FinTech Australia

SUBMISSION PAPER:

Submission to Treasury on Currency (Restrictions on the Use of Cash) Bill 2019

August 2019

This Submission Paper was prepared by FinTech Australia working with and on behalf of its Members; over 300 FinTech Startups, VCs, Accelerators and Incubators across Australia.

Fintech Australia strongly supports the goal to eliminate tax evasion and fraud, and black market economies. On behalf of our member-base, including companies directly participating in or providing electronic and digital payment services, Fintech Australia makes the following submission in relation to the 'Exposure draft legislation for an economy-wide cash payment limit of $10,000' *Currency (Restrictions on the Use of Cash) Bill 2019* (Cth) ("**Draft Bill**").

Fintech Australia understands that this Draft Bill seeks to criminalise transactions in physical cash and digital currency that are not less than $10,000 other than personal or private transactions or undertaken by certain entities, such as banks.

Fintech Australia also understand that this Draft Bill follows the *Black Market Economy Taskforce Report,* October 2017 ("**Report**"),[1] the Australian Government's response to the Report in Maty 2018 ("**Government Response**"),[2] and the 2018-19 Budget Review "Targeting the Black Economy"("**Budget Review**").[3]

Fintech Australia generally supports the proposal to limit payments in physical currency to $10,000 as set out in the Exposure Draft. However, Fintech Australia does not support the proposal to criminalise transactions involving digital currencies over $10,000. Such a proposal is not aligned with the context in which this Draft Bill has arisen and runs the risk of effectively criminalising legitimate transactions simply because a digital currency forms part of the payment mechanism.

We would welcome the opportunity to discuss this with you in further detail and to provide comments on any further proposed amendments to the Draft Bill.

Submission 1: Digital Currency should not be included in the Draft Bill

Fintech Australia does not agree that digital currencies should be considered to be 'cash' for the purposes of this proposed bill as this is a significant departure from the recommendations of Report, the Government Response, the Budget Review and the ATO's "The whole-of-government black economy action plan".

The Report primarily mentions digital currencies in relation to central bank issued digital currencies. The definition of digital currency adopted under the Draft Bill is the definition of digital currency under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

(Cth) ("**AML/CTF Act**"). This does not include digital currencies "issued by or under the authority of a government body".[4] These comments have no bearing on the Draft Bill.

In relation to digital currencies as they are defined under the Act, the Report merely notes that

> "While cryptocurrencies play a niche role today, this needs to be monitored"[5]

This does not suggest introducing a law which would criminalise any transaction involving digital currency above $10,000.

Fintech Australia submits that any issues regarding digital currencies noted in the report related to money laundering and have now been resolved by the amendments to the AML/CTF Act. The Report provides that

> "As is well known, cryptocurrencies are largely anonymous, making them attractive for criminals, however increasingly they are being used as an investment vehicle and for other legitimate purposes."[6]

At the time that the Report was handed down, comments in the Report that cryptocurrencies were "unregulated" were accurate as the new designated service under section 6, table 1, item 50A with respect to digital currency exchange transactions had not passed parliament. This has now been resolved. There was no further suggestion in the Report that digital currencies should otherwise be regulated.

The explanatory memorandum to the Draft Bill should also be updated to reflect the distinction between digital currencies and other crypto-assets. The draft notes that digital currency transactions resemble cash transactions:

> *1.7 That said, some forms of electronic payment more closely mirror physical currency. In particular, crypto-currencies and other digital currencies are generally unregulated and do not create clear records of transactions in a form that can easily be used to identify the parties to a transaction*

Though digital currency or crypto-asset transactions may occur outside of the traditional fiat banking system, this does not necessarily mean that the transactions occur outside of the realm of regulation. Suggestions that these assets are unregulated fail to acknowledge the significant

work undertaken by Treasury and the Australian Securities and Investments Commission ("**ASIC**") with respect to crypto-assets more broadly. As noted above, the AML/CTF Act requires a digital currency exchange business to register with the regulator, AUSTRAC, and comply with other requirements, including to conduct know your customer ("**KYC**") procedures and to report transactions. This ensure that any party who receives digital currency through an exchange has complied with a high regulatory standard.

