Fintech

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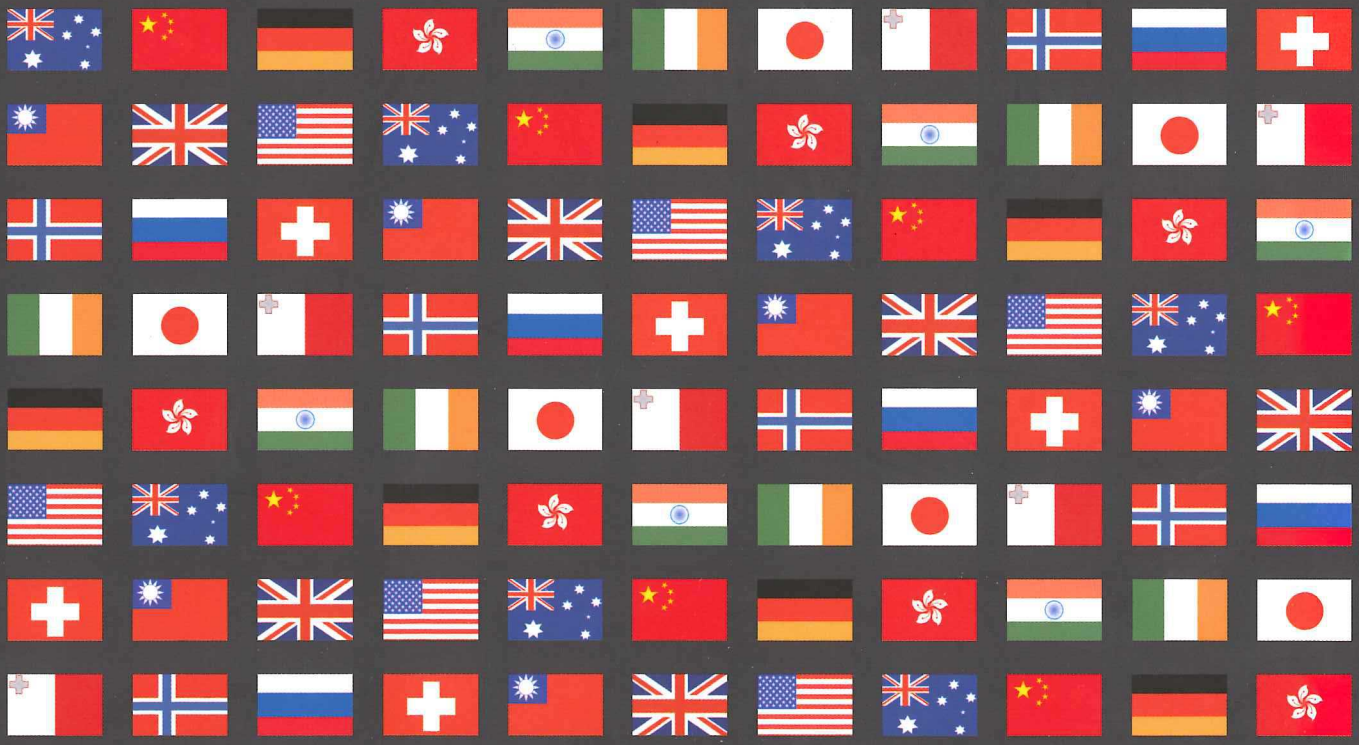

2017

GETTING THE DEAL THROUGH

Australia

Peter Reeves
Gilbert + Tobin

Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

A person who carries on a financial services business in Australia must hold an Australian financial services licence (AFSL) or be exempt from the requirement to be licensed.

The Corporations Act 2001 (Cth) (Corporations Act), which is administered by the Australian Securities and Investments Commission (ASIC), states that a financial services business is considered to be carried on in Australia if, in the course of the person carrying on the business, they engage in conduct that is intended to induce people in Australia to use the financial services they provide or is likely to have that effect, regardless of whether the conduct is intended, or likely, to have that effect in other places as well.

Broadly, financial services are provided in relation to financial products and financial services include the provision of financial product advice, dealing in financial products (both as principal and as agent), making a market for financial products, operating registered schemes and providing custodial or depository services.

A financial product is a facility through which, or through the acquisition of which, a person makes a financial investment, manages a financial risk or makes a non-cash payment. Examples of financial products include securities (eg, shares and debentures), interests in collective investment vehicles known as managed investment schemes (eg, units in a unit trust), payment products (eg, deposit products and non-cash payment facilities), derivatives and foreign exchange contracts.

