

3 February 2021

Secretariat
Payments System Review
The Treasury
Langton Crescent
PARKES ACT 2600

By email: PaymentsReview@treasury.gov.au

Dear Mr Farrell

Afterpay submission to Payments System Review Issues Paper

We appreciate the opportunity to make a submission to the consultation on the Payments System Review Issues Paper (Issues Paper).

Afterpay Limited (Afterpay) is an Australian financial technology (FinTech) company listed in the S&P/ASX 20 of the Australian Securities Exchange (ASX). Afterpay employs over 1,000 staff across Australia, New Zealand, the United States, the United Kingdom, and Canada, with further growth underway in Europe and Asia.

Australia has a highly respected regulatory regime, and the Reserve Bank of Australia (RBA) has implemented globally leading reforms to improve access and reduce costs within the traditional payment systems. However, the existing regulatory framework was designed for a different time: for a system with large and duopolistic incumbents operating as pure payment systems. We now have a heterogeneous market made up of platforms (which are more than just payment methods) with different economic attributes.

Accordingly, there are opportunities to update Australia's regulatory architecture to better support innovation, create business certainty, protect consumers and improve policy making.

In this submission, we provide our views on the areas that are relevant to Afterpay's business. In summary, Afterpay recommends that:

- There is explicit recognition by policymakers and regulators that the payments system has evolved, and that innovation has created new and diversified business models
- The regulatory architecture distinguish traditional payment systems from platforms that include payment facilitation as a small component of their business models
- Treasury be given a greater role in overall policy making, reflecting its role as a central policy agency, and in line with the UK approach

- The RBA retain responsibility for oversight of systemic risk and overall performance of the payments system
- Regulators be more attuned to promoting competition and innovation in the payments system, and better aware of how their actions affect large incumbents versus newer FinTechs
- Regulators be more willing to proactively engage with FinTechs and provide regulatory guidance that reflects rapidly changing business models and approaches
- Self regulation be maintained where there is evidence of strong competition, innovation, no evidence of consumer harm, and lower barriers to entry.

Background - Afterpay

Afterpay has revolutionised the way that consumers pay for goods and services by turning the traditional model of high-cost consumer credit on its head. Afterpay has grown into a leading international player in the Buy Now Pay Later (BNPL) sector, with over 11 million customers globally.

Afterpay offers a simple and highly effective platform for consumers and merchants.

Afterpay is a no cost service to the customer if instalment payments are made on time. Responsible spending rules and consumer protections are built into the service – these rules help ensure customers never revolve in debt, no exceptions. In circumstances where the customer does not pay their instalment payments on time, their service is immediately suspended, and late payment fees can be applied. Late payment fees are fixed, capped and do not accumulate or compound over time.

Merchants benefit significantly by being part of the Afterpay ecosystem, as it delivers them value, reduced risk, and deeper engagement with customers. Our platform's success is underpinned by an innovative model which does not seek to charge the customer. While part of a growing BNPL sector, Afterpay differs significantly from other BNPL participants in this regard.

The nascent BNPL sector is still small and rapidly evolving. According to analysis by AlphaBeta, it represents less than 1% of total payments in Australia and consists of a wide variety of products and competitors. By comparison, the dominant international credit cards were launched in Australia in 1984 and were not subject to Reserve Bank of Australia (RBA) regulation until 2004, by which time they represented around 36% of spending.

In the short period since its inception, the BNPL sector has made significant strides in self-regulation; unilaterally raising standards as well as working cooperatively with regulators. This includes the development of a Code of Practice (BNPL Code) that will be implemented on 1 March 2021, close engagement on two dedicated ASIC BNPL industry reviews and the ongoing Senate Committee inquiry into FinTech and RegTech (Senate Inquiry).

