Fintech

Contributing editors
Angus McLean and Penny Miller

2019

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Fintech 2019

Contributing editors

Angus McLean and Penny Miller

Simmons & Simmons

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2016
Third edition
ISBN 978-1-78915-024-7

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Fintech 2019

Third edition

Getting the Deal Through is delighted to publish the third edition of *Fintech*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Angus McLean and Penny Miller of Simmons & Simmons, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
August 2018

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) (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, providing custodial or depository services and providing a crowdfunding service.

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 may be 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. The Australian government is currently undertaking a review of the NCCP Act, which includes a proposal to introduce a self-reporting regime that will require ACL holders to notify ASIC of any breach of their compliance obligations. Much of this review has been deferred pending the outcome of the Banking and Financial Services Royal Commission.

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 (eg, securitisation) (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 scheme 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, assessable income of less than A$200,000 in an income year and not have any of its equity interests listed on any stock exchange, 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 a new corporate collective investment vehicle (CCIV) structure, in order to make Australian funds more familiar to foreign investors. The government released a draft bill and explanatory materials during its public consultation process that concluded on 2 February 2018.

If passed in its current form, the CCIV structure will have the following key features:

- a CCIV must be a company limited by shares and have a corporate director that is a public company and holds an AFSL authorising it to operate a CCIV and it is not a foreign company;
- a CCIV will be classified as either retail or wholesale, with different tests and requirements for each type (eg, wholesale CCIVs will not be required to have a compliance plan);
- a CCIV must be operated by a single corporate director, who possesses specific powers and obligations;
- a CCIV must have at least one sub-fund at all times, and may comprise multiple sub-funds. All business of a CCIV must be conducted through a sub-fund;
- a CCIV can be open-ended or closed-ended; and
- all CCIVs will be required to be registered under the Corporations Act.

It will be possible for the structure to be offered to both Australian and offshore investors, aligning with the proposed Asia Region Funds Passport (ARFP) initiative (see question 6). The CCIV regime is currently under consideration, with an expected response by mid to late 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 US, the UK, 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 proving 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 has been reviewing the framework for passport relief and released a consultation paper in May 2018. At the time of writing, ASIC has proposed to repeal the existing avenues of relief for FFSPs over a transitional period until 30 September 2020, and introduce a limited AFSL regime for FFSPs.

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 allow fund managers from member economies to sell their products in other 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, with the Australian government having undergone multiple public consultation rounds over the past six months with exposure draft bills. The final bill is currently before parliament, with the ARFP expected to be effective by the end of 2018.

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 have 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.

Australia's regulatory framework for crowd-sourced equity funding (CSF) was established in early 2017 by virtue of the Corporations Amendment (Crowd-sourced Funding) Act (Cth) (the CSF Act). 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.

The Australian government has proposed to extend the reach of the CSF reforms to proprietary companies. After a number of draft bills and public consultations throughout 2017, the final bill is currently being considered by parliament. If passed in its current form, notable features of the reform will 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 automated investment advice in your jurisdiction.

Generally, ASIC and the Corporations Act adopt a 'technology neutral' approach to regulation, such that digital financial product advice is subject to the same regulatory requirements as non-digital financial product advice. This means that digital or hybrid-advice providers will generally be required to hold an AFSL, or be exempt from the requirement to hold such a licence. ASIC has released Regulatory Guide 255: providing digital financial product advice to retail clients, which details issues that digital advice providers need to consider during the AFSL application stage and when providing digital financial product advice to retail clients. Generally, digital or hybrid-advice providers will need to comply with organisational competence requirement, resourcing, monitoring and testing requirements, and uphold their best interests duty when providing 'scaled advice' to retail clients.

11 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 (concerning terms and conditions and dispute resolution processes), an AFSL is not required. 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.

12 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.

13 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 generally must hold an AFSL or be exempt from the requirement to hold an AFSL, in order to market or sell insurance products in Australia.

14 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.

15 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).