The definitions of financial service and financial product under the Corporations Act are very broad and will often capture investment, marketplace lending, crowdfunding platforms and other fintech offerings.

Arranging (bringing about) deals in investments (ie, financial products), making arrangements with a view to effecting transactions in investments, dealing in investments as principal or agent, advising on investments, and foreign exchange trading may trigger the requirement to hold an AFSL if such activities are conducted in the course of carrying on a financial services business in Australia. Consumer credit facilities and secondary market loan trading are generally regulated under the credit licensing regime (discussed in question 2); however, arrangements that are established to facilitate investment or trading in such products (eg, marketplace lending or securitisation) may also trigger the requirement to hold an AFSL.

An AFSL is not required to be held in relation to advising on and dealing in factoring arrangements provided certain conditions are met, such as the terms and conditions of the factoring arrangement being provided to any retail client before the arrangement is issued and an internal dispute resolution system that complies with Australian standards being established and maintained.

Generally, an entity that takes deposits must, in addition to holding an AFSL, be an authorised deposit-taking institution (ADI) in Australia. The Australian Prudential Regulation Authority (APRA) is responsible for the authorisation process (as well as ongoing prudential supervision).

A person who engages in consumer credit activities in Australia generally must hold an Australian credit licence (ACL) or be exempt from the requirement to be licensed (see question 2).

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Consumer lending is regulated under the National Consumer Credit Protection Act 2009 (Cth) (NCCP Act), which is also administered by ASIC. The NCCP Act applies to persons or entities that engage in consumer credit activities, which includes the provision of a credit contract or lease, securing obligations under a credit contract or lease, and providing credit services.

The NCCP Act only applies to credit services provided to natural persons or strata corporations, wholly or predominantly for personal, household or domestic purposes. An ACL is not required where credit services are provided wholly or predominantly for business or investment purposes. However, it is anticipated that this regime will be extended to capture small business lending.

Where the NCCP Act applies, the credit provider must hold an ACL or be exempt from the requirement to hold an ACL.

In a retail marketplace lending context (as opposed to business-to-business), the regime under the NCCP Act and the obligations imposed (see below) mean that in Australia, the platform structure is not truly peer-to-peer.

ACL holders are subject to general conduct obligations, including:

- acting efficiently, honestly and fairly;
- being competent to engage in credit activities;
- ensuring clients are not disadvantaged by any conflicts of interest;
- ensuring representatives are competent and comply with the NCCP Act;
- having internal and external dispute resolution systems;
- having compensation arrangements;
- having adequate resources (including financial, technological and human resources) and risk management systems; and
- having appropriate arrangements and systems to ensure compliance.

ACL holders are also subject to responsible lending obligations to make reasonable enquiries of a consumer's requirements and objectives, verify a consumer's financial situation and assess whether the proposed credit contract is suitable for the consumer.

There are also prescriptive disclosure obligations relating to the entry into, and ongoing conduct under, consumer credit contracts and leases. Consumers are entitled to challenge unjust transactions, unconscionable interest or charges and apply for a variation on hardship grounds.

All ACL holders must submit annual compliance reports to ASIC, disclosing any instances of non-compliance during the reporting period.

Consumer lending may also be subject to the consumer protection regime in the Competition and Consumer Act 2010 (Cth) (Consumer Law).

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

If a secondary market is effected in a marketplace lending context an AFSL may be required and if the loans traded are consumer loans within the meaning of the NCCP Act, the intermediary that offers the loans, and the acquirer of such loans, may require an ACL.

Packaging and selling loans in the secondary market may also trigger the requirement to hold either or both an AFSL or ACL, depending on the structure of the product and whether the loans are consumer loans (however, exemptions from the requirement to hold an ACL are available for securitisation and special purpose funding entities).

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within scope of any such regime.

Collective investment schemes in Australia can be 'managed investment schemes' (MISs) (which can be contract-based schemes, unincorporated vehicles (typically structured as unit trusts or unincorporated limited partnerships)) or bodies corporate (which are incorporated and typically structured as companies or incorporated limited partnerships).

Depending on the structure, a platform or scheme operated by a fintech company may fall within the scope of the Australian collective investment schemes regulations. They may also be subject to the AFSL, ACL, Consumer Law and financial services laws relating to consumer protection under the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act).

Unincorporated structures

Generally, an MIS that is operated by a financial services firm or a promoter of MISs and that is open to retail clients is required to be registered with ASIC. The operator of such an MIS ('a responsible entity') will, typically, need to hold an AFSL covering the provision of general financial product advice and dealing services in relation to interests in the scheme and the financial products and assets held by the scheme, and to operate the scheme.

