Fintech

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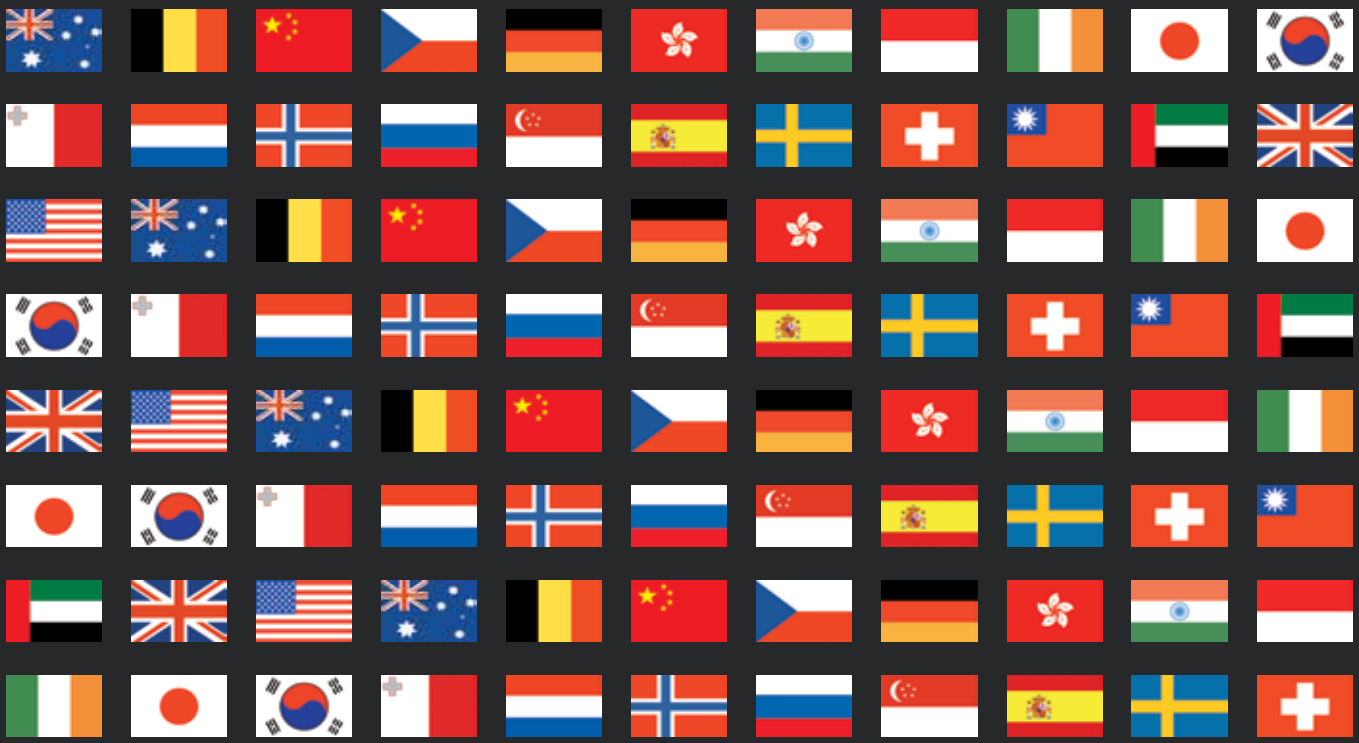

2018

GETTING THE DEAL THROUGH

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CONTENTS

Australia

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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) (the Corporations Act), which is administered by the Australian Securities and Investments Commission (ASIC), states that a financial services business is taken 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, whether or not the conduct is intended, or likely, to have that effect in other places as well.

Broadly, financial services include the provision of financial product advice, dealing in financial products (as principal or 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 below), 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). 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.

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) (the 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. 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 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 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 consumers' requirements and objectives, verify consumers' financial situation and assess whether the proposed credit contract is suitable for consumers.

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) (the 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 offeror and acquirer of the 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 providing alternative finance products or services would generally fall within the scope of any such regime.