The evolution of payments in the economy means that new platforms such as Afterpay cannot simply be classified as traditional payment systems. Although Afterpay operates

as a payment method, Afterpay is predominantly a budgeting and marketing platform which includes other services. This includes access to a new budget-focused customer base, reduced fraud risk, higher order values, dedicated marketing campaigns and a referral program that provides over 20 million customer referrals per month. When these broader benefits are considered, Afterpay more closely resembles marketing referral services such as Google and Facebook, and does so at a much lower cost.

The table at Appendix 1 compares the merchant and consumer benefits of traditional payment systems compared with Afterpay and other platforms.

As the table demonstrates, merchants receive benefits by partnering with Afterpay well beyond that of typical payment systems. It is, therefore, important for policy making to take a broad view, and for it to be led by policy makers rather than individual regulators. Parliamentary processes that are driven by central policy agencies have a greater ability to more holistically consider the policy settings that should be in place. In contrast, regulators are constrained by the limits of their legal jurisdictions, and consider policy issues through the narrower prisms of their mandates.

Diversity of the BNPL sector

Not only has Afterpay's business model been purposefully designed to be different from traditional credit providers and those institutions whose products are currently regulated as payment systems, it is also different to other BNPL players. The Australian Securities and Investments Commission (ASIC) has recognised the diversity of the BNPL industry, finding that the market for these arrangements is diverse, evolving, and growing rapidly.¹

Afterpay has intentionally designed a merchant sponsored model that offers our customers a free service. Merchants pay Afterpay not for facilitating a transaction but for assuming risk on their behalf and providing a marketing channel for new and returning customers. As a result, the cost of Afterpay is not borne by the consumer which in turn drives positive merchant outcomes.

Importantly, companies in the BNPL industry earn their revenue in markedly different ways. In Afterpay's case, we make the vast majority of our revenue from the fees we charge merchants. This is a fundamental part of our business model. Afterpay's business model and profitability rely on consumers paying on time and therefore not incurring any charges. Consumers that do not pay on time are suspended from the Afterpay service. And although Afterpay charges late fees, these are capped both in dollar terms (\$68) and as a percentage (25%) of the transaction amount - with the cap being the lower of the dollar amount or percentage.

Currently, Afterpay earns about 14% of its revenue from consumer fees, compared with much higher percentages for our competitors (up to 61% for one of our key competitors)² and even higher for credit cards. This again reflects the nature of our business model: our profitability relies on only providing our service to consumers who have the ability to pay us back on time across four instalments.

¹ <https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>

² <https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>, at page 9.

While other BNPL providers would also argue that they rely on customers paying them back on time, their business models are different in important ways. Other providers do not require customers to repay a BNPL purchase in a defined period. Customers may extend repayment periods indefinitely so long as minimum repayments are met and/or a fixed monthly fee is paid.

Other BNPL providers provide interest-free loans to cover very significant purchases - from \$2,000 all the way up to \$30,000. These business models - while still classified as BNPL - are based on substantially different arrangements.

The implications of this diversity are significant for policymakers and regulators. As new business models are created through innovation, regulation needs to be attuned to the different economic drivers of heterogeneous business models. For example, on the issue of merchant surcharging, current policy in Australia is predicated on business models that charge the consumer - such as via monthly or annual fees, or interest charges on revolving debt. In contrast, Afterpay's business model - and its success with merchants and consumers - is underpinned by an approach that does not charge the consumer. This means that current surcharging policy is not capable of simple extension to the diverse BNPL industry, without causing significant unintended consequences.

The evolution of the payments system

Historically, the payments system was made up of clearly defined payment systems. This is no longer the case. And while there are new platform business models that appear to be facilitating payments (or appear to be payment methods), the regulation of platforms involves much broader considerations that have typically been applied to traditional payment systems.

The question of what constitutes a payment system has both legal and practical dimensions.

From a legal perspective, Afterpay noted in its submission to the RBA Review of Retail Payments Regulation: Issues Paper (RBA Review) in January 2020, that it does not consider itself to be a payment system as defined in the legislation. We explore this legal issue further in Appendix 1 of our submission.

