sets out ASIC's views on what the obligations require and steps credit licensees can take to minimise the risk of non-compliance.
- RG209 outlines the responsible lending obligations and gives an overview of ASIC's guidance.

The key concern is that providers of BNPL products and arrangements will be forced to either comply with full-scale RLOs (as provided for in RG209), or otherwise run the risk of non-compliance by opting-in to comply with the modified RLO framework (by inadvertently committing a breach, on account of there being insufficient guidance in terms of how the modified RLO framework is intended to be implemented).

There is also some concern among members of FinTech Australia, that without sufficient clarity and guidance in this regard, providers of BNPL products and arrangements may even become subject to an RLO framework that is even more onerous than that imposed on other credit licensees. In particular, if providers of BNPL products and arrangements are subject to obligations unique to BNPL contracts and arrangements (as is indicated by the reference in the Explanatory Memorandum to "some modifications to ensure regulation is proportionate"), and such providers also perceive that they must also comply with full-scale RLOs (as provided for in RG209) – then such providers will become subject to an inadvertently high compliance standard.

For any providers of BNPL products and arrangements that choose to comply with full-scale RLOs (as provided for in RG209), the increased complexity and compliance burden is likely to cause practical difficulties and lead to an increase in compliance costs. This will likely have a flow-on effect of making it harder for such providers to continue to compete and innovate, and/or will lead to increased costs for consumers. FinTech Australia recommends Treasury carefully considers this.

This position also likely creates a demarcation between providers of BNPL products and arrangements that already have an Australian credit licence (for example, to the extent they are already providing credit in other parts of their business), and those that do not. For the latter category of providers of BNPL products and arrangements, this likely further compounds against their ability to compete and innovate, as compared with any of their competitors that are already providing credit. Again, FinTech Australia recommends Treasury carefully considers this.

Another potential issue that will arise among providers of BNPL products and arrangements that already have an Australian credit licence is that they will need to consider whether they should either (i) have one RLO policy that applies to all forms of credit they provide (BNPL and other forms of credit), or (ii) have an RLO policy that applies to BNPL, and a separate (more onerous) RLO policy that applies to other forms of credit being provided.

In the context of (i), again this gives rise to the key concern that providers of BNPL products and arrangements will be forced to either comply with full-scale RLOs (as provided for in RG209), or otherwise run the risk of non-compliance by opting-in to comply with the modified RLO framework (by inadvertently committing a breach, on account of there being insufficient guidance in terms of how the modified RLO framework is intended to be implemented).

In the context of (ii), this likely gives rise to additional complexity in terms of application and administration of the two policies. It will likely involve the same staff members making assessments across both policies (or otherwise relying on technology to appropriately demarcate between the two policies) – and this exposes the potential for misapplication of consumers under the policies (eg the less onerous compliance obligations and requirements being inadvertently applied where the more onerous compliance obligations and requirements should have been applied instead). Again, this likely negates what would otherwise be the benefit of offering an opt-in model for a modified RLO framework.

2.2 Unsuitability policy

The Legislative Package states that the new regulatory framework for LCCCs is intended to maintain the benefits of consumer access to these kinds of credit products (ie BNPL), while providing appropriate and proportionate protections. One of the ways it seeks to achieve this outcome, is by modifying the existing RLO framework to create an opt-in RLO framework that scales better with the risks posed to consumers, including requiring providers of LCCCs to develop and review a written policy on assessing whether the contract will be unsuitable for the consumer.

In respect of the proposal for providers of BNPL products and arrangements to have a separate policy as to whether a contract will be unsuitable for a consumer, FinTech Australia submits that there is not necessarily any practical advantage to be gained from having a separate policy of this nature – especially in circumstances where the modified RLO framework does not appear to provide any practical benefits in its current form.

In addition, there was some concern raised that a requirement for an unsuitability policy (in addition to the relevant RLO framework in place) increases the possibility of ASIC audits – without necessarily providing for increased benefits for consumers.

Rather, we are of the view that the modified RLO framework should have regard to concepts of unsuitability – and this should be sufficient from the perspective of legislative compliance. This would be more reflective of the approach taken by industry in practice – ie establishing a responsible lending policy appropriate to each product line being offered, with credit assessment criteria specific to each such product line. Having an overarching policy relevant to unsuitability does not appear to achieve any practical purpose or benefit, but rather it simply imposes the requirement for another policy to be established and maintained.

