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The International Comparative Legal Guide to:

Fintech 2018

2nd Edition

A practical cross-border insight into Fintech law

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EDITORIAL

Welcome to the second edition of *The International Comparative Legal Guide to: Fintech*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of fintech.

It is divided into two main sections:

Three general chapters. These chapters provide an overview of artificial intelligence in fintech, the regulation of cryptocurrency as a type of financial technology, and fintech and private equity.

Country question and answer chapters. These provide a broad overview of common issues in fintech laws and regulations in 44 jurisdictions.

All chapters are written by leading fintech lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Rob Sumroy and Ben Kingsley of Slaughter and May for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Australia

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1 The Fintech Landscape

1.1 Please describe the types of fintech businesses that are active in your jurisdiction and any notable fintech innovation trends of the past year within particular sub-sectors (e.g. payments, asset management, peer-to-peer lending or investment, insurance and blockchain applications).

Australia has seen a proliferation of active fintech businesses over the last year. The estimated number of fintechs operating in Australia is now approaching 600, more than double the number since 2015.

Insurance technology has had exponential interest given its possible applications in disrupting the individual sections of the insurance value chain, augmenting the existing processes of underwriting risk and predicting loss, and improving the existing capabilities of insurers, reinsurers, intermediaries and service providers.

As compliance costs increase, there has also been an increased focus on regulatory technology, or regtech, and the opportunities to automate regulatory reporting, manage compliance and ensure clarity regarding how regulation is interpreted.

There has also been sustained attention on blockchain and distributed ledger technology (**DLT**). Fintech businesses have begun moving beyond proof-of-concept to formalising actual use cases for DLT such as managing supply chains, making cross-border payments, trading derivatives, managing assets and managing digital currency exchanges. Notably, the Australian Securities Exchange (**ASX**), Australia's primary securities exchange, recently announced that it will adopt blockchain-based technology for its clearing and settlement process to replace its current system.

Businesses have also begun exploring new automated service methods, such as the use of robo-advisors, for distributing financial advice in more cost-effective ways.

1.2 Are there any types of fintech business that are at present prohibited or restricted in your jurisdiction (for example cryptocurrency-based businesses)?

At the time of writing, there have not been any specific prohibitions or restrictions.

2 Funding For Fintech

2.1 Broadly, what types of funding are available for new and growing businesses in your jurisdiction (covering both equity and debt)?

Equity Funding

Businesses can seek funds from private investors (e.g., through private placement or initial public offering), venture capitalists, the Australian Government and through crowdfunding.

On 29 September 2017, the *Corporations Amendment (Crowd-sourced Funding) Act 2017* (Cth) (**Act**) came into effect. The Act establishes a regulatory framework for crowd-sourced equity funding (**CSEF**) by public companies to retail investors, reducing regulatory barriers to investing in small and start-up businesses. The Act also creates certain licensing obligations for CSEF intermediaries (i.e., the persons listing CSEF offers for public companies).

The Act also introduces further exemptions for persons operating markets and clearing and settlement facilities by expanding the types of exemptions which may be given from licensing regimes that are otherwise required to operate those facilities. These exemptions will provide a means by which any person providing a platform for secondary trading can seek an exemption with tailored conditions from more onerous licensing requirements.

The CSEF framework was also developed by the *Corporations Amendment (Crowd-sourced Funding) Regulations 2017* (Cth) (**Regulations**). These Regulations prescribe many of the essential details regarding the content and requirements for CSEF offer documentation and clarify the role and obligations of a CSEF intermediary.

The Australian Securities and Investments Commission (**ASIC**), Australia's corporate regulator, has released Regulatory Guides 261 and 262 to assist companies seeking to raise funds through CSEF and intermediaries seeking to provide CSEF services respectively.

The Government has moved to extend the reach of its CSEF reforms to proprietary companies through the introduction to Parliament of the *Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017* (Cth). The Treasury is currently consulting on draft regulations providing detail on the expansion of the CSEF regime to proprietary companies.