However, beyond the legal question of whether Afterpay is a payment system, Afterpay is also not a payment system because of how our platform operates in practice. Afterpay's business model positions it as a service that sits above existing payment systems. Customers choose to use Afterpay as a platform because its value proposition is not limited to being a mere payment system. The payment component of the Afterpay transaction is a small component of the overall services it provides and more relevantly the value it adds to consumers and merchants alike. Indeed, Afterpay allows consumers to pay for Afterpay transactions while using traditional payment methods and Afterpay interacts with traditional payment systems to deliver its overall service.

Afterpay involves bilateral relationships between Afterpay and consumers on the one hand, and Afterpay and merchants on the other. Through this approach we provide an intentionally free service to consumers, and a powerful sales and marketing platform for

merchants in exchange for a negotiated merchant transaction fee. Our merchant fee includes all transaction processing costs, and because Afterpay is the merchant of record on purchases made by customers, our size and scale enables us to leverage reduced processing costs.

As a marketing platform, Afterpay competes with other customer acquisition channels including Google, Facebook, Amazon and smaller players such as Unidays.³ The fees charged by these companies for customer referrals range from 10 to 15 per cent, which are significantly higher than the typical Afterpay merchant fee. As with these other platforms, Afterpay includes payment processing as a component of its platform.

If Afterpay is a payment system, then it logically follows that UberEats and Google are payment systems as well. However, this amounts to taking a very broad view of what constitutes the payments system. It is hard to “develop an overall vision, strategy and principles” for a payments system that is made of highly diverse players, with different business models, sizes, economic drivers and impacts. Given this, policy should err on the side of limiting intervention unless clear harms are demonstrated. It should also look to ensure historical regulatory constructs and outdated regulatory definitions are not inadvertently hindering innovative business models that will ultimately benefit the community.

At the same time, as innovation creates new business models, it is important for the regulatory architecture of the payments system to be designed in a way that addresses the potential harms that might arise, in a way that is proportionate, flexible and supportive of innovation.

As the payments system regulator, with an appropriately systemic focus, the RBA has generally only formally exercised its powers in relation to the large and dominant traditional payment systems. The RBA has also expressed a preference for reaching voluntary agreements with industry participants, rather than through the formal use of its powers. Afterpay supports this approach, and supports the RBA continuing to have a key role in relation to the key players and infrastructure of the payments system. This includes consideration of the role that large and dominant global technology companies play in facilitating access to payments.

However, Afterpay would be concerned with the RBA going beyond its core mandate, as this can create particular risks for new and innovative FinTech businesses that are creating new business models that do not fit neatly within existing regulatory mandates. One way to ensure this doesn't occur is by adopting the UK regulatory approach (described further below).

³ Unidays is a marketplace for merchants to sell platforms and services to a network of university students, enabling new customer acquisition and providing a referral network.

Supporting innovative businesses

The Issues Paper has asked:

6. What are the required features of a future regulatory architecture to ensure it is well-placed to meet the needs of end-users in relation to emerging innovations in the payments system such as those discussed above? Are changes needed to existing structures, roles and mandates involved in the governance of the system?

7. What regulatory architecture is needed to provide support and clarity for businesses – particularly new entrants – to invest and innovate in our payments system?

Afterpay believes a number of factors are relevant to these questions, including:

- The importance of policy certainty
- The ability of new firms to engage with regulators proactively

At present, the ability of the RBA to designate a payment system unilaterally, coupled with broad ranging powers over designated payment systems, is a source of potential policy uncertainty. There is potential uncertainty over what types of business models are captured by the definition of 'payment system', and uncertainty about how the RBA might seek to exercise its very broad powers in relation to those business models that it considers to fall within its jurisdiction.

In relation to the BNPL sector, the RBA has more recently acknowledged the importance of having guidance from the Government about whether new policy should be created. In reaching this position, the RBA Governor said⁴:

The Board's preliminary view is that the BNPL operators in Australia have not yet reached the point where it is clear that the costs arising from the no-surcharge rule outweigh the potential benefits in terms of innovation. So consistent with its philosophy of only regulating when it is clear that doing so is in the public interest, the Board is unlikely to conclude that the BNPL operators should be required to remove their no-surcharge rules right now.