Collective investment schemes in Australia can be 'managed investment schemes' (MIS) (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 AFSL, ACL, Consumer Law and financial services laws relating to consumer protection under the Australian Securities and Investments Commission Act 2001 (Cth) (the 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. There are specific requirements relating to the content of the scheme's governing document, 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 generally must hold unencumbered and highly liquid net tangible assets of at least the greater of A$10 million or 10 per cent of the average responsible entity 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, and share capital and company details to ASIC. Large proprietary companies, public companies and foreign-controlled companies must lodge annual audited accounts with ASIC which are made publicly available.

Australian fintech companies may meet the criteria for classification as an 'early stage innovation company' (ESIC), which includes expenditure of less than A$1 million and assessable income of less than A$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 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) due 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. It will be possible for the structures 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 asset classes may be subject to specific disclosure requirements (eg, property or hedge fund products).

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, Singapore and Luxembourg, which enable foreign financial service providers (FFSP) 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 in Australia those financial services it is authorised to provide 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 of the occurrence of any significant matters (eg, investigations or regulatory actions) applicable to the financial services it provides in Australia.

The instruments effecting passport relief were due to expire ('sunset') between 1 October 2016 and 1 April 2017. In late 2016, ASIC simultaneously repealed the passport relief instruments and extended the operation of the relief to 1 October 2018. During the transitional period, ASIC will review the framework for passport relief and intends to release a consultation paper in January 2018 with its proposals to remake relief.

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 effective 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. Certain activities will cause an entity to be deemed to be carrying on business in Australia. 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.

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. Retail peer-to-peer or marketplace lending platforms are often structured as MISs 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 and banking products.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

In March 2017, the Corporations Amendment (Crowd-sourced Funding) Act (Cth) (the CSF Act) received royal assent, providing a regulatory framework for crowd-sourced equity funding (CSF) in Australia. The CSF Act, among other things, sets out requirements for eligible companies and eligible offers, requirements for how the offer must be made and obligations on CSF intermediaries (ie, the platform operators) in respect of platforms. The CSF Act includes the following features:

- the offers must be made by 'eligible CSF companies' – unlisted public companies with less than A$25 million in consolidated gross assets and less than A$25 million in annual revenue;
- the offer must meet certain requirements, including a fundraising cap of A$5 million in any 12-month period;
- the offer must be made via a 'CSF offer document' which will involve reduced disclosure requirements, and must be published on the platform of a single CSF intermediary;
- CSF intermediaries must be licensed to provide crowdfunding services; and
- investment caps for retail investors of A$10,000 per issuer per 12-month period.

As part of the Federal Budget 2017, the government moved to extend the reach of the CSF reforms to proprietary companies. Features of the draft legislation include:

- eligibility requirements: a CSF eligible company includes proprietary companies with at least two directors that also satisfy any other prescribed regulatory requirements;
- disclosure requirements: CSF offers must be made via a CSF offer document, which will involve reduced disclosure requirements; and
- CSF shareholders not to count towards member limit: a CSF shareholder, being an entity that holds securities issued pursuant to a CSF offer, is not counted towards the 50-member statutory limit for proprietary companies.

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

Factoring arrangements generally require that the factor hold an AFSL; however, regulatory relief is available such that if certain conditions are met (around terms and conditions and dispute resolution processes) an AFSL is not required. However, Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the AML/CTF Act) requirements (see below) 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 above.

Whether an invoice trading business is otherwise regulated within the existing consumer protection, 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 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 (RBA).

Payment services are generally 'designated services' under the 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; and 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 A$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 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Companies must be authorised by APRA in order to carry on an insurance business in Australia, and companies must hold an AFSL in order to market or sell insurance products in Australia.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

The provision of credit references in Australia is subject to the Privacy Act 1988 (Cth) (the Privacy Act). The Privacy Act provides that only credit reporting agencies (corporations that carry on a credit reporting business) are authorised to collect personal information, collate such information in credit information files and disclose this information to credit providers. Credit reporting agencies must comply with obligations under the Privacy Act with regard to the use, collection and disclosure of credit information.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

There are legal and regulatory rules that oblige financial institutions to make customer or product data available to third parties. For example, the AML/CTF Act requires an ordering institution (as defined in that act) to pass on certain information about a customer (a payer) and a transaction to other entities in a funds transfer, where such information may include customer and product data.