2.3 Comparative approach based on international jurisdictions

We note BNPL regulations have recently been introduced in New Zealand, which serve as a useful comparison in terms of relevant matters covered by the Legislative Package.

Applying more scalable and proportionate suitability requirements aligns with recent BNPL regulations passed in New Zealand. The New Zealand Department of Business, Innovation and Employment (**MBIE**) recently considered the issue of suitability and its application to BNPL contracts as part of regulations passed by the New Zealand Government in September 2023. MBIE's Regulatory Impact Statement found that the requirement to assess suitability - which is highly comparable to Australia's suitability regime – will have little impact on financial hardship, as suitability requirements would likely be of little benefit to BNPL applicants.

The New Zealand government reached its decision regarding suitability requirements despite there being no comparable product suitability framework to the Australian DDO regime - a significant form of outcomes-based consumer protection that ensures that providers design products with consumers in mind, and ensure that products are distributed to an appropriate target market. In New Zealand, BNPL providers must make reasonable inquiries, before entering

into an agreement with a consumer, and before making relevant material changes to any such agreement, so as to be satisfied that (i) it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives, and (ii) that the borrower will make the payments under the agreement without suffering substantial hardship (Affordability Principle). In addition, BNPL providers must assist the consumer to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement. To achieve a similar approach in Australia, consideration could be given to imposing a partial credit check to a broader range of LCCCs and removing the section 28HAD(5) requirement that LCCC providers obtain information that the provider reasonably believes to be substantially correct in relation to income, expenses and any low cost credit contracts, small amount credit contracts or consumer leases to which the consumer is currently a party.

2.4 Credit limit increases

We support the framework allowing providers to conduct inquiries and an assessment for an amount of credit larger than that initially offered to the consumer, and that this assessment will also suffice for any subsequent credit limit increases up to that amount, up to a period of 2 years.

2.5 Regard to technology more broadly

The Legislative Package would benefit from further reference to technology that is being used, or that may be used in the future, in the context of providers of BNPL products and arrangements in maintaining compliance with their legislative obligations.

The Explanatory Statement released as part of the Legislative Package uses the example of "IntervalCash", an Australian credit licensee designing a new webform for consumers to use when applying for credit. In the example, IntervalCash is stated as planning to use the webform to obtain the required information about each consumer's income, expenditure and use of other credit products, and in doing so, that its options include:

- asking the consumer to supply a response in a free text field;
- asking the consumer to upload documents such as payslips and bank statements; and
- asking the consumer to authorise IntervalCash to access the consumer's information through a third party banking transaction data service.

There is some concern among FinTech Australia's membership base that this is not necessarily reflective of the technologies available to providers of BNPL products and arrangements, in terms of making reasonable inquiries (about the consumer's requirements, objectives and financial situation), and in taking reasonable steps (to verify the consumer's financial situation).

A broader regard for technological advancements (both to present day, and which may be experienced in the future) would likely put the Legislative Package in a better position to respond to changes in the way that compliance obligations are attended to in practice. While we

recognise that the Australian Government is not able to predict the different technologies that will emerge in coming years, we encourage a more modern and tech-savvy approach when it comes to developing guidance for providers of BNPL products and arrangements, in terms of how they can comply (and how they do comply, in practice) with their legislative obligations.

2.6 More nuanced approach to obtaining customer data

Further, we recommend a more nuanced approach in terms of day-to-day legislative compliance; including one that moves away from the notion of stated income, less stated expenses, equals capacity for borrowing. Without additional context as to unsuitability of the relevant product (which is largely tied to affordability for the relevant consumer), information as to income and expenses only presents part of the picture. Ambiguity in terms of application of relevant rules in this regard might be avoided to an extent, by prescribing the reasonable enquiries to be made (in particular, the type of information to be collected) in certain circumstances, by certain BNPL providers and in respect of certain consumers – and providing that the resulting contract cannot be deemed unsuitable based on any information not required to be collected. This would allow a risk-based approach to the concept of unsuitability, and would foster a greater degree of certainty for BNPL providers in complying with these requirements.