Even the largest BNPL providers still account for a small proportion of total consumer payments in Australia, notwithstanding their rapid growth. New business models are also emerging, including some that facilitate payments using virtual cards issued under the designated card schemes that are subject to the existing surcharging framework. In addition, the increasing array of BNPL providers is resulting in competitive pressure that could put downward pressure on merchant costs.

The Board expects that over time a public policy case is likely to emerge for the removal of the no-surcharge rules in at least some BNPL arrangements. Some of the BNPL operators are growing rapidly and becoming widely adopted by merchants, particularly in certain sectors. As part of the Bank's ongoing

⁴ <https://www.rba.gov.au/speeches/2020/sp-gov-2020-12-07.html>

consideration of this issue, Bank staff will be discussing with industry participants possible criteria or thresholds for determining when no-surcharge rules should no longer be allowed.

If the point is reached where the Board's view is that the public interest would be served by the removal of a no-surcharge rule, the Board's preference would be to reach a voluntary agreement with the relevant provider. This would be similar to the approach adopted with American Express and PayPal. In the event that this were not possible, the Bank would discuss with the Australian Government the best way to address the issue. More broadly, as I discussed above, the current Treasury review of the regulatory architecture provides an opportunity to look holistically at this issue and whether the existing legislation and regulatory provisions could be amended to better reflect our modern and dynamic payments ecosystems.

Afterpay welcomes these comments from the RBA Governor, particularly as they recognise that the best way to address this policy issue may not be through the application of traditional regulatory approaches.

In addition to moving to the UK regulatory approach described further below, Afterpay also believes that there is an opportunity for regulators to take a more collaborative and proactive approach in engaging with innovative businesses. While Afterpay has now grown from an early-stage startup to a significant business in multiple jurisdictions, the continued fast growth of Afterpay and the fact it is a disruptor means that it can require a different type of engagement with regulators and policy makers than established institutions. In this regard, we note the Government's Statement of Expectations to the Payments System Board:⁵

"To maximise the benefits of this digital revolution, the Government's strong expectation is that the PSB create a regulatory environment in which the payments system is allowed, where appropriate, to self-adapt to innovation and change."

"The Government's preference is for principles-based regulation, which identifies the desired outcomes and allows industry participants to achieve the outcomes in their own way, rather than prescribing specific conduct."

Afterpay believes that regulators have an opportunity to be more willing to provide regulatory guidance on new and emerging areas, with a focus on consumer outcomes rather than whether technical compliance can be achieved. We explore this issue in more detail in our submission to the Senate Inquiry.⁶

The recent Senate Inquiry has provided a great opportunity to strengthen Australia as a destination for FinTech and RegTech businesses. Several recommendations within the

⁵ <https://www.rba.gov.au/about-rba/boards/psb/psb-statement-of-expectations.html>

⁶ <https://www.afterpaytouch.com/images/21012020-Afterpay-submission-to-Senate-FinTech-and-RegTech-inquiry.pdf>

Senate Inquiry's Interim Report⁷ are directly relevant to helping promote a culture of innovation and competition, including

- Recommendation 13: that the Australian Government provide the Council of Financial Regulators (CFR) with a competition mandate as advice to the government and that the CFR regularly report on competitive dynamics in the Australian financial services market.
- Recommendation 14: that the Australian Government establish a framework for the CFR, supported by Austrade, to regularly consider and report on Australia's external competitive position in financial services, including measuring technology adoption and innovation.
- Recommendation 16: that the Australian Government establish a culture of innovation and competition in financial services by supporting self-regulation where innovative products emerge, whilst ensuring strong consumer protection.

These recommendations are also aimed at achieving holistic policy making, which is critically important, and can also be enabled by giving the Treasury a greater role in setting policy for the payments system (which we discuss further below).