Debt Funding

The industry has asked the Government to explore the potential for the existing crowdfunding framework to extend to debt funding and the Government has previously indicated it intends to consult on this. Debt financing is less common than equity financing in the Australian fintech sector; however, businesses can approach financial institutions, suppliers and finance companies in relation to debt finance.

Initial Coin Offerings (ICOs)

ICOs are an increasingly popular method of funding for blockchain or cryptocurrency-related projects, where token issuers offer tokens in return for funds. In September 2017, ASIC released *INFO 225 Initial coin offerings to offer guidance on the potential application of the Corporations Act 2001* (Cth) (**Corporations Act**) to ICOs. Entities should note that the Corporations Act may apply regardless of whether the ICO was created and offered from Australia or overseas.

Generally, ASIC has indicated that the legal status of an ICO depends on the ICO's structure, operation, and the rights attached to the tokens offered in the ICO. Tokens offered during the ICO may trigger particular licensing and disclosure requirements if the tokens represent financial products (e.g., interests in managed investment schemes, securities, derivatives or non-cash payment facilities). Any company operating a cryptocurrency exchange will also be required to hold an Australian Market Licence or be exempt from market licensing requirements, if the tokens traded on the exchange constitute financial products.

ICOs will also be subject to general law and the *Australian Consumer Law*, which includes a general prohibition on misleading or deceptive conduct, in relation to the offer of services or products.

Asia Region Funds Passport and Corporate Collective Investment Vehicles

The Commonwealth Government has recently released draft legislation proposing the Asia Region Funds Passport (**Passport**) and Corporate Collective Investment Vehicle (**CCIV**). The draft legislation proposes amendments to the *Corporations Act 2001* (Cth). Enactment of the Passport and the CCIV may lead to new financing opportunities for fintech businesses.

The Passport is a region-wide initiative designed to facilitate the offer of interests in certain collective investment schemes (**CIS**), established in Passport member economies, to investors in other Passport member economies. It aims to provide Australian fund managers with greater access to economies in the Asia-Pacific region by reducing existing regulatory hurdles.

The CCIV scheme creates a new type of investment vehicle, which will allow Australian fund managers to pursue overseas investment opportunities through a company structure. It is intended to complement the Passport by making Australian funds more accessible to foreign investors. The objective in developing the CCIV is to align Australia's legal funds structures with structures commonly found in other jurisdictions.

Unlike comparable jurisdictions, the Australian funds market is dominated by unit trusts. However, corporate and limited partnership investment vehicles are the norm throughout the Asia-Pacific region. The CCIV will provide an internationally recognised investment vehicle which will be able to be marketed to foreign investors (including through the Passport).

There are concerns that the reforms will add extra complexity, given the far-reaching potential changes to corporate, partnership and tax laws. At the time of writing, the laws establishing the Passport and CCIV are yet to be enacted.

2.2 Are there any special incentive schemes for investment in tech/fintech businesses, or in small/medium-sized businesses more generally, in your jurisdiction, e.g. tax incentive schemes for enterprise investment or venture capital investment?

Incentives for investors

(1) **Early stage innovation company incentives**

Incentives are available for eligible investments made in start-ups known as Early Stage Innovation Companies (**ESICs**), which are generally newly incorporated entities with low income and expenses.

Investments of less than 30% of the equity in an ESIC would generally qualify for a 20% non-refundable tax offset (capped at AUD$200,000 per investor including any offsets carried forward from the prior year's investment) and a 10-year exemption to capital gains tax (**CGT**).

(2) **Eligible venture capital limited partnerships**

Fintech investment vehicles may be structured as venture capital limited partnerships (**VCLPs**) or early stage venture capital limited partnerships (**ESVCLPs**), and receive favourable tax treatment for venture capital investment.

For VCLPs, benefits include tax exemptions for foreign investors (limited partners) from CGT on their share of profits made by the partnership, and concessional treatment of the fund manager's carried interest in the partnership. For ESVCLPs, the income tax exemption applies to both resident and non-resident investors (where the non-resident's home country has a double tax agreement with Australia), plus a 10% non-refundable tax offset available for new capital invested.