Further, the requirement for providers to make enquiries into customer income and expenses is unlikely to generate consistent or effective consumer outcomes or aid responsible lending decisions. For the purposes of low-value LCCCs that typically provide low initial credit limits (and/or where the LCCC leverages the short term credit exemption and has separate loan contracts for each transaction as part of an instalment plan, each of which does not have a "credit limit" at all that can be later increased), this information is unlikely to provide meaningful inputs into BNPL providers' decision making framework.

Some consumers (eg consumers employed on a casual or part-time basis, or who otherwise do not have an annual salary that can be simply declared) may find it difficult to accurately determine their income and expenses. Other consumers might not necessarily have certainty or predictability over their expenses on a weekly, monthly or yearly basis, or otherwise might not necessarily distinguish between discretionary and non-discretionary expenses in the same way that traditional credit checking models dictate. Without flexibility in responding to different scenarios such as these (and without adequate guidance as to how these difference scenarios should be treated), there is likely to be unintended consequences in terms of how different information and circumstances are treated. Further, the friction created by requiring customers to supply all of this information in these circumstances (and then verify it in some cases) is disproportionately burdensome for small purchases. This is likely to deter consumers from using BNPL in those circumstances.

Instead of requiring BNPL providers to obtain information about the customer which is likely to be unreliable, and introducing a new and uncertain obligation for BNPL providers to "reasonably believe" the information, we urge Treasury to consider aligning Australia's approach with that of New Zealand. In New Zealand, BNPL providers will be required (from September 2024) to have a

credit policy which lays out how they take into account information from credit reports in lending decisions.

Further, a BNPL provider is exempt from the application of the Affordability Principle in respect of a BNPL contract if (a) they first obtain information from a credit report on the borrower in a manner permitted by the relevant provisions, and that report includes, where available, all information set out in the relevant provisions (including the type of credit account of the borrower, the amount of credit extended to the borrower, and the capacity of the borrower), (b) they provide all relevant information to the credit reporter, (c) while the BNPL contract is in force, they disclose to the borrower (in a manner that is clear, concise, and likely to bring the information to the attention of a reasonable person), at the time of each purchase made by the borrower using a BNPL contract between the BNPL provider and the borrower, the dates and amount of payments required for the purchase, and details of any default fees that may be payable under the contract, including how and when those fees would become payable, and (d) while the BNPL contract is in force, the BNPL provider has in place at all times a credit policy that explains how credit report information will be used by the BNPL provider when assessing whether or not to provide credit to a borrower, that such credit policy is complied with by the BNPL provider, and that such credit policy is available to the commission on request.

2.7 $2,000 threshold for determining relevant checks

The Legislative Package provides that an LCCC licensee must seek to obtain relevant information from a credit reporting body about the financial situation of a consumer who is, or will be, a debtor under an LCCC that has a value of less than $2,000 (ie a 'negative credit check').

The Legislative Package provides that if the value of the LCCC is $2,000 or greater, and the consumer is an individual, the licensee must seek to obtain from a credit reporting body, the information required by subsection 28HAD(2), as well as information about consumer credit (within the meaning of the *Privacy Act 1988* (Cth)) provided to the individual that is consumer credit liability information (within the meaning of the *Privacy Act 1988* (Cth)) (ie a 'partial credit check').

As part of consultation with members of FinTech Australia, there has been some concern expressed that the threshold should be changed slightly, so that a 'negative credit check' should be performed in respect of an LCCC that has a value of $2,000 (or less), and that a 'partial credit check' should be performed in respect of an LCCC that has a value of more than $2,000. This would provide for greater ease of administration, in that providers of BNPL products and arrangements would be dealing with a threshold of up to $2,000, rather than a threshold of up to $1,999.99.

3 Fees

2.8 Concerns around prescriptiveness of late fees

Regulation 69E provides some detail on maximum fees and charges that are to be levied in the context of LCCCs, before an arrangement is no longer captured by the Legislative Package. While this is not necessarily a "cap" on fees per se, for ease of reference we refer to these as caps on fees.