The responsible entity must also comply with licence conditions and financial services laws (including obligations relating to financial resources, compliance arrangements and organisational competence). There are specific requirements relating to the content of the scheme's governing document, compliance committees, compliance arrangements and offer documents, and there are obligations to report to ASIC and audit scheme accounts.

The responsible entity must be a public company with at least three directors (two of whom are ordinarily resident in Australia) and it must hold unencumbered and highly liquid net tangible assets of at least the greater of AU$10 million or 10 per cent of the average revenue, unless an external custodian is engaged.

If the MIS is not required to be registered, the licensing, compliance, disclosure and regulatory capital requirements are generally less onerous.

Incorporated structures

Australian companies are incorporated and regulated under the Corporations Act. Broadly, companies may be proprietary companies limited by shares or public companies limited by shares. All companies must have at least one shareholder, which can be another company. A proprietary limited company must have at least one director who ordinarily resides in Australia. A public company must have at least three directors, two of whom ordinarily reside in Australia. Directors have specific duties, including in relation to acting with care and diligence, avoiding conflicts of interest and avoiding insolvent trading, for which they may be personally liable in the event of non-compliance. All companies must report changes to its officers, share capital and company details to ASIC. Large proprietary companies, public companies and foreign-controlled companies must lodge annual audited accounts with ASIC that are made publically available.

Australian fintech companies may meet the criteria for classification as an 'early stage innovation company' (ESIC), including expenditure of less than AU$1 million and assessable income of less than AU$200,000 in an income year, having only recently been incorporated or commenced carrying on a business and being involved in innovation. Tax incentives are available for investors in ESICs.

Limited partnerships may be incorporated in some or all Australian states and territories (the incorporation process is broadly similar across jurisdictions). Once incorporated, a partnership must notify the relevant state or territory regulator of changes to its registered particulars.

Incorporation is typically sought in connection with an application for registration as a venture capital limited partnership (VCLP) or early stage venture capital limited partnership (ESVCLP) under the Venture Capital Act 2002 (Cth) (VCA), which are partnership structures commonly used for venture capital investment (including investment in fintech) owing to favourable tax treatment.

New structures

The government has proposed the introduction of two new collective investment vehicle (CIV) structures: a corporate CIV and a limited partnership CIV.

It is expected that the proposed CIVs will take a similar form to the corporate and partnership CIVs used in other jurisdictions (eg, in the United Kingdom under the Undertakings for Collective Investment in Transferrable Securities regime). The corporate CIV will likely involve a central investment company that manages underlying pooled assets, with investors holding securities in the company. The limited partnership CIV will likely involve investors joining as passive partners and assets managed by a managing partner.

The new structures will be required to meet similar eligibility criteria as managed investment trusts, including being widely held and engaging in primarily passive investment. Investors will be taxed as if they had invested directly in the underlying asset. The structures will be able to be offered to both Australian and offshore investors, aligning with the proposed Asia Region Funds Passport (ARFP) initiative (see question 6).

At the time of writing, it is expected that corporate CIVs will be introduced by July 2017 and limited partnership CIVs by July 2018.

5 Are managers of alternative investment funds regulated?

There is no separate regime for alternative investment funds in Australia. Australian investment funds and fund managers are all generally subject to the same regulatory regime. However, funds offering particular assets classes may be subject to specific disclosure requirements (eg, property or hedge fund products).

ASIC has entered into 29 supervisory cooperation agreements with European Union securities regulators to allow Australian fund managers to manage and market alternative investment funds to professional investors in the EU under the rules of the AIFMD.

6 May regulated activities be passported into your jurisdiction?

Australia has cooperation (passport) arrangements with the regulators in the United States, the United Kingdom, Germany, Hong Kong and Singapore that enable foreign financial service providers (FFSPs) regulated in those jurisdictions to provide financial services to wholesale clients in Australia without holding an AFSL.

Passport relief is available subject to the FFSP satisfying certain conditions, which include providing materials to ASIC evidencing registration under the laws of the provider's home jurisdiction, consenting to ASIC and the home regulator sharing information, appointing an Australian local agent and executing a deed poll agreeing to comply with any order made by an Australian court relating to the financial services provided in this jurisdiction.

Passport relief is only available in relation to the provision of financial services to wholesale clients and the FFSP must only provide those financial services in Australia if it is authorised to provide them in its home jurisdiction. Before providing any financial services in Australia, the FFSP must disclose to clients that it is exempt from the requirement to hold an AFSL and that it is regulated by the laws of a foreign jurisdiction. The FFSP must also notify ASIC as soon as practicable, and in any event within 15 business days, of the occurrence of any significant matters (eg, investigations or regulatory actions) applicable to the financial services it provides in Australia.