Incentives for Fintechs

The R&D Tax Incentive programme is available for entities incurring eligible expenditure on R&D activities, which includes certain software R&D activities commonly conducted by fintechs. Claimants under the R&D Tax Incentive may be eligible for:

(a) *Small businesses (less than AUD$20 million aggregated turnover)*: a 43.5% refundable tax offset.

(b) *Other businesses*: a 38.5% non-refundable tax offset.

2.3 In brief, what conditions need to be satisfied for a business to IPO in your jurisdiction?

The ASX sets out 20 conditions to be satisfied in its Listing Rules. Briefly, these include the entity having at least 300 non-affiliated security holders each holding the value of at least AUD$2,000 and the entity satisfying either the profit test or the assets test (which requires particular financial thresholds to be met).

2.4 Have there been any notable exits (sale of business or IPO) by the founders of fintech businesses in your jurisdiction?

In one of the largest fintech deals in Asia during the first half of the year, Rubik Financial was acquired by Swiss company, Temenos for over AUD$70 million. Rubik is a leading Australian fintech company that delivers innovative banking, financial services and collections software solutions. Rubik's clients include Australia's leading financial institutions (e.g., all four major Australian banks).

3 Fintech Regulation

3.1 Please briefly describe the regulatory framework(s) for fintech businesses operating in your jurisdiction, and the type of fintech activities that are regulated.

Fintech businesses that carry on a financial services business in Australia need to hold an Australian financial services licence (**AFSL**), or qualify for an exemption. The definitions of financial service and financial product under the Corporations Act are broad and will often capture investment, marketplace lending, crowdfunding platforms and other fintech offerings. Similarly, fintech businesses that carry on a consumer credit business in Australia need to hold an Australian credit licence (**ACL**) or qualify for an exemption.

In December 2016, ASIC made certain class orders establishing a fintech licensing exemption and released *Regulatory Guide 257*, which details ASIC's framework for fintech businesses to test certain financial services, financial products and credit activities without holding an AFSL or ACL by relying on the class orders (referred to as the regulatory sandbox). There are strict eligibility requirements for both the type of businesses who can enter the regulatory sandbox and the products and services that qualify for the licensing exemption. Once a fintech business accesses the regulatory sandbox, there are restrictions on how many persons can be provided with a financial product or service and caps on the value of the financial products or services which can be provided.

3.2 Are financial regulators and policy-makers in your jurisdiction receptive to fintech innovation and technology-driven new entrants to regulated financial services markets, and if so how is this manifested?

The Government and regulators have generally been responsive to facilitating the development of fintech. More broadly there has been the AUD$1.1 billion National Innovation and Science Agenda (**NISA**) promoting commercial risk taking and encompassing tax incentives for early-stage investment in fintech companies, changes to the venture capital regime, insolvency law reforms and the establishment of the FinTech Advisory Group to advise the Treasurer and the launch of innovation hubs by ASIC and Australian Transaction Reports and Analysis Centre (**AUSTRAC**).

ASIC's Innovation Hub is designed to foster innovation that could benefit consumers by helping Australian fintech start-ups navigate the Australian regulatory system. It provides tailored information and access to informal assistance intended to streamline the licensing process for innovative fintech start-ups. AUSTRAC's Fintel Alliance also has an Innovation Hub targeted at improving the fintech sector's relationship with Government and regulators. The Hub includes a regulatory sandbox in which fintech businesses can test financial products and services without risking regulatory action or costs by AUSTRAC.

The framework relating to ASIC's regulatory sandbox has been subject to review. The Government recently closed consultation on draft legislation and regulations outlining the framework for an enhanced regulatory framework that allows businesses to test a wider range of products and services for a longer period of time. ASIC has also released a consultation paper suggesting that no changes to its existing fintech licensing exemption be made.

ASIC has released *Regulatory Guide 255: providing digital financial product advice to retail clients* which details issues that digital advice providers need to consider generally, during the AFSL application stage and when providing digital financial product advice to retail clients. The guide should be considered by any fintech business that provides digital or hybrid advice and is considering operating in Australia, to ensure that licensing requirements can be met.