International approaches on policy making

The Issues Paper notes the creation of the Payments System Regulator (PSR) in the UK. In the UK, the Government is responsible for “designating” a payment system, which then brings it into the scope of the PSR. Whereas in Australia, the regulator (RBA) has powers to designate a payment system unilaterally if it is in the public interest to do so.

The UK approach allows the government to focus the regulator's attention where it is required and provides flexibility to bring emerging payment systems into scope. However, the PSR cannot unilaterally decide to regulate a non-designated payment system.

This distinction is an important one in the context of ensuring holistic policy making which should take consumer benefits into account. In 2019, the RBA announced that it would review the application of ‘no surcharge’ rules in the BNPL sector, by applying its existing mandate and approach to this policy issue.

In contrast, the UK approach mitigates the risk of policy making to be too narrowly cast, as the Government is responsible for determining the payment systems that are subject to a particular regulator's jurisdiction.

In relation to the Government's participation in the regulation of the payments system, the Issues Paper notes:

Under the current regulatory framework, the RBA and other regulators have broad discretion in how they pursue their policy objectives, which are generally set out in legislation. While the government has the power to legislate and modify

⁷ https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024366/toc_pdf/SelectCommitteeonFinancialTechnologyandRegulatoryTechnology.pdf;fileType=application%2Fpdf

the framework, it is generally not involved in directing future payment policy directions or prescribing how the regulatory framework is enforced.

...

However, the government has oversight of the operations of regulators through reports submitted to the government (such as the PSB's Annual Report), appearances of the regulators at House and Senate Committees and ad-hoc reviews.

Consistent with our view that Australia should adopt the UK's approach to the designation of payments systems, we consider that there is an opportunity for the Government to take a greater role in directing future payments system policy, particularly when it comes to new and innovative businesses. Although the RBA and other regulators are subject to parliamentary oversight, this does not enable policy formulation to be considered in detail.

Instead, we believe that the Treasury should be formally empowered to oversee the policy settings for the payments system, including in designating payment systems to bring them within the mandate of individual regulators. This approach builds on the Government's recent decision to move responsibility for oversight of the Consumer Data Right (CDR) regime from the Australian Competition and Consumer Commission (ACCC) to the Treasury.

The regulatory architecture for the payments system would benefit from Treasury oversight in several ways: the Treasury is a central policy agency, it is expected to anticipate and analyse policy issues with a whole-of-economy perspective, understand government and stakeholder circumstances, consumer interests and respond rapidly to changing events and directions.

Importance of self-regulation

The Financial Services Royal Commission revealed the need for smarter and more fit-for-purpose regulation and self-regulation as a way to better ensure strong consumer outcomes. Effective self-regulation can and should play an important role in raising industry standards in the interests of consumers.

Effective self-regulation has many benefits, including:

- It is more flexible and adaptable than formal regulation, and allows industry participants to quickly respond to emerging risks in a market sector. The process of implementing legislative change is always time consuming, but particularly so in the financial services area post-Royal Commission.
- It can address potential consumer harms in a tailored and more effective way than regulation: because self-regulatory codes are created within sub-sectors of the financial services industry (such as retail banking, mutual banking, insurance, insurance broking, life insurance, insurance in superannuation, etc) the provisions within such codes can directly address the conduct of businesses and impact on consumers within the relevant sub-sector.

- It can promote confidence by consumers and other stakeholders in the conduct and reputation of an industry sector, particularly where self-regulatory initiatives go above and beyond what is required under the law.
- It can complement and enhance the existing regulatory framework, including by giving concrete and practical meaning to principles-based legal provisions. For example, codes of conduct can elaborate on what it means to treat consumers fairly, or identify the practical steps that businesses can take to ensure they are distributing their products to an appropriate target market.

