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# Fintech

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## Expert Analysis Chapter



## Q&A Chapters

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# Australia



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## 1 The Fintech Landscape

**1.1 Please describe the types of fintech businesses that are active in your jurisdiction and the state of the development of the market, including in response to the COVID-19 pandemic and ESG (Environmental, Social and Governance) objectives. Are there any notable fintech innovation trends of the past year within particular sub-sectors (e.g. payments, asset management, peer-to-peer lending or investment, insurance and blockchain applications)?**

The COVID-19 pandemic, uncertainty in global markets and various international conflicts have significantly impacted the Australian fintech landscape over the last few years. Despite these disruptors, fintech and the rapid digital evolution of the financial sector has remained a key focus of the market with many fintech businesses developing and refining product and service offerings to better meet shifting consumer preferences and reflect innovations and opportunities created by technology.

As of 2024, fintech creation, development and adoption continues to rapidly grow with the Australian fintech community broadening product offerings and the Australian Government (**Government**) and regulators seeking to enhance Australia's policy and regulatory approach. While previous fintech offerings were limited to operating on the periphery of traditional financial services (including lending, personal finance and asset management), the sector has now moved to disrupt the core product offering of many Australian institutional financial service providers, including payments, stored value, supply chain, wealth and investment, data and analytics and decentralised finance. In the data and investment sector in particular, there have been opportunities for fintechs to assist businesses with growing investor preferences for sustainable investing by collating and analysing Environmental, Social and Governance (**ESG**) data.

2023 saw a continued global economic slowdown due to concerns regarding the possibility of recession, rising inflation and interest rates, uncertainties relating to the Russia-Ukraine and Israel-Palestine conflicts and continued issues with global supply chains. The total number of fintech deals and the average fintech deal size continued to decrease from figures in recent years though, positively, remained higher than the average deal size recorded from 2012–2020, indicating that fintechs continue to challenge traditional market share and participants despite adverse market conditions with early economic benchmarks suggesting 2024 may demonstrate a position of market recovery.

Regulators and the Government face the challenge of adapting and aligning existing financial regulation to new products and services, balancing innovation with consumer protection. Regulators such as the Australian Securities and Investments Commission (**ASIC**), Australian Prudential Regulation Authority (**APRA**) and Australian Transaction Reports and Analysis Centre (**AUSTRAC**) have become more proactive on licensing, conduct and disclosure and have taken a more rigorous approach to enforcement. In particular, ASIC has become significantly more active in litigious enforcement, targeting disclosure issues with respect to design and distribution obligations (**DDOs**), crypto assets (see question 3.3), misleading conduct in relation to sustainable finance (including greenwashing), predatory lending practices, non-compliance with reporting obligations, misconduct in relation to superannuation and insurance practices and general enforcement actions targeting poor distribution of financial products.

Australia's current financial services policy and regulatory context continues to be informed by the findings of the 2017–2019 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**). A raft of legislative changes followed to implement the findings and fintechs – particularly those that are motivated to provide financial services in a way that is more convenient, personalised and simplified for consumers – have been well