Fintech businesses should also be aware that in March 2017, ASIC released *Information Sheet 219 Evaluating distributed ledger technology* for both existing licensees and new market entrants. The information sheet informs businesses considering operating market infrastructure or providing financial or consumer credit services using DLT or how ASIC will assess whether a proposed DLT solution is compliant with licence conditions.

The Government has also committed AUD$8 million to an Incubator Support Program to assist innovative start-ups by providing funding, mentoring, resources and business network access.

3.3 What, if any, regulatory hurdles must fintech businesses (or financial services businesses offering fintech products and services) which are established outside your jurisdiction overcome in order to access new customers in your jurisdiction?

Regulatory hurdles to overcome in order to access Australian customers include satisfaction of requirements relating to carrying on a business in Australia (which includes the requirement to incorporate a local subsidiary or register a branch office if carrying on a business from outside Australia) and meeting licensing requirements, or qualifying to rely on a licensing exemption. Broadly, these regulatory hurdles are determined by the extent to which the provider wishes to establish an Australian presence, the types of financial products and services provided, and the type of Australian investors targeted.

4 Other Regulatory Regimes / Non-Financial Regulation

4.1 Does your jurisdiction regulate the collection/use/transmission of personal data, and if yes, what is the legal basis for such regulation and how does this apply to fintech businesses operating in your jurisdiction?

The Privacy Act

In Australia, the *Privacy Act 1988* (Cth) (**Privacy Act**) generally regulates the handling of personal information by Federal government agencies and private sector organisations with an aggregate group revenue of at least AUD$3 million. The Privacy Act does apply to some businesses (e.g., credit providers and credit reporting bodies) regardless of turnover.

The Privacy Act includes 13 Australian Privacy Principles (**APPs**), which create obligations on the collection, use, disclosure, retention and destruction of personal information. The APPs provide for personal information to be de-identified and the Office of the Australian Information Commissioner (**OAIC**), which administers the Privacy Act, has published guidance on this.

Consumer data access and use

The Productivity Commission has also recently handed down their final report on Data Availability and Use, which considered the introduction of a comprehensive right for consumers to access and use their data. Recommended reforms in the report are aimed at moving from a system based on risk aversion and avoidance, to one based on transparency and confidence in data processes. Reforms proposed by the Productivity Commission include:

- the proposed introduction of a new Data Sharing and Release Act and a National Data Custodian to guide and monitor new access and use arrangements;
- a new Comprehensive Right for consumers to give individuals and small/medium businesses opportunities for active use of their own data;
- for datasets designated as national interest, all restrictions to access and use contained in a variety of national and state legislation, and other programme-specific policies, replaced by new arrangements under the Data Sharing and Release Act; and
- a suite of Accredited Release Authorities to be sectoral hubs of expertise and enable the ongoing maintenance of, and streamlined access to, National Interest Datasets as well as to other datasets to be linked and shared or released.

As part of the 2017–18 Budget, the Government has announced an inquiry to recommend the best approach to implementing an open banking regime by which consumers could exercise greater access and control over their banking data. The Open Banking Review has released an Issues Paper examining what data should be shared and between whom, how data should be shared, how to ensure data is kept secure, what regulatory framework is needed to give effect to and administer the regime, and the possible implementation of an open banking regime. The Open Banking Review will be reporting in 2018.

4.2 Do your data privacy laws apply to organisations established outside of your jurisdiction? Do your data privacy laws restrict international transfers of data?

The Privacy Act has extraterritorial operation and extends to an act undertaken outside Australia and its external territories where there is an 'Australian link' (i.e., where the organisation is an Australian citizen or organisation) or carries on a business in Australia and collects or holds personal information in Australia.

Under the framework for cross-border disclosure of personal information, APP entities must ensure that overseas recipients handle personal information in accordance with the APPs, and the APP entity is accountable if the overseas recipient mishandles the information. The APP entity is also only to disclose information for the primary purpose for which it was collected.