In February 2018, the Australian Treasury released its final report on the Open Banking Review, which is an application of the comprehensive 'consumer data right' to the banking industry. Under the proposed new open banking regime, customers will have greater control over their banking data, including the ability to direct banks to share product and customer data with third parties. The open banking regime is expected to entail a phased implementation from July 2019.

16 Does the regulator in your jurisdiction make any specific provision to encourage the launch of new banks?

Australian regulators and legislators have generally been responsive to removing barriers to entering the banking industry. As discussed in question 15, the proposed new open banking regime will provide customers with enhanced abilities to control their banking data, making it easier to switch between service providers. This is intended to improve competition in the banking sector and encourage innovation to improve customer experience.

Following consultation, Australia's banking regulator, APRA, has established a new restricted Authorised Deposit-taking Institution (ADI) licensing framework to support new entrants to the banking industry, particularly those with innovative or non-traditional business models. Under the framework, entities can seek to apply for a restricted ADI licence, which would allow applicants to begin limited operations while progressing to meet the requirements to operate with a full ADI licence. At the time of writing, there has been one restricted ADI licence issued by APRA.

17 Describe any specific rules relating to notification or consent requirements if a regulated business changes control.

If a regulated business experiences a change in control, the business will be required to notify the relevant regulator(s). Generally, AFS licensees must notify ASIC of any changes in control within 10 business days of the licensee becoming aware of the change. Similarly, public companies may also need to consider whether they need to notify the Australian Securities Exchange (ASX) as part of their continuous disclosure obligations.

It is worth noting that, in June 2017, the ASIC Enforcement Review Taskforce consulted on strengthening ASIC's enforcement powers. The Taskforce proposed new powers for ASIC including where it must assess whether controllers are fit and proper. If ASIC is not satisfied that this is the case, it would be empowered to refuse an AFSL application, or where there has been a change in control, suspend or cancel the AFSL. The Taskforce also proposed introducing a statutory obligation to notify a change of control within 10 days of control passing with penalties imposed for failure to notify.

18 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.

The government has proposed to legislate an enhanced regulatory sandbox. A final bill is currently before parliament which will allow new businesses to test a wider range of financial and credit products and services without the appropriate financial services or credit licence from ASIC, and for a longer period of time compared with the current sandbox.

ASIC has also released guidance on issues that providers need to consider when providing digital advice (see question 10).

AUSTRAC's Fintel Alliance Innovation Hub is 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.

19 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), the Malaysian Securities Commission (SC), the Swiss Financial Markets Authority (FINMA), the Dubai Financial Services Authority (DFSA), the China Securities Regulatory Commission (CSRC), and the Abu Dhabi Global Market Financial Services Regulatory Authority (FSRA).

Under ASIC's agreements with CMA, OJK, CSRC and FSRA, 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, SC FINMA, DFSA and FSRA, 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 more than 100 regulators to mutually assist and cooperate with each other, particularly in relation to the enforcement of securities laws.

20 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.

21 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.

22 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.

23 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 44). 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.

Distributed ledger technology

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

In March 2017, ASIC released guidance to inform businesses considering operating market infrastructure or providing financial or consumer credit services using distributed ledger technology (DLT) of how it will assess compliance by the provider with applicable licence conditions. There is otherwise no specific regulation applicable to DLT.

Digital currencies

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

While the Government has taken a broadly non-interventionist approach to the regulation of cryptocurrency to date, there has been general clarification by Australian regulators of the application of Australian regulatory regimes to cryptocurrencies and related activities. For example, ASIC holds the view that legislative obligations and requirements are technology neutral. As such, the existing regulatory framework applies irrespective of the mode of technology that is being used to provide a regulated service. Therefore, while legislation has not specifically been enacted to deal with cryptocurrencies, they are captured by various regimes under Australian law that have been amended to include cryptocurrency transaction relationships (eg, issuing and exchanging) within their scope of operation. This has been discussed in detail in question 27.