It is now widely recognised that where a crypto-asset is acting like money it is digital currency, where it has features of a financial product or service (including to "make a financial investment" as it is defined under the *Corporations Act 2001* (Cth)), it is that financial product or service, and where it is a good or other service regulated under the consumer law, this should be treated as under those laws. The technological feature that is the integration of cryptography in the asset should not mask its true nature. Once its true nature is determined, it should be regulated as would any other equivalent asset.

We propose that digital currency transactions should remain as a unique method of transacting and regulated or legislated in a way that does not materially damage the digital currency ecosystem in Australia. Given the nature of digital currency, by criminalising any transaction involving digital currency above $10,000 even where a transaction uses traditional payment rails (such as by way of non-cash payment facilities) and would be legal if it only involved fiat currency, such a transaction is illegal as it involves digital currency in its settlement process. By criminalising transactions above $10,000 in digital currency, transactions which would be perfectly legal were they only undertaken with fiat currency would be rendered illegal because digital currency is used.

Fintech Australia acknowledges that the Exposure Draft *Currency (Restrictions on the Use of Cash- Excepted transactions) Instrument 2019* (Cth) ("**Draft Instrument**") at section 9 effectively removes the requirement that digital currencies are to be included in the definition of "cash" for the purposes of the Draft Bill. Whilst the practical effect is to remove this requirement from any law, by implication it leaves the door open for the Treasurer to criminalise transactions involving digital currency in the future.

Given this is a sector that attracts investment and innovation in Australia, it would be counterproductive and inappropriate to classify digital currencies into a category for convenience, thereby limiting the scope of growth of this market.

Some negative consequences of classifying digital or crypto-currencies as cash for the purposes of this bill include:

- Imposing criminal penalties on all transactions which involve more than $10,000 worth of digital currencies.
- Limiting investment in Australian technologies and companies that rely in part or wholly upon digital currency transactions.
- Limiting the development of innovations and technologies in Australia that may incubate in the digital and cryptocurrency space but evolve to bring beneficial services and systems to financial, banking and other industries - block-chain technology is an example of this.
- Limiting the development of appropriate regulatory systems, legislation and procedures that could create a more stable and better-regulated environment for these types of transactions in the future- which would, in turn, stimulate this sector of the economy and potentially create positive outcomes for Australia
- Impacting upon legitimate business transactions - such as equity stock purchased that are conducted in crypto or digital currencies.

Instead, Fintech Australia submits that if in the future digital currencies were seen to facilitate the black economy, at that stage a change to the law may be made by an amendment to any Act passed by parliament itself. Given the Report has not identified this as a significant issue, and the degree of harm done to the industry by specifying that digital currency is included in any legislation, even where its effect is neutralised, digital currency should not be included in the definition of “cash”. By including this, it acts as a signpost to anyone undertaking business using digital currency that even where regulated under the AML/CTF Act or the Corporations Act (or both) the Treasurer may at any time render the industry illegal. The only effect on the industry would be negative.

Submission 2: Cheque Payments should not be mentioned in the Summary

The effect of the Draft Bill as stated in the “At a glance summary” of the Draft Bill (“**Summary**”) calls for transactions that are equal to or greater than $10,000 to be made via cheque or electronic payments. Whilst it is acknowledged that cheques represent an avenue of financial inclusion, including them specifically in this Summary as a desired form of payment is confusing

and unhelpful as neither cheques nor electronic payments are mentioned in the test of the Draft Bill or any other instrument including the Explanatory Memorandum to the Draft Bill. From a policy perspective, mentioning cheques in this way may extend the already waning lifespan of cheques which are costly and cumbersome forms of payment. Including cheques may perhaps prevent innovative reporting or monitoring technology that may be developed out of necessity as a result of this Draft Bill. Such potential technology could prove to be a powerful tool in reaching the goals of the Draft Bill but the specific inclusion of cheques in this Summary of the Draft Bill will be a severe limiter to any such developments.