4.3 Please briefly describe the sanctions that apply for failing to comply with your data privacy laws.

OAIC has a range of enforcement powers, including:

- the power to make a determination requiring the payment of compensation for damages or other remedies, such as the provision of access or the issuance of an apology (enforceable by the Federal Court or Federal Magistrates Court);
- acceptance of enforceable undertakings;
- seeking civil penalties of up to AUD$340,000 for individuals and up to AUD$1.7 million for companies; and
- seeking an injunction regarding conduct that would contravene the Privacy Act.

The Australian Government has also enacted the *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth), which creates reporting obligations for businesses when eligible types of data breaches occur (i.e., unauthorised access to or disclosure of information). Where an entity has reason to suspect that an eligible data breach may have occurred, the entity is required to undertake a reasonable and expeditious assessment of the circumstances and in any event take all reasonable steps to complete that assessment within 30 days. Under the Privacy Act, OAIC carries the power to investigate non-compliance with respect to this obligation and can apply to the court to have civil penalties imposed for non-compliance.

4.4 Does your jurisdiction have cyber security laws or regulations that may apply to fintech businesses operating in your jurisdiction?

Cyber security regulation has been a key focus of regulators given the rapid innovation present in the fintech space and the interplay between financial services, financial products and new technologies.

ASIC provides some guidance regarding cybersecurity in *Report 429: Cyber Resilience – Health Check* and *Report 555: Cyber resilience of firms in Australia's financial markets*. In these reports, ASIC has examined and provided examples of good practices identified across the financial services industry and some questions board members and senior management of financial organisations should ask when considering their cyber resilience. ASIC's *Regulatory Guide 255* also particularises the standards and frameworks which providers of digital advice should test their information security arrangements against and nominated frameworks setting out relevant compliance measures which should be in place where cloud computing is relied upon.

As part of the Government's Cyber Security Strategy, CERT Australia – the national computer emergency response team – has drafted national cyber security exercise programme guidelines and an evaluation framework for Commonwealth, state and territory governments and businesses in the private sector. Beyond this, Australia has ratified the Council of Europe Convention on Cybercrime (the Budapest Convention), which codifies what constitutes a criminal offence in cyberspace and streamlines international cybercrime cooperation between signatory states. Australia's accession was reflected in the passing of the *Cybercrime Legislation Amendment Act 2011* (Cth).

4.5 Please describe any AML and other financial crime requirements that may apply to fintech businesses in your jurisdiction.

To the extent a fintech company provides a designated service under the *Anti-money Laundering and Counter-terrorism Financing Act 2006* (Cth) (**AML/CTF Act**), the company will be a reporting entity for the purposes of the AML/CTF Act. Examples of designated services include factoring receivables, providing loans or issuing or selling securities or managed investment scheme interests. Reporting entities have obligations to:

- enrol with AUSTRAC;
- conduct due diligence on customers prior to providing any services;
- adopt and maintain an AML/CTF programme; and
- report annually to AUSTRAC and as required on the occurrence of a suspicious matter, a transfer of currency with a value of AUD$10,000 or more, and all international funds transfer instructions.

The Australian government recently passed the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (**Amendment Act**), which will bring cryptocurrencies within the scope of Australia's anti-money laundering regime.

The amendments focus on the point of intersection between cryptocurrencies and the regulated financial sector, namely digital currency exchanges and digital wallet providers.

Digital currency exchange providers are now required to register with the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) in order to operate, with a penalty of up to two years imprisonment or a fine of up to AUD$105,000, or both, for failure to register. Registered exchanges will be required to implement know-your-customer processes to adequately verify the identity of their customers, with ongoing obligations to monitor and report suspicious and large transactions. Exchange operators are also required to keep certain records relating to customer identification and transactions for up to seven years. Bringing digital currency exchange providers within the ambit of the AML/CTF framework is intended to help legitimise the use of cryptocurrency while protecting the integrity of the financial system in which it operates.

4.6 Are there any other regulatory regimes that may apply to fintech businesses operating in your jurisdiction?

Not at the time of writing; however, ASIC recently closed consultation on its draft regulatory guide which proposes significant changes to how Australian market licences and exemptions from Australian market licensing requirements are granted. A market licence is required to operate a facility which provides for the purchase and sale of financial products.