Various cryptocurrency networks have also implemented 'smart contracts' or self-executing contracts. These are permitted in Australia under the Electronic Transactions Act 1999 (Cth) (ETA) and the equivalent Australian state and territory legislation. The ETA provides a legal framework to enable electronic commerce to operate in the same way as paper-based transactions. Under the ETA, self-executing contracts are permitted in Australia, provided they meet all the traditional elements of a legal contract.

Generally, 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 also released public rulings and general guidance 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 the fringe benefits tax applicable to remuneration paid in digital currency where there is a valid salary sacrifice arrangement. In relation to the goods and services tax (GST) treatment of digital currencies, see question 49.

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. The digital wallet provider may also need to consider Australian consumer law in operating its wallets.

26 Are there any rules or guidelines relating to the operation of digital currency exchanges or brokerages in your jurisdiction?

Where digital currencies traded on an exchange constitute financial products, it is likely that the digital currency exchange will be required to hold an Australian market licence (AML) or be exempt from the requirement to hold an AML. Under the Corporations Act, licensed market operators are exempted from the AFSL regime and therefore will not be required to simultaneously hold an AFSL in relation to certain services. However, digital currency exchanges that facilitate payments by cryptocurrencies may still be required to hold an AFSL or be entitled to rely on an exemption from the requirement to hold an AFSL.

Digital currency exchange service providers must also comply with anti-money laundering and counter-terrorism financing requirements. These requirements have been outlined at question 51 below.

27 Are there legal or regulatory rules or guidelines in relation to initial coin offerings (ICOs) or token generating events in your jurisdiction?

Licensing and marketing

Entities wishing to conduct an initial coin offering (ICO) or token generation event must consider whether the token is a financial product that may trigger financial services licensing and disclosure requirements. In its information sheet, INFO 225 Initial coin offerings (Info

225), ASIC provided its views that tokens or cryptocurrencies with similar features to financial products (eg, securities) will trigger the relevant regulatory obligations. The legal status of a cryptocurrency will depend on the structure of the ICO and the rights attached to the tokens. Depending on the circumstances, cryptocurrencies may constitute interests in managed investment schemes (collective investment vehicles), securities, derivatives or fall into a category of more generally defined financial products, all of which are subject to the Australian financial services regulatory regime, including but not limited to the requirement to hold an AFSL.

Info 225 also notes that an ICO that may constitute an offer of financial products will also have implications for the marketing of the ICO. Apart from whether the marketing activity itself may cause the ICO to be an offer of a regulated financial product, an offer of a financial product to a retail client (with some exceptions) must be accompanied by a regulated disclosure document that satisfies the content requirements of the Corporations Act and regulatory guidance published by ASIC. Under the Corporations Act, an offer of financial products may not require disclosure dependent on the minimum amount of funds invested per investor and where the investor is a 'sophisticated investor' or wholesale client.

Consumer law

Even if an ICO is not regulated under the Corporations Act, it may still be subject to other regulation and laws, including Australian consumer laws relating to the offer of services or products. Australian consumer law prohibits misleading or deceptive conduct in a range of circumstances. Care must be taken in ICO promotional material to ensure that buyers are not misled or deceived. Promoters and sellers are prohibited from engaging in unconscionable conduct and must ensure the coins are fit for their intended purpose. There can be a range of consequences for failing to comply with the Australian consumer law and the ASIC Act, including enforcement by regulators, penalties, injunctions and compensatory damages.

Taxation

In the context of an ICO, a coin issuance by an entity that is either an Australian tax resident, or acting through an Australian 'permanent establishment', will likely be taxable in Australia on the ICO proceeds. The current corporate tax rate in Australia is between 27.5 per cent and 30 per cent. If the issued coins are characterised as equity for tax purposes, the ICO proceeds should not be taxable to the issuer, but all future returns to the token holders will be treated as dividends.

Securitisation

28 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 that the underlying agreement is invalid.