Legal and regulatory rules also require a financial institution to disclose customer or product data to regulators in certain circumstances (generally breach or likely breach of an applicable requirement).

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

The ASIC Innovation Hub is designed to foster innovation that could benefit consumers by helping Australian fintech start-ups navigate the Australian regulatory system by providing access to informal assistance intended to streamline the licensing process for innovative fintech start-ups.

ASIC has implemented a regulatory sandbox, the features of which include a testing window that allows certain financial services and products to be provided without a licence; an ability for sophisticated investors to participate with a limited number of retail clients (within monetary exposure limits); and modified conduct and disclosure obligations.

As part of the Federal Budget 2017, the government announced plans to legislate an enhanced regulatory sandbox encouraging testing of a wider range of financial products and services without a licence. The regulatory sandbox will include an extended 24-month testing time frame, providing eligible businesses with a greater window to test their products.

ASIC has also released guidance on issues that providers need to consider when providing digital advice (which is advice that is produced by algorithms and technology).

AUSTRAC's newly established Fintel Alliance has announced an innovation hub targeted at improving the fintech sector's relationship with the government and regulators. The hub will test a regulatory sandbox for fintech businesses to test financial products and services without risking regulatory action or costs.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

ASIC has arrangements with the Hong Kong Securities and Futures Commission (SFC), the Monetary Authority of Singapore (MAS), the UK's Financial Conduct Authority (FCA), Canada's Ontario Securities Commission (OSC), the Capital Markets Authority of Kenya (CMA), Indonesia's Otoritas Jasa Keuangan (OJK), the Japan Financial Services Agency (JFSA) and the Malaysian Securities Commission (SC).

Under ASIC's agreements with CMA and OJK, the regulators have committed to sharing information in their respective markets relating to emerging market trends and the regulatory issues arising as a result of growth in innovation. Under ASIC's agreements with SFC, FCA, MAS, OSC, JFSA and SC, the regulators will be able to refer to one another innovative businesses seeking to enter the others' market.

Under ASIC's agreement with the FCA, innovative businesses will also be given help during the authorisation processes with access to expert staff and, where appropriate, the implementation of a specialised authorisation process. Following authorisation, the businesses will have a dedicated regulator contact for a year.

ASIC is also signatory to the IOSCO Multilateral Memorandum of Understanding, which has committed over 100 regulators to mutually assist and cooperate with each other, particularly in relation to the enforcement of securities laws.

17 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 will 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 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, including:

- 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;
- fees or costs should give a realistic impression of the overall level of fees and costs a consumer is likely to pay;
- industry concepts and jargon should be avoided; and
- 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 so suitable.

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

A person is restricted from transferring funds to a country or person who 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. Such transfers are subject to AML/CTF Act compliance requirements imposed on the institutions effecting the transaction.

19 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 and issue products to an Australian 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) and the service is provided from outside Australia.

If the unsolicited approach relates to credit activities that are regulated under the NCCP Act (broadly, consumer credit), the provider is required to hold an ACL irrespective of the unsolicited approach.

20 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.

21 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 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 applies to the cross-border activities of an Australian organisation to whom the act applies (see question 41 for further details). 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.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

Generally, there are no licensing exemptions that specifically apply where the services are provided in Australia through an offshore account. However, this may affect the nature of the authorisations required.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

Currently, there are no legal or regulatory rules or guidelines relating to the use of distributed ledger technology (DLT) in Australia. However, in March 2017 ASIC released guidance to inform businesses considering operating market infrastructure or providing financial or consumer credit services using DLT of how ASIC will assess compliance by the provider with applicable licence conditions.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Currently, digital currencies are generally unregulated in Australia. The RBA, ASIC and AUSTRAC have each made statements confirming virtual currencies are (at this point in time), in and of themselves, outside their existing areas of concern or legal definitions that form their regulatory functions. However, several Australian regulators (including those listed, and the Australian government more broadly) are considering expanding the scope of regulation to include virtual currencies, and we expect this to be on the regulatory agenda for 2017.

The facilitation of payment by virtual currencies may require that the facilitator hold an AFSL or be entitled to rely on an exemption.

Digital currencies are subject to the general consumer protection provisions, whereby providers must not make false or misleading representations or engage in unconscionable conduct.