Australia is also a founding member of the ARFP, which is a region-wide initiative to facilitate the offer of interests in certain collective investment schemes established in ARFP member economies. Once implemented, the ARFP will facilitate the offer of Australian registered MISs in member economies, subject to compliance with home economy laws relating to the authorisation of the scheme operator, host economy laws relating to the scheme's interaction with clients (eg, disclosure) and special passport rules relating to registration, regulatory control and portfolio allocation. The member economies are currently working towards implementing domestic arrangements and the ARFP is expected to be in effect by the end of 2017.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

A foreign company that carries on a business in Australia (including a financial services business) must either establish a local presence (ie, register with ASIC and create a branch) or incorporate a subsidiary. An entity will be deemed to be carrying on business in Australia if it undertakes certain activities. Generally, the greater the level of system, repetition or continuity associated with an entity's business activities in Australia, the greater the likelihood that the registration requirement will be triggered. An insignificant and one-off transaction will arguably not trigger the registration requirement; however, a number of small transactions occurring regularly, or a large, one-off transaction, may trigger the requirement.

Generally, if a company obtains an AFSL it will be carrying on a business in Australia and will trigger the registration requirement.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Peer-to-peer or marketplace lending is regulated within the existing consumer protection, financial services and credit regulatory frameworks. In Australia, a retail peer-to-peer or marketplace lending platform is often structured as an MIS and there will generally be an AFSL and ACL within the structure.

ASIC has published guidance on advertising marketplace lending products, which promoters should consider in addition to general ASIC guidance on advertising financial products. The guidance notes that references to ratings of borrowers' creditworthiness should not create a false or misleading impression that they are similar to ratings issued by traditional credit rating agencies and that it is not appropriate for comparisons to be made between marketplace lending products offered to consumers and banking products offered to consumers.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding is currently regulated within the existing consumer protection (Consumer Law and ASIC Act) and financial services regulatory framework. Equity crowdfunding platforms can be structured as MIS or non-MIS platforms. In either case the operator will usually hold an AFSL or an AFSL holder will be retained for the purposes of the structure.

In late 2015, a regulatory framework to facilitate crowdsourced equity funding in Australia was proposed. The draft legislation aimed to reduce the regulatory barriers to investing in small and start-up businesses; however, it has been criticised because of the restrictive rules around the type of company that could raise funds, the amount that could be raised and the amount investors could invest. The draft legislation lapsed upon the dissolution of Parliament in May 2016.

As both major Australian political parties broadly support the objectives of the proposed regulatory framework, it is generally expected that draft legislation will be reintroduced (although perhaps not in its previous form); at the time of writing, however, nothing has been formally proposed.

10 Describe any specific regulation of invoice trading in your jurisdiction.

As noted in question 9, factoring arrangements generally require that the factor must hold an AFSL; however, regulatory relief is available such that if certain conditions are met (around factoring terms and conditions and dispute resolution processes) an AFSL is not required. However, AML and CTF requirements (see question 11) generally apply in relation to factoring arrangements. The factor could also be taken to be carrying on business in Australia in relation to the factoring arrangements and could trigger the ASIC registration requirement (described in question 7).

Whether an invoice trading business is otherwise regulated within the existing consumer protections, financial services and credit regulatory frameworks will depend on the structure, including whether there are consumer debts being traded.

11 Are payment services a regulated activity in your jurisdiction?

Payment services are regulated across several pieces of legislation and industry regulations and codes.

Payment services may be regulated as financial services under the Corporations Act where such service relates to a: deposit-taking facility made available by an ADI in the course of carrying on a banking business; or facility through which a person makes a non-cash payment.

In such circumstances, the service provider must hold an AFSL or be exempt from the requirement to hold an AFSL.

Payment services relating to a deposit-taking facility or a purchased payment facility must be provided by an APRA-regulated ADI.

Payment systems (ie, any funds transfer systems that facilitate the circulation of money) and purchased payment facilities (eg, smart cards and electronic cash) are regulated under the Payment Systems (Regulation) Act 1998 (Cth), which is administered by the Reserve Bank of Australia.

Payment services are generally 'designated services' under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML/CTF Act). The AML/CTF Act regulates providers of designated services, referred to as 'reporting entities'. Key obligations include enrolling with the Australian Transaction Reports and Analysis Centre (AUSTRAC), conducting due diligence on customers prior to providing any services, adopting and maintaining an AML/CTF programme and reporting annually to AUSTRAC and as required on the occurrence of a suspicious matter, a transfer of currency with a value of AU$10,000 or more, and all international funds transfer instructions.