29 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? May these loans be assigned without informing the borrower?

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.

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 Will the securitisation be subject to risk retention requirements?

At present, there are no minimum risk retention requirements.

31 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 that 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

32 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. There is no registration requirement to have copyright protection. 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.

33 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. Business schemes and plans are not patentable, nor are abstract business models which happen to involve a new type of corporate structuring to bring about a certain result.

However, there are some business methods that are patentable. In order to be patentable, the business method must directly involve a physical device which is used to bring about a useful product. If the method involves the application of technology, this technological aspect must be substantial. The mere presence of technology is not enough to make a business model patentable; there must be some creation of a useful product. Related software may only receive patent protection if it meets the requirements for a manner of manufacture, and is an industrially applicable solution to a technological problem. Simply incorporating a business method into a computer is not patentable, unless there is an invention in the way that the computer carries out this method.

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

The employer generally owns new intellectual property rights developed by an employee in the course of employment to the extent that the employee was hired for that purpose. This position can be altered by the terms of employment that contain an effective assignment of such rights to the employee.

35 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.

36 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).

37 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.

38 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.

Where a business has established a certain level of recognisable reputation and brand in the goods and services that it provides, there is also a common law prohibition that will restrict other businesses from passing off that brand as their own. As a common law prohibition, this does not operate as a right to any operational business, but can be enforced in a court to the extent that a business can show the existence of such reputation and brand.

39 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, trademarks 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.

40 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, damages and account of profits.

41 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

42 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.

43 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.

44 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.

Outsourcing, cloud computing and the internet of things

45 Are there legal requirements or regulatory guidance with respect to the outsourcing by a financial services company of a material aspect of its business?

ASIC has set out guidance for AFS licensees wishing to outsource functions relating to their licence such as administrative or operational functions. Broadly, AFS licensees remain responsible for complying with obligations as a licensee.

ASIC expects licensees to have measures in place to ensure due skill and care are taken in selecting service providers, that the licensee will monitor the ongoing performance of any service providers it has engaged, and will deal appropriately with any actions by service providers that breach service level agreements or the licensee's obligations as a licensee.

For a third party to provide financial services to a client on the AFS licensee's behalf, the third party must be an authorised representative. The third party may also be licensed, however, ASIC will generally consider the third party to be providing financial services on its own behalf where the third party has an AFSL.

46 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 third of businesses report using paid cloud computing (reported by the Australian Bureau of Statistics for the financial year ended 30 June 2016).

Update and trends

As a number of government and regulator initiatives have been implemented over the past year, the coming year will likely see a period of 'monitoring and response' to industry adoption of these new regimes as they attempt to boost further growth in the fintech sector.

An area of interest for regulators and market participants is the future regulatory landscape for new technologies as they intersect with established regimes; notably with respect to distributed ledger technology (DLT) and cryptocurrencies. This year has seen a trend of greater awareness of the significant efficiency gains that can be realised by the broader implementation of DLT. As this area develops, we expect to see a shift from the proof of concept stage of these projects to greater institutional adoption across a range of sectors. This is marked by the ASX's implementation of DLT in its clearing and settlement systems, as well as the government's pledge to further understand how blockchain technology could become a valuable resource for government services.

Regulators have been taking a more active stance in relation to cryptocurrencies, particularly in the context of ICOs. This is evidenced by the release of more comprehensive guidance on their approach to tokenisation and technology implementations, with a range of new powers (eg, ASIC's new delegated power to take action under the Australian consumer law relating to crypto-assets) and an increasing level of enforcement activity. However, this should pave the way for a more developed offering landscape, where the legal status of tokens and coins is clearer and the legal ramifications are more predictable. As the case for integrating cryptocurrencies gains greater legitimacy, there is a trend developing that will likely see more complex token arrangements created and institutional offerings undertaken.

As the Banking and Financial Services Royal Commission uncovers the flaws of the industry, we expect that the coming year will witness many policy and regulatory changes that will seek to provide greater transparency and industry cooperation in the provision of financial services generally.