The BNPL Code has been recognised as an important initiative by the Senate Inquiry and ASIC. The Senate Inquiry found that:

The development of an industry code of practice in the Buy Now Pay Later (BNPL) sector is an example of where industry is working constructively to respond to stakeholder concerns and seek to achieve appropriate regulation that benefits consumers.⁸

More recently, ASIC's review of the BNPL sector found that:

Industry codes can play an important role in delivering benefits to both consumers and those who are bound by and must comply with the provisions of the code to which they subscribe. An effective code can help to improve consumer confidence in a particular industry.⁹

Self regulation in payments

The regulatory architecture of the payments system already includes self-regulatory arrangements and Afterpay, in principle, supports this. While we acknowledge that the effectiveness of self-regulation can be limited in industries or sectors where competition is not strong and barriers to entry are high, these are not characteristics of the BNPL sector.

When the *Payment Systems (Regulation) Act 1998* (PSRA) (enabling the current surcharging regulations) was enacted, electronic credit card payments were identified as a broadly positive and rapidly growing component of the payments system in Australia. At that time, however, concerns regarding transparency, price signalling and competitive market forces were raised as important motivations for regulatory intervention - specifically regarding interchange fees and surcharging.

These concerns reflected the market dominance within the electronic payments sector of the two major credit card schemes. Point of sale payment infrastructure and complex transfer and settlement arrangements meant the sector was viewed as lacking transparency, potentially impacting user choice, new market entry, overall competition and, therefore, price efficiency in the sector.

⁸ https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024366/toc_.pdf/SelectCommitteeonFinancialTechnologyandRegulatoryTechnology.pdf;fileType=application%2Fpdf, at page 216.

⁹ <https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>, at page 22.

Unlike the traditional payment systems, Afterpay's business model is not structured to drive up merchant fees. Afterpay has a single product that operates in the same way for all customers. Afterpay does not offer incentives for some customers (such as reward points, balance transfer offers, lifestyle rewards, etc) which need to be funded by higher fees on merchants and high interest rates for revolving customers. Merchants also do not face unpredictable costs when accepting Afterpay as a payment method, unlike with credit cards where different credit cards can have significantly higher merchant fees (such as premium credit cards and internationally-issued credit cards). Afterpay's merchant fees have remained stable over time.

As a result, self-regulation is likely to be more effective in the evolving BNPL sector than was historically the case for the traditional card schemes.

Conclusion

Thank you for the opportunity to make this submission. We look forward to the outcomes of this review. Please do not hesitate to contact us if you require further input or clarification.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'A. Eisen', with a stylized flourish underneath.

Anthony Eisen
Co-Founder & Chief Executive Officer
Afterpay Limited

Appendix 1 - Comparison of payment systems with platforms

	Debit	Credit	afterpay	UberEats	eBay	Amazon
Issuer of receipt	Merchant (merchant name appears on transaction record)		Service (Service name appears on transaction record)			
Payment facilitation	• Yes	• Yes	• Via existing card schemes	• Via existing card schemes	• Via existing card schemes	• Via existing card schemes
Merchant cost	• Regulated fee for payment processing	• Regulated fee for payment processing	• Negotiated fee for bundled platform services	• Negotiated fee for bundled platform services	• Negotiated fee for bundled platform services	• Negotiated fee for bundled platform services
Spending tracking & budgeting support	• Tracks spending through bank app	• Tracks spending and credit card balance through bank app	• Tracks spending and future payments	• Tracks historical spending	• Tracks historical spending	• Tracks historical spending
Loyalty program and/or membership benefits	• Loyalty schemes include 'Visa offers' and 'MasterCard priceless'	• Loyalty schemes include 'Visa offers' and 'MasterCard priceless'	• Pulse Rewards - benefits driven by responsible spending			• Membership benefits including free same day delivery, exclusive savings and access to daily deals
Delayed settlement		• Revolving line of credit	• Payment in four, fortnightly instalments			
Delayed settlement - consumer cost		• APR - typically around 20%	• Nil cost (fraud and credit risk borne by Afterpay)			
Consumer marketplace			• App connects users with 37,000 merchants	• App connects users with 25,000 restaurants	• App connects users with 40,000 merchants	• App connects users with over 10,000 merchants
Revenue generator for merchants			• Increases purchases and order value of existing customers • Increases customer base	• Increases purchases and order value of existing customers • Increases customer base	• Increases purchases and order value of existing customers • Increases customer base	• Increases purchases and order value of existing customers • Increases customer base
Reduction in marketing costs for merchants			• Lower marketing costs: Shop Directory referrals and targeted marketing campaigns	• Lower marketing costs	• Lower marketing costs	• Lower marketing costs (e.g. Amazon Prime Day)
Reduction in operating costs for merchants			• Lower operating costs (e.g. lower return costs)	• Reduction in delivery costs	• Digital tools to build online storefront	• Reduction in delivery costs