Submission 3: Ambiguity in language should be reviewed

There is some concern regarding the ambiguity of elements that are left to the discretion of the Treasurer. This ambiguity creates an uncertain and unstable environment for new technology development and business who operate in the digital currency space and exposes these businesses to changes in government and fluctuations of opinions. The clauses that are particularly concerning for ambiguity reasons are:

1.11 The Bill creates new offences that apply if an entity makes or accepts cash payments with a value that equals or exceeds the cash payment limit. However, the offence does not apply if the payment is made in the course of a transaction of a kind specified by the Treasurer by legislative instrument.

1.12 The cash payment limit is $10,000. The Treasurer may specify how to work out the market value of an amount of foreign or digital currency in Australian dollars.

1.23 While digital currency is included in the definition of cash, given ways in which digital currency is presently used in Australia, it is expected that the Treasurer will exempt most transactions involving digital currency for the cash payment limit.
In relation to this, please see submission 1 above.

Submission 4: All entities providing designated services under item 3,4, and 5 of Table 1 section 6, of the AML/CTF Act should be exempted from the Draft Bill

Fintech Australia supports attempts to streamline the AML/CTF Act and the Draft Bill however submits that the revisions to the threshold transaction reporting requirements in the *Currency*

(Restrictions on the Use of Cash)(Consequential Amendments and Transitional Provisions) Bill 2019 (Cth) ("**Consequential Amendments Draft Bill**") may negatively impact non-ADI reporting entities who are otherwise given equivalent treatment, potentially preventing them from operating.

Section 11(3) of the Draft Bill provides that it does not apply to payments specified by the Minister in a legislative instrument. This includes payments involving entities which are required to provide a threshold transaction report under section 43 of the AML/CTF Act.[7] Previously section 43 of the AML/CTF Act included all transactions above $10,000. The proposed revised to section 43 the Consequential Amendments Draft significantly narrows this to include only

> "(i) the reporting entity is an ADI and the service is covered by item 3, 4 or 5 of table 1 in section 6; or
> (ii) the service is covered by item 50 of that table (regardless of whether the reporting entity is an ADI);"

As a result, any person who is not an ADI will no longer be able to receive payments at or above $10,000. Whilst we would presume any bank, building society or credit union is an ADI and so would not be affected by this, there may be circumstances where entities are providing services under item 3,4, or 5 of Table 1 section 6 and are not ADI. This includes credit unions who are not ADI, or (more importantly) card issuers.[8] If these entities may no longer receive payments over $10,000, including instalment payments, this would severely impact business. This strikes at the core of credit issuers as they are unable to be repaid amounts owing. It may even result in closure of some businesses and may ultimately reduce broader competition in the banking sector. On the other hand, there is no specified policy reason why non-ADIs providing these services and card issuers (amongst others providing these designated services) should not be allowed to take advantage of the same exemption.

Submission 5: Additional questions and matters for consideration

Fintech Australia would like to submit the following questions about the new bill:

How will this rule be communicated to the greater community given that it criminalises activities that legitimate businesses may have been performing based on a reporting 'safety net'?

Instalment payments with the value paid in cash instalments equal to or greater than $10,000 have been included. This will be an extraordinarily difficult thing to track and may be open to interpretation. Is there a plan in place for a framework to capture this instalment payment information?

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[1] https://treasury.gov.au/sites/default/files/2019-03/Black-Economy-Taskforce_Final-Report.pdf.
[2] *Tackling the Black Economy- Government Response to the Black Economy Taskforce Final Report*, Australian Government, May 2018, https://treasury.gov.au/sites/default/files/2019-03/Government-response-final.pdf.
[3] https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201819/TargetingBlackEconomy.
[4] AML/CTF Act, s5, “digital currency”.
[5] Report, p.16.
[6] Report, p.47.
[7] See Draft Instrument, s6.
[8] See AML/CTF Rules Instrument 2007 (No.1) rule 71.4.