The Federal Budget 2018 addressed a number of areas that will have significant impact on fintech businesses, some of which have been outlined in this chapter. The most notable development arising out of this is the introduction of the national consumer data right, which will give Australians the ability to access and share their data safely with trusted providers.

As the open banking regime will be the first area to be included within the national consumer data right framework, this will enable banking-focused businesses to better tailor their services where consumers have decided to share their data, especially in a financial planning and budgeting context where advice can be personalised. To the extent that fintech businesses are exploring the capabilities of artificial intelligence in the provision of their services, it is notable that the government is taking a more active interest in this space, with a pledge of almost A$30 million in funding over the next four years to bolster Australia's development of artificial intelligence and machine learning, including the establishment of a national artificial intelligence ethics framework.

47 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.

48 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 present, there are no plans to develop or implement these priority areas.

Tax

49 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.

At the time of writing, there is a bill before parliament that will allow investors to obtain certainty about the availability of these tax concessions to fintech investments.

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). As part of the Federal Budget 2018, the Australian government announced new incremental intensity tests for larger businesses, with an annual cash refunds capped at A$4 million per annum for businesses with less than A$20 million aggregated annual turnover, and a A$150 million per annum cap for businesses with greater than A$20 million aggregated annual turnover. These changes take effect from 1 July 2018.

GST

From 1 July 2017, the GST treatment of digital currency (such as Bitcoin) has been aligned with the GST treatment of money with the result 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 was taxable on the basis that a supply of such currency in exchange for goods or services was a barter transaction. Consequently, consumers who used digital currencies as payment prior to 1 July 2017 were effectively liable to GST twice: once on the purchase of the digital currency and again on its use in exchange for other goods or services.

The treatment from 1 July 2017 of supplies and acquisition of digital currency as input taxed financial supplies has ensured sale and purchases of digital currencies are no longer liable to GST. Consequently, suppliers of digital currency will not be required to charge GST on these supplies, and a purchaser would not be entitled to GST refunds (ie, input tax credits) for the corresponding acquisitions. Removing double taxation on digital currencies has in that regard removed an obstacle for the fintech sector to grow in Australia.

On the basis that digital currency is a method of payment, as an alternative to money, the normal GST rules apply to the payment or receipt of digital currency for goods and services.

The term 'digital currency' in the GST legislation requires that it is a digital unit of value that has all of the following characteristics:

- it is fungible and can be provided as payment for any type of purchase;
- it is generally available to the public free of any substantial restrictions;
- it is not denominated in any country's currency;
- its value is not derived from or dependent on anything else; and
- it does not give an entitlement or privileges to receive something else.

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 and underlying debts to the securitisation vehicle (typically, a unit trust) and the issue of units and debt securities by the securitisation trust.

Competition

50 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 discussed in question 16, there are a number of government and regulator initiatives that are attempting to boost competition for fintech companies, particularly in the banking sector.

Financial crime

51 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.

The Anti-money Laundering and Counter-terrorism Financing Amendment Act 2017 (Cth) (AML/CTF Amendment Act) came into force on 3 April 2018. Under the AML/CTF Amendment Act, digital currency exchange providers are now required to register with AUSTRAC and comply with its relevant AML/CTF obligations. Generally, registered exchanges will be required to implement know-your-customer processes to adequately verify the identity of their customers, with ongoing obligations to monitor and report suspicious and large transactions. Exchange operators are also required to keep certain records relating to customer identification and transactions for up to seven years. There is a penalty of up to two years' imprisonment or a fine of up to A$105,000, or both, where registrable digital currency exchange provider provides registrable services without registering.

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.

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

Not at the time of writing.

Peter Reeves **preeves@gtlaw.com.au**

Level 35, Tower Two
International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000
Australia

Tel: +61 2 9263 4000
Fax: +61 2 9263 4111
www.gtlaw.com.au

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
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 Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-024-7