Appendix 2 - Why Afterpay is not a payments system under the PSRA

Under the PSRA, the Payments System Board (PSB) has power to determine standards governing individual payment systems in Australia. In setting these standards, the PSB is charged with maintaining the stability, competitiveness and efficiency of the overall Australian payments system.

Under the PSRA, “payment system” is defined to mean a “funds transfer system that facilitates the circulation of money, and includes any instruments and procedures that relate to that system”.

In the Explanatory Memorandum to the PSRA,¹⁰ regulation of payment systems is grounded in the need to ensure the process of “clearing and settling” does not result in systemic risk to the economy. The PSRA’s regulatory purpose is described as giving the RBA “additional legislative powers to regulate clearing and settlement systems, to control risk in the financial system and to promote efficiency and competition in the public interest”.¹¹

The meaning of “payment system” was considered by the Federal Court in the 2003 *Visa* case¹². According to that judgement, the combined clearing, settlement and transfer of funds through the RBA’s exchange settlement accounts comprise a “payment system”. Other aspects of these four party card schemes, including particular payment flows that necessarily occur within such a system, were considered “instruments and procedures that relate to that system”.

In contrast, the Afterpay platform is constituted by a series of bilateral relationships, rather than the operation of a broader system that involves the clearing, settlement and transfer of net payments between multiple parties.

The Afterpay platform is made up of two distinct features involving separate bilateral arrangements:

- A bilateral arrangement whereby Afterpay provides a form of credit to individual consumers, and
- A separate bilateral arrangement between Afterpay and a merchant, where Afterpay agrees to provide a range of services, including making a payment to a merchant for the transaction amount of the consumer’s purchase (less applicable fees).

This means that the Afterpay platform is not a “funds transfer system” because it does not facilitate the transfer of funds from one party to another.

Likewise, the simple disbursement of loan funds, which is a common procedure across many finance products in the Australian market (including home loans and personal

¹⁰ Explanatory Memorandum, <https://www.legislation.gov.au/Details/C2004B00343/6374c997-7afb-4cd9-b37c-87e2af1211a5>, page 4.

¹¹ Explanatory Memorandum, page 7.

¹² *Visa International Service Association and Another v Reserve Bank of Australia* [2003] FCA 977.

loans), is not of itself the type of funds transfer that facilitates the “circulation of money”. It is simply a bilateral payment by a lender at the direction of its borrower.

This is consistent with the position in the United Kingdom (UK) and Europe. Within the context of the revised Payment Services Directive, the concept of “payment service” closely aligns with aspects of a payment system under the PSRA. The UK regulator, the Financial Conduct Authority (FCA) has provided guidance in relation to what it considers comprises a payment service. It states that in its view:

“mortgage or loan accounts do not fall within the scope of the regulations. This is on the basis that the simple act of lending funds or receiving funds by way of repayment of that loan does not amount to provision of a payment service.”¹³

The alternative position would mean that a significant number of arrangements would fall within the definition of a “payment system” under the PSRA, an outcome that is inconsistent with the intended mandate of the PSB.

¹³ <https://www.handbook.fca.org.uk/handbook/PERG/15/3.html>