During consultation with members, significant concerns were raised about whether there is a clear policy rationale for introducing a new and prescriptive cap on late fees, in circumstances where existing consumer protection laws adequately constrain the ability of lenders to charge unfair late fees. The key concern in this regard is that BNPL contracts are already subject to the Unfair Contract Terms (**UCT**) regime in the Australian Consumer Law (overseen by ASIC in relation to financial products and services). Overlap in terms of regulatory regimes will likely not lead to any benefit for consumers, but rather will likely create ambiguity and confusion for providers of BNPL products and arrangements.

Concern has also been raised that the proposed approach to late fees is also problematic because it is disproportionately restrictive and unduly complex; it is too restrictive because it fails to account for the ways in which consumers use low-value BNPL products on a repeated basis for different types of purchases, and it is unduly complex because it is in addition to the existing caps on ongoing fees which will continue to apply on a yearly (not monthly) basis (noting that a higher cap applies in the first year of a BNPL arrangement).

We do not believe additional restrictions on late fees are necessary given the longstanding application of the UCT regime. There is no suggestion that the existing UCT regime has failed to appropriately constrain the late fees of BNPL providers.

Furthermore, the BNPL Code of Practice overseen by the Australian Finance Industry Association, currently mandates a range of actions required from BNPL providers in relation to fees and charges. This includes that late fees are "fair, reasonable and capped". The BNPL Code of Practice has proven to be successful in this regard, as millions of consumers across Australia choose to use BNPL providers whose conduct is governed by the BNPL Code of Practice.

The NCCPA does not impose a cap on the late fees of other mainstream credit products. While BNPL products will potentially be subject to less onerous responsible lending obligations compared with credit cards, this does not justify credit cards being treated differently in relation to late fees. Credit cards are justifiably subject to the existing responsible lending obligations due to the very high rates of interest that are charged, and a product design construct that encourages consumers to make low minimum repayments and revolve in debt for long periods of time.

2.9 Ongoing fees

Fintech Australia supports caps on ongoing fees for BNPL arrangements. Since ongoing fees are not subject to the UCT regime, and the policy intent is for BNPL arrangements to remain as "low cost" credit contracts, an appropriately designed legislative cap is warranted.

The proposal will, however, continue to apply dollar-based caps that have remained unchanged since the introduction of the NCCPA in 2009. Given the passage of time, and impact of inflation over the past 15 years, Treasury should consider indexation of the existing caps. This will allow BNPL products to vigorously compete in the market for consumer credit, while continuing to offer consumers a simple and low cost alternative to traditional credit products.

4 Breadth of regulation-making powers

The proposed legislative reforms contemplate broad regulation-making powers, in the context of the NCCPA and NCCPR. While FinTech Australia recognises and understands the need for regulation-making powers, as a means of efficient and effective administration of legislation, we encourage the Australian Government to carefully consider the circumstances in which it would use these regulation-making powers.

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 NCCPA and 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 in our view.

For example, the Options Paper refers 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 Legislative Package.

5 Transitional arrangements

Members are concerned that the transitional period of 6 months from royal assent would be insufficient to comply with the new framework. This is due to a number of factors, principally:

- the need for providers of BNPL products and arrangements to review and consider any guidance from ASIC (yet to be published) in respect of how the modified RLO framework should be applied in practice, or otherwise undertaking the necessary preparatory steps in readiness for full-scale RLO compliance;
- to the extent that a provider of BNPL products and arrangements needs to apply for an Australian credit licence, there is a significant volume of work (in terms of application and preparing the necessary compliance framework internally) to be done in a relatively short space of time;
- ASIC's capability to process applications within 6 months (unless there is an exemption from the requirement to hold an Australian credit licence, to the extent that an application has already been lodged with ASIC before the relevant deadline); and
- the applicant's ability to meet compliance obligations, including obligations which ASIC may set out in any yet to be published ASIC regulatory guides.

We expect there will be an influx of many applications for new Australian credit licences, and applications for variation of existing Australian credit licences. This will require significant work from the businesses themselves, to meet relevant obligations, and ASIC, to process applications – and this is a novel area, from the perspective of being the subject of new legislation.

We also note the context of new licensing frameworks being implemented for payment service providers and digital asset platforms. These will add to the already significant burden on ASIC's capabilities, particularly in licensing and the development of complex regulatory guidance.