The Australian Taxation Office (ATO) has released public rulings on the tax treatment of digital currencies, including capital gains tax when using digital currency for investment or business purposes, income tax on the profits of businesses providing an exchange service, buying, selling or mining digital currency, and fringe benefits tax applicable to remuneration paid in digital currency where there is a valid salary sacrifice arrangement. In relation to the GST treatment of digital currencies, please refer to question 45.

In relation to digital wallets, depending on the nature of the wallet, the person providing the wallet may be required to hold an AFSL or ACL, or be exempt from the requirement to be licensed, and may have obligations under the AML/CTF Act. Depending on the data captured by the wallet, the person providing the wallet may also need to comply with the Privacy Act.

Securitisation

25 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 Property 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.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace 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 the subject of the unperfected security interest.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace 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.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace 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. The company must also comply with any duty of confidentiality in the underlying loan or security agreement.

Intellectual property rights

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

Copyright in software (including source code) is automatically protected by legislation. An owner may also apply to IP Australia for software to be registered or patented.

Software can also be protected contractually through confidentiality agreements between parties.

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

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

31 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 employee.

32 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.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Generally, joint ownership restricts a single owner from using, licensing, charging or assigning a right in intellectual property without the agreement of the other joint owner(s), subject to any pre-existing agreement with the other joint owner(s).

34 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 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 a power to close a court to protect trade secrets or confidential commercial information in certain exceptional circumstances.

35 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;
- domain name by applying to the desired hosts; and
- trademark by registering with IP Australia.

In relation to trademarks, 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.

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

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

IP Australia maintains publicly available registers of patents, trade marks and designs. However, due 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.

37 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.

38 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.

Data protection

39 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 A$3 million. The Privacy Act has extraterritorial operation and extends to an act done outside Australia where there is an 'Australian link'.

The Privacy Act comprises 13 Australian Privacy Principles (APPs) that 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.

Fintech companies may collect tax file numbers (TFNs) from customers for a number of reasons in the ordinary course of their business. TFNs may only be collected when required for the purposes of a tax, personal assistance or superannuation law. Recipients must ensure that they inform individuals of the reason that they are collecting the TFN, and may only use the TFN for the purpose of complying with such a law. Where a TFN is no longer required, a recipient must take reasonable steps to securely destroy or permanently de-identify the information.

40 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 we can expect developments in this area.

Update and trends

The Australian government and regulators have generally been responsive to facilitating the development of fintech, for example with the creation of an A$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, the crowd-sourced funding regime, and the establishment of the FinTech Advisory Group to advise the Treasurer and the ASIC Innovation Hub.

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 has also become a 'participant' via its 'digital transformation office' seeking to provide better access to government services online and looking to create a digital marketplace for start-ups to deliver digital services to government.

The Federal Budget 2017/18 specifically targeted fintech businesses with a range of initiatives (as outlined throughout this chapter), which is further proof of the emergence of fintech as a force in both Australian business and the Australian economy more broadly. Many of these initiatives address gaps or issues in the existing regulatory framework, which have been identified by industry participants and communicated to regulator stakeholders in the context of a recent trend towards encouraging industry consultation and dialogue.

The final Productivity Commission Inquiry Report into Data Availability and Use was handed down in May 2017, considering ways to increase data availability in Australia with a view to boosting innovation. Following its release, the government announced an inquiry to recommend the best approach to implement an open banking regime forcing banks to share data with fintech companies.

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

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

Guidance published by the Office of the Australian Information Commissioner on de-identifying personal information includes removing or modifying personal identifiers and aggregating information.

Cloud computing and the internet of things

42 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 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).

43 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 on the use of cloud computing in the financial services industry. From a risk and compliance perspective, the same 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. ASIC has released regulatory guidance indicating its expectations for licensees' cloud computing security arrangements.

44 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 regulation 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. At the time of writing, there are no plans to develop or implement these priority areas.

Tax

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

State and local governments provide ad hoc discretionary tax incentives to technology-based ventures, and require significant investment in the particular government area. More formally, the Australian and certain state governments have introduced a number of incentives to encourage innovation by, and investment in, the Australian fintech sector.