ASIC noted that there have been recent changes and developments in markets which include, a proliferation of alternative market venues (i.e., growth in organised trading in non-exchange listed products), increased complexity in market venue technology and use of social media to create new forms of market-like venues. This has led ASIC to propose a new two-tier approach to market licensing.

Tier 1 is designed to facilitate oversight of traditional market models and significant non-exchanges and is expected to include all current retail exchanges. The purpose of Tier 2 is to appropriately tailor regulatory obligations for a broad range of specialised and emerging market venues. Tier 2 venues would be subject to a specified subset of core licence obligations but are exempt from other obligations. Tier 2 licensees would not be permitted to use terms like ‘exchange’ or ‘stock/securities/futures markets’ in their title or documentation like marketing material.

5 Accessing Talent

5.1 In broad terms, what is the legal framework around the hiring and dismissal of staff in your jurisdiction? Are there any particularly onerous requirements or restrictions that are frequently encountered by businesses?

The hiring and dismissal of staff in Australia is governed under the *Fair Work Act 2009* (Cth) (**Fair Work Act**). In relation to hiring, minimum terms and conditions of some employees (including professionals) are governed by modern awards, which sit on top of the National Employment Standards. However, modern awards do not apply to employees earning over a threshold of AUD$142,000 (from 1 July 2017, threshold indexed annually), provided their earnings are guaranteed by written agreement with their employer.

To terminate an employee’s employment, an employer has to give an employee written notice of the last day of employment. There are minimum notice periods dependent on the employee’s period of continuous service although the employee’s award, employment contract, enterprise agreement or other registered agreement could set out longer minimum notice periods. Notice can be paid out rather than worked; however, the amount paid to the employee must equal the full amount the employee would have been paid if they worked until the end of the notice period.

For serious misconduct, employers do not need to provide notice of termination; however, the employee must be paid all outstanding entitlements such as payment for time worked or annual leave.

5.2 What, if any, mandatory employment benefits must be provided to staff?

Under the Fair Work Act, minimum entitlements for employees are set out under modern awards and include terms and conditions such as minimum rates of pay and overtime.

Australia also has 10 National Employment Standards. These include maximum weekly hours, requests for flexible working arrangements, parental leave and related entitlements, annual leave, long service leave, public holidays, notice of termination and redundancy pay, and a fair work information statement.

The Fair Work Act also has some general protection provisions governing a person’s workplace rights, freedom of association and workplace discrimination, with remedies available to employees if these provisions are contravened.

5.3 What, if any, hurdles must businesses overcome to bring employees from outside your jurisdiction into your jurisdiction? Is there a special route for obtaining permission for individuals who wish to work for fintech businesses?

Migrants require working visas via the Department of Immigration and Border Protection (**DIBP**) in order to work in Australia, and each type has its own eligibility requirements. Businesses can nominate or sponsor such visas.

In September 2016, as part of NISA, the DIBP launched an Entrepreneur visa stream as part of the Business Innovation and Investment visa programme. Interested applicants must submit an expression of interest and be nominated by an Australian State or Territory Government.

The Government has implemented major changes to its temporary employer-sponsored skilled migration programme, affecting the Temporary Work (Skilled) (subclass 457) visa (**457 visa**). Amongst other changes, the existing occupation lists were re-named and significantly condensed:

- the Consolidated Sponsored Occupation List was replaced with the Short-term Skilled Occupation List (**STSOL**) with a maximum visa period of two years provided there are not international trade obligation requirements; and
- the Skilled Occupation List was replaced with the new Medium and Long-term Strategic Skills List (**MLTSSL**) with a maximum visa period of four years.

The STSOL and MLTSSL will be reviewed every six months by the Department of Employment. Certain occupations, such as ICT Systems Test Engineer, ICT Support Engineer and Web Developer, have also had additional requirements imposed (e.g. more than two years’ relevant work experience). The 457 visa will be abolished in March 2018 and replaced by a new Temporary Skills Shortage visa.