There are a number of industry regulations and codes that also regulate payment services in Australia, including the regulations developed by the Australian Payments Clearing Association, the Code of Banking Practice and the ePayments Code. Although such codes are voluntary, it is common for providers of payment services to adopt applicable codes.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

Australian law restricts: sending unsolicited commercial electronic messages, including emails and SMS; making unsolicited commercial calls to telephone numbers listed on the Do Not Call Register; and making unsolicited offers to a retail client to acquire a financial product.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

ASIC has established an innovation hub to foster innovation that could benefit consumers by helping Australian fintech start-ups navigate the Australian regulatory system. The innovation hub provides tailored information and access to informal assistance intended to streamline the licensing process for innovative fintech start-ups.

ASIC has also proposed a regulatory sandbox, the features of which include: a testing window, allowing certain financial services and products to be provided without a licence; the ability for sophisticated investors to participate with a limited number of retail clients with separate monetary exposure limits; consumer protection (external dispute resolution and compensation arrangements would typically apply in the retail environment); and modified conduct and disclosure obligations. Industry consultation on the proposed regulatory sandbox closed on 22 July 2016. At the time of writing, ASIC expects to finalise guidance and the exemption conditions by the end of 2016.

14 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Marketing financial services may itself constitute a financial service requiring an AFSL or reliance on an exemption.

If financial services are to be provided to retail clients, a financial services guide must first be provided, setting out prescribed information, including the provider's fee structure, to assist a client to decide whether to obtain financial services from the provider.

Generally, any offer of a financial product to a retail client must be accompanied by a disclosure document, typically a prospectus or product disclosure statement (depending on the product type), which satisfies the content requirements in the Corporations Act. There are

exemptions from the requirement to provide a disclosure document in certain circumstances (eg, a small-scale offer) and where the offer is made to wholesale clients only.

Marketing materials (including advertisements) must not be misleading or deceptive and are expected to meet ASIC advertising guidance.

Advertisements should give a balanced message about the product.

Warnings, disclaimers and qualifications should be consistent and given sufficient prominence to effectively convey key information.

Where fees or costs are referred to, such reference should give a realistic impression of the overall level of fees and costs a consumer is likely to pay.

Comparisons should only be made between products that have sufficiently similar features and differences should be made clear. All comparisons should be current, complete and accurate.

Terms and phrases should not be used in a way that is inconsistent with the ordinary meaning commonly recognised by consumers. Industry concepts and jargon should also be avoided.

Advertisements should be capable of being clearly understood by the audience and should not suggest the product is suitable for a particular type of consumer unless the promoter has assessed that the product is suitable in this way.

Advertisements should be consistent with disclosure documents.

Photographs, images and diagrams should not be used in a way that detracts from warnings, disclaimers or qualifications and graphs should not be overly complicated or ambiguous.

Advertisements should not create unrealistic expectations about what a service can achieve.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

There is currently no product intervention power in Australia. Such a power was proposed as part of the 2014 Financial System Inquiry and the government response indicated that it would consider the proposal. However, at the time of writing, no formal plans have been proposed.

16 Are there any foreign exchange or currency control restrictions in your jurisdiction?

A person is restricted from transferring funds to a country or person that is the subject of a sanction law.

Although not a restriction, a person (typically an ADI) who sends or receives an international funds transfer instruction must report the details of such instruction to AUSTRAC within 10 business days after the day on which the instruction is sent or received. Such transfers are subject to AML/CTF Act compliance requirements imposed on the institutions effecting the transaction.

17 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Generally, an offshore provider can address requests for information, pitch, provide explanatory memoranda and issue its products to an Australian (citizen or resident) investor if the investor makes the first approach (ie, there has been no conduct designed to induce the investor, or that could be taken to have that effect (including any active solicitation)) and the service is provided from outside Australia.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

Generally, if the investor or client is a temporary resident in Australia (including its external territories) the AFSL or ACL requirements will still apply, except if the service relates to products issued by the provider and there has been no conduct by the provider designed to induce any investor, or that could be taken to have that effect (including any active solicitation) in relation to such products.

19 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

A provider is generally not required to hold an AFSL or ACL if the financial service or consumer credit activity is undertaken outside Australia. However, if the provider otherwise carries on a financial services or consumer credit business in Australia, the provider cannot avoid the requirement to hold the relevant licence by structuring the service such that the relevant activity is undertaken or effected offshore.