Incentives for investors

ESIC incentives

Incentives are available for eligible investments made in ESICs. Broadly, a company is an ESIC if it:

- was incorporated within the last three income years, or was incorporated within the last six years and for the last three of those income years it and its wholly owned subsidiaries had total expenses of A$1 million or less;
- had assessable income of A$200,000 or less and expenses of A$1 million or less in the previous income year;
- does not have interests listed on a stock exchange; and
- is undertaking an 'eligible business' (ie, a business with scalability, potential for growth and engaged in innovation, with several tests used for innovation, including research and development (R&D)).

Investments of 30 per cent or less in an ESIC would generally qualify for a non-refundable tax offset equal to 20 per cent of the investment (capped at A$200,000 per investor). Investments of 30 per cent or less are also exempt from capital gains tax (CGT) if disposed of within 10 years.

Eligible VCLPs

Fintech investments may be made through VCLP or ESVCLP structures, both of which receive favourable tax treatment. Specific registration and eligibility requirements apply.

For VCLPs, benefits include tax exemptions for foreign investors from CGT on their share of profits made by the partnership. For ESVCLPs, income tax exemptions apply to both resident and non-resident investors, and a 10 per cent non-refundable tax offset is available for new capital invested.

While there is currently some legislative uncertainty as to whether the VCLP and ESVCLP tax concessions apply to investments in fintech companies, the government has announced plans to amend the legislation to specifically bring fintech investments within the scope of those concessions.

Incentives for fintechs

The R&D tax incentive programme is available for entities incurring eligible expenditure on R&D activities.

Claimants under the R&D tax incentive programme may be eligible as follows:

- for most small businesses with less than A$20 million aggregated turnover: a 43.5 per cent refundable tax offset; and
- for other businesses: a 38.5 per cent non-refundable tax offset.

Broadly, eligible R&D activities include experimental activities whose outcome cannot be known in advance and are undertaken for the purposes of acquiring new knowledge (known as core R&D activities), and supporting activities directly related to core R&D activities (known as supporting R&D activities).

GST

The Australian government has introduced draft legislation (in the form of an Exposure Draft), which, if passed, will align from 1 July 2017 the GST treatment of digital currency (such as Bitcoin) with money to ensure that consumers are no longer subject to 'double taxation' when using this digital currency.

Under the previous regime, the ATO considered that Bitcoin was neither money nor a foreign currency, and the supply of digital currency was not a financial supply but rather may be taxable on the basis that a supply of such currency in exchange for goods or services is a barter transaction. Consequently, consumers who used digital currencies as payment could effectively be liable to GST twice: once on the purchase of the digital currency and again on its use in exchange for other goods or services.

This recent Budget measure has ensured purchases of digital currencies will, upon passage of the legislation, no longer be subject to GST. Removing double taxation on digital currencies has in that regard removed an obstacle for the fintech sector to grow in Australia.

Stamp duty

There are stamp duty exemptions provided in certain jurisdictions for securitisation transactions. These exemptions were introduced to foster the growth of the securitisation industry in Australia and are administered broadly by each relevant revenue authority. The exemptions apply to the typical transactions that would occur in the securitisation context, such as the transfer of the mortgages to the securitisation vehicle (typically, a unit trust) and the issue of units and debt securities by the securitisation trust.

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Competition

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

There are no specific competition issues that exist with respect to fintech companies.

As part of the Federal Budget 2017, the government introduced a series of proposed measures to boost competition particularly for fintech companies in the banking sector. These include reduced barriers to entry to establishing a bank and carrying on a banking business in Australia.

Financial crime

47 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 (for example, by factoring a receivable, providing a loan, or issuing or selling securities), the company will be a reporting entity for the purposes of that 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 programme; and report annually to AUSTRAC and as required on the occurrence of a suspicious matter, a transfer of currency with a value of A$10,000 or more, and all international funds transfer instructions.

For fintech businesses engaging in digital currency exchanges, the Attorney-General's office has recently closed consultation on amending the AML/CTF Act to 'regulate activities relating to convertible digital currency, particularly activities undertaken by digital currency exchange providers'. The government is aiming to draft legislative proposals later this year.

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.

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

Not at the time of writing.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
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