6 Technology

6.1 Please briefly describe how innovations and inventions are protected in your jurisdiction.

Patent protection is available for certain types of innovations and inventions in Australia. A standard patent provides long-term protection and control over an invention, lasting for up to 20 years from the filing date. The requirements for a standard patent include the invention being new, involving an inventive step and being able to be made or used in an industry. An innovation patent is targeted at inventions with short market lives, lasting up to eight years. These quick and relatively inexpensive patents are aimed at protecting inventions that do not meet the inventive threshold, instead requiring that an invention involves novelty or an innovative step.

In Australia, provisional applications can also be filed as an inexpensive method of signalling intention to file a full patent application in the future, providing applicants with a priority date. However, filing this application alone does not provide the applicant with patent protection, but does give the person filing 12 months to decide whether to proceed with a patent application.

6.2 Please briefly describe how ownership of IP operates in your jurisdiction.

Broadly, the person or business that has developed intellectual property generally owns such intellectual property, subject to any existing or competing rights. In an employment context, the employer generally owns new intellectual property rights developed in the course of employment, unless the terms of employment contain an effective assignment of such rights to the employee. Contractors, advisors and consultants generally own new intellectual property rights developed in the course of engagement, unless the terms of engagement contain an effective assignment of such rights to the company by whom they are engaged.

6.3 In order to protect or enforce IP rights in your jurisdiction, do you need to own local/national rights or are you able to enforce other rights (for example, do any treaties or multi-jurisdictional rights apply)?

Options available to protect or enforce intellectual property rights depend on the type of intellectual property. As an example, software (including source code) is automatically protected under the *Copyright Act 1968* (Cth). An owner may also apply to IP Australia, the government body administering IP rights and legislation, for software to be registered under the *Designs Act 2003* (Cth) or patented under the *Patents Act 1967* (Cth). Software can also be protected contractually through confidentiality agreements between parties.

A standard, innovation or provisional patent can also be held to protect or enforce IP rights in Australia. Australia is also a party to the Patent Cooperation Treaty (**PCT**), administered by the World Intellectual Property Organisation. A PCT application is automatically registered as a standard patent application within Australia, but the power to successfully grant patent rights remains with IP Australia.

6.4 How do you exploit/monetise IP in your jurisdiction and are there any particular rules or restrictions regarding such exploitation/monetisation?

In Australia, there are generally four commonly used approaches to monetising IP. These are:

- *Assignment*: An outright sale of IP, transferring ownership to another person without imposing any performance obligations.
- *Licensing*: Permission is granted for IP to be used on agreed terms and conditions. There are three types of licence and each come with conditions.
- *Franchising*: A method of distributing goods and services, where the franchisor owns the IP rights over the marketing system, service method or special product and the franchisee pays for the right to trade under a brand name.
- *Spin-off*: Where a separate company is established to bring a technology developed by a parent company to the market. IP activities to be carried out for spin-offs include due diligence, confidentiality, employment contracts, assignment agreements and licence agreements.

Broadly, a business can only exploit or monetise IP that the business in fact owns or is entitled to use. Restrictions apply to the use of IP that infringes existing brands, and remedies (typically injunctions and damages) are available where the use of IP infringes the rights of another business.

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Peter is a Partner in Gilbert + Tobin's Corporate Advisory team, leading the firm's Financial Services and fintech practices. Peter's practice includes advising Australian and off-shore corporates, financial institutions, funds, managers and market participants in relation to establishing, structuring and operating financial services sector businesses in Australia. Peter also advises across a range of issues relevant to the fintech and digital sectors including platform establishment, blockchain solutions, digital fundraising and currencies and regulatory compliance and has extensive experience dealing with regulators. Peter has a Bachelor of Laws (Honours) and Bachelor of Commerce (Finance) from The University of Newcastle.

Established in 1988, Gilbert + Tobin is a leading independent corporate law firm and a key player in the Australian legal market. From our Sydney, Melbourne and Perth offices, we provide innovative, relevant and commercial legal solutions to major corporate and Government clients across Australia and internationally, particularly in the Asia-Pacific region.

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