20 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Fintech companies must comply with the Australian financial services and credit legislation, including when carrying out cross-border activities, where such activities relate to the provision of financial services or credit in Australia or its external territories.

The conduct of a fintech company offshore may also have an impact on the company's compliance with its obligations under the Australian regulatory framework. For example, misconduct by a representative that occurs in another jurisdiction may cause ASIC to investigate the licensee's compliance with local obligations.

The Privacy Act 1988 (Cth) (Privacy Act) applies to the cross-border activities of an Australian organisation to whom the act applies (see question 41). The AML/CTF Act also has cross-border application where designated services are provided by a foreign subsidiary of an Australian company and such services are provided at or through a permanent establishment of the subsidiary in a foreign jurisdiction.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

Generally, no.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

Generally, there are no licensing exemptions that specifically apply where the services are provided in Australia through an offshore account. However, it may affect the nature of the authorisations required to be held and the additional obligations associated with such authorisations (eg, regulatory capital).

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

See question 22; the same applies to a nominee account.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

An AFSL is not required to provide financial services in relation to a financial product where such product is merely an incidental part of a facility that does not have managing a financial risk, making a non-cash payment or making a financial investment as its primary purpose.

There is no equivalent exemption for ancillary or incidental credit activities.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

A product issuer, or a related body corporate, is not required to hold an AFSL in order to provide general financial product advice to an AFSL holder, where the AFSL holder is authorised to provide such advice. Also, a person who is not in Australia is not required to hold an AFSL to provide financial services to a client who is an AFSL holder, unless that client is acting on behalf of someone else.

There are no equivalent exemptions available from the requirement to hold an ACL when dealing with clients that are duly regulated.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

An AFSL is not required to provide financial services to clients that are related bodies corporate of the provider or commonwealth, state or territory bodies.

Although not an exemption to the requirement to hold an AFSL, reduced disclosure obligations apply to financial services provided to wholesale (including professional) clients.

In relation to credit activities, an ACL is not required where such activities are provided to a customer who is a body corporate (other than a strata corporation), or a commonwealth, state or territory body.

Securitisation

27 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

The requirements for executing loan or security agreements are generally set out in the underlying document. A lender has the right to enforce its contractual claim for repayment and may sue for repayment in the courts. A secured lender may also have enforcement rights under the Personal Properties Securities Act 2009 (Cth), in addition to contractual rights.

There is a risk that loans or securities originated on a peer-to-peer or marketplace lending platform are not enforceable on the basis the underlying agreement is invalid.

28 What steps are required to perfect an assignment of loans originated on a peer-to-peer lending platform? What are the implications for the purchaser if the assignment is not perfected?

Generally, the assignment of a loan (including loans originated on peer-to-peer lending platforms) is effected by a deed of assignment, which is perfected by the assignee taking control of the loan. No additional steps are required to perfect the assignment. If the assignment is not effected by a valid deed, the assignment may constitute a deemed security interest and is perfected by the assignee registering the interest on the Personal Property Securities Register. Failure to register may mean that the security interest is void as against a liquidator and an unperfected security interest will 'vest' in the grantor on its winding up, which means that the relevant secured party will lose any interest they have in the relevant collateral that is the subject of the unperfected security interest.

29 Is it possible to transfer loans originated on a peer-to-peer lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Loans originated on a peer-to-peer lending platform may be transferred to a purchaser without informing or obtaining consent from the borrower. The assignee must provide a copy of its credit guide to the borrower as soon as practicable after assignment.

30 Would a special purpose company for purchasing and securitising peer-to-peer loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

A company that purchases or securitises peer-to-peer loans must comply with the Privacy Act, to the extent the act applies to the company and its conduct (see question 41). The company must also comply with any duty of confidentiality in the underlying loan or security agreement.

Intellectual property rights

31 Which intellectual property rights are available to protect software and how do you obtain those rights?

Software (including source code) is automatically protected under the Copyright Act 1968 (Cth). An owner may also apply to IP Australia 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.

32 Is patent protection available for software-implemented inventions or business methods?

Patent protection is available for certain types of software (eg, operating computer systems and computational methods). Patents are not available for source code, which is usually protected by copyright legislation.

33 Who owns new intellectual property developed by an employee during the course of employment?

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 employer.

34 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

The consultant or contractor generally owns 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 who engaged the consultant or contractor.

35 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are considered proprietary and confidential, and are automatically protected. An owner of trade secrets can pursue a discloser for a breach of confidentiality, however the owner must be able to demonstrate that it has made 'reasonable efforts' to protect such information (eg, by requiring employees to sign confidentiality agreements).