To alleviate this, FinTech Australia recommends:

1. phased transitional arrangements to require a person to apply for, rather than obtain, an Australian credit licence by a certain date; and
2. ASIC publish any draft regulatory guidance (and amendments to other regulatory guidance) as soon as possible, and well in advance of the Legislative Package being considered for approval.

5.1 Phased transitional arrangements

FinTech Australia recommends phasing the transition to allow for a period in which an 'apply by' rather than a 'licensed by' date is set, as follows:

- prospective Australian credit licensees receive a 12-month transitional period to prepare and lodge their application or variation;

- prospective Australian credit licensees which have made their application by the end of this transitional period will then receive limited transitional relief until the earlier of the day the application is withdrawn or the day ASIC has dealt with the application, provided:

  (a) the application has already been made and has not been withdrawn by the applicant or dealt with by ASIC before the end of the 12-month transitional period; and

  (b) the person is a member of the Australian Financial Complaints Authority (**AFCA**).

Our proposal for a phased transition is drawn from the transitional arrangements used for bringing 'debt management services' into the credit licensing framework as a new credit activity in 2021[1] and insurance claims handling as a financial service following the recommendation of the Royal Commission. It is intended to provide consumer protections and recourse to the ombudsman, while easing the burden on ASIC, minimising disruption to businesses and acknowledging that some providers already hold a credit licence. It is also intended to provide a level playing field for entities regardless of whether they are making an application for a new Australian credit licence or seeking a variation in respect of an existing Australian credit licence.

5.2 ASIC guidance

FinTech Australia members request sufficient information be provided regarding how they may comply with initial licensing and meet ongoing compliance obligations when entering into LCCCs, entering into BNPL contracts and when making BNPL arrangements available.

FinTech Australia recommends ASIC publish draft regulatory guidance as soon as possible, and well in advance of the Legislative Package being adopted. This will assist businesses to 'get their house in order', and will also provide greater clarity around whether businesses need to adhere to the full-scale RLO framework, or otherwise whether they can comply (with confidence) with a modified RLO framework. This process should be expedited and prioritised over any forthcoming broader review of RG 209.

[1] National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021.

Beyond ASIC guidance, FinTech Australia also encourages AFCA to provide updated guidance regarding its approach to complaints involving BNPL products and arrangements, to assist industry to manage these appropriately.

5.3 Enhanced Regulatory Sandbox

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 LCCCs. A review would provide an opportunity to address the current limitations and consider new cohorts which could benefit from this model, particularly those previously benefiting from Code exemptions that are now captured as LCCC providers. Fintech Australia believes the ERS regime can be expanded, improved and better promoted.

As set out in our recent Pre-Budget Submission, other changes to the ERS that could be considered include:

- Providing for an expanded 'international entrant' sandbox for firms entering Australia which are already licensed in a recognised overseas jurisdiction (e.g. the UK or Singapore) – the sandbox could offer them a 'bridge' to start launching while their full licence is being assessed and approved;
- Expanding the current threshold restrictions on time, funds held and customers permitted, while balancing the need for consumer protection;
- Increasing awareness by better promoting the ERS and Innovation Hub and its benefits relative to alternative licensing pathways, like becoming a representative;
- Improving guidance around ASIC's discretion in relation to 'innovative' and 'use of technology' requirements to reduce uncertainty and risk of early termination (i.e. some form of authorisation model); and
- Making the sandbox process a clearer path to full AFS or credit licensing – the UK takes this approach and has significantly better uptake and outcomes.

As the ERS has now been in place for almost four years, it is the right time to conduct a review process with broad consultation focused on current and past users, businesses which enquired but did not utilise the sandbox and legal advisers (who are often serve as the decision maker on the ERS' viability when advising on licensing matters). Alongside a revised ERS, consideration should also be given to bolstering ASIC's Innovation Hub to ensure it can provide greater guidance and support for newly regulated LCCC providers.

5.4 Industry Funding Model levy

Upon commencement, 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.

Conclusion

FinTech Australia and its members thank Treasury for the opportunity to provide their views on such an important suite of issues. We greatly appreciate Treasury's ongoing efforts to engage with the sector, including through the Options Paper and the Legislative Package, and over the many past consultations with FinTech Australia and its members. We look forward to continuing to engage as the draft legislation is further considered and consulted on.