A party can apply to a court to make an order to close or clear the court where the presence of the public would frustrate or render impracticable the administration of justice. Australian courts have found that a power to close a court to protect trade secrets or confidential commercial information may be valid in certain exceptional circumstances.

36 What intellectual property rights are available to protect branding and how do you obtain those rights?

A brand can be protected by registering: a business name by applying to ASIC; a domain name by applying to the desired hosts; and a trade mark by registering with IP Australia.

In relation to trade marks, registration will provide the owner with exclusive rights throughout Australia to the mark within the designated classes of goods or services, and provides the owner with rights and remedies in the event of misuse, including a right to seek injunctive relief.

37 How can new businesses ensure they do not infringe existing brands?

New businesses can search a publically available register of business names. New businesses can also conduct web searches to determine the availability of domain names.

IP Australia maintains publically available registers of patents, trade marks and designs; however, owing to the complexity of the various classes and categories of registration, most businesses will engage a law firm or service provider to conduct searches of these registers.

There is no repository of copyright works or trade secrets. New businesses should conduct their own due diligence on existing brands.

38 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

The available remedies depend on the nature of the infringement and the applicable legislation. Available remedies typically include injunctions and damages.

39 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

Generally, there are no legal or regulatory rules or guidelines surrounding the use of open-source software.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

In 2012, proceedings began between competing high-frequency trading firms, Optiver Australia Pty Ltd and Tibra Trading Pty Ltd. The matter concerned a number of former Optiver employees who had left the company to establish Tibra, a competitor. Optiver alleged that Tibra had copied all or a substantial part of Optiver's computer program used to conduct its business and had divulged confidential information. The matter was ultimately settled out of court for a reported AU$10 million.

Update and trends

In Australia, fintech is a focal point for economic growth and it is generally accepted that policy and reform in the financial services sector will be driven by fintech innovations. The Australian government and regulators have generally been responsive to facilitating the development of fintech. More broadly, Australia has seen the AU$1.1 billion National Innovation and Science Agenda promoting commercial risk-taking and encompassing tax incentives for early stage investment in fintech companies, changes to the venture capital regime, insolvency law reforms, the establishment of the FinTech Advisory Group to advise the Treasurer, the ASIC innovation hub and the proposed expansion of the crowd-sourced equity funding regime (yet to commence) to include debt funding. ASIC has also recently completed its consultation in relation to a proposed 'regulatory sandbox'.

Further policy considerations relating to fintech include enabling better access to data, the development of more efficient and accessible payment systems, the need for comprehensive credit reporting, the proposed treatment of digital currency as money and the implications of big data. The government is also becoming a 'participant' via its 'digital transformation office' seeking to provide better access to government services online and looking to create a digital marketplace for small and medium-sized enterprises (SMEs) and start-ups to deliver digital services to the government.

A recently released ASIC report in relation to financial market infrastructure providers and cyber-resilience expresses ASIC's intention to work to assist other organisations in Australian financial markets to enhance their cyber resilience framework and environment. ASIC has 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 what cyber resilience they have. Cyber resilience will be a regulatory focus given the rapid innovation Australia is experiencing in the fintech space and the interplay between fintech products and new technologies. In particular, blockchain and smart contract solutions are now being tested and developed at institutional and SME and fintech levels. In addition to the regulatory challenges and developments associated with these solutions, developments are expected in the governance frameworks that are necessary to facilitate the adoption of such solutions and also the roles played by traditional intermediaries.

Data protection

41 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Privacy Act regulates the handling of personal information by Australian government agencies, Australian Capital Territory agencies and private sector organisations with an aggregate group revenue of at least AU$3 million. The Privacy Act has extraterritorial operation and extends to an act undertaken outside Australia and its external territories where there is an 'Australian link' (ie, where the organisation is an Australian citizen or organisation) or carries on a business in Australia and collects or holds personal information in Australia.

The Privacy Act comprises 13 Australian Privacy Principles (APPs), which create obligations on the collection, use, disclosure, retention and destruction of personal information. The APPs include:

- open and transparent management of personal information;
- disclosure to a person that their personal information will be collected;
- restrictions on the use and disclosure of personal information;
- obligations to ensure the accuracy of collected personal information; and
- obligations to protect personal information.

42 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

Fintech companies are subject to the same legal requirements and regulatory guidance relating to personal data as any other company. However, the application of existing privacy and confidentiality laws to fintech companies is the subject of current discussion and review so developments are expected in this area.

The government has requested the Productivity Commission to consider ways to increase data availability in Australia with a view to boosting innovation, which will be particularly important for fintech innovators. In particular, the Commission will examine whether big banks should be forced to share more data on customer transactions with fintech companies.

43 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

The APPs provide for personal information to be de-identified, including enabling information to be disclosed in a form that does not contravene the Privacy Act.

The Office of the Australian Information Commissioner, which administers the Privacy Act, has published guidance on de-identifying personal information. The guidance describes methods for de-identification, which may include removing or modifying personal identifiers and aggregating information.

Cloud computing and the internet of things

44 How common is the use of cloud computing among financial services companies in your jurisdiction?

The most current data available on the use of cloud computing indicates that nearly one in five businesses report using paid cloud computing (reported by the Australian Bureau of Statistics for the financial year ended 30 June 2014).

45 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There are no specific legal requirements or regulatory guidance on the use of cloud computing in the financial services industry. However, from a risk and compliance perspective, the same general requirements, tests and expectations apply to cloud computing as would apply to other functions and operations (including those that are outsourced) in a financial services business. In this context, APRA has commented that it is not readily evident that public cloud arrangements have yet reached a level of maturity commensurate with usages having an extreme impact if disrupted.

46 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no specific legal requirements with respect to the internet of things.

In 2015, the Australian Communications and Media Authority (ACMA) undertook an assessment of how existing regulations can be used to facilitate and enable Australian businesses and citizens to benefit from internet of things innovations. ACMA released an issues paper on its findings, which included priority areas for regulatory attention, managing network security and integrity, supporting the interoperability of devices and information through standards-setting, and supporting Australian business and consumers to develop stronger digital technology capabilities. Currently, there are no plans to develop or implement these priority areas.

Tax

47 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

The government has introduced a number of incentives to encourage innovation by, and investment in, the Australian fintech sector.

Start-ups and growing Australian fintech companies may qualify as ESICs, which entitles investors to certain tax incentives. These include providing eligible investors with:

- a 20 per cent non-refundable carry-forward tax offset on amounts invested in qualifying ESICs, with the offset capped at AU$200,000 per investor per year (on an affiliate-inclusive basis); and

- a 10-year exemption on capital gains tax for investments held as shares in an ESIC for at least 12 months, provided that the shares held do not constitute more than a 30 per cent interest in the ESIC.

Fintech investors are often structured VCLPs or ESVCLPs, and receive favourable tax treatment for venture capital investment. The government has also announced plans to amend the ESVCLP regime so that it specifically allows the tax concession available for investments made through ESVCLPs to apply to investments in fintech companies, as this is not clear in existing legislation.

In relation to crowdfunding, the Australian Taxation Office, which is responsible for administering Australia's taxation laws, has released guidance setting out its current view of the tax implications for crowdfunding arrangements. Broadly, if a person earns or receives any money through crowdfunding, some or all of it may be assessable income, which must be declared and some of the costs related to gaining or producing that income may be allowable deductions.

Competition

48 Are there any specific competition issues which exist with respect to fintech companies in your jurisdiction or which may become an issue in future?

There is a proposal to replace the existing misuse of market power provisions in the Competition and Consumer Act 2010 (Cth) (CCA), which currently adopts a purpose test, with an effects test. The proposed change will require the Australian Competition and Consumer Commission (ACCC) – which administers the CCA – and courts to have regard to whether the relevant conduct enhances efficiency, innovation, product quality or price competitiveness and if it prevents, restricts or deters the potential for competitive conduct or new entry. The chairman of the ACCC has announced the effects test 'must be strong enough to protect emerging start-ups from anticompetitive behaviour from the big four banks'. The proposed legislation is expected to be introduced to Parliament in late 2016.

Financial crime

49 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

To the extent a fintech company provides a designated service under the AML/CTF Act (eg, by factoring a receivable, providing a loan, or issuing or selling securities or MIS interests), the company will be a reporting entity for the purposes of the AML/CTF Act and will have obligations to enrol with AUSTRAC, conduct due diligence on customers prior to providing any services, adopt and maintain an AML/CTF program and report annually to AUSTRAC and as required on the occurrence of a suspicious matter, a transfer of currency with a value of AU$10,000 or more, and all international funds transfer instructions.

Similarly, a fintech company, like any other company, is required to comply with Australia's anti-bribery legislation, which includes a prohibition on dishonestly providing or offering a benefit to someone with the intention of influencing a commonwealth public official in the exercise of their duties.

50 Is there regulatory or industry anti-financial crime guidance for fintech companies?

At the time of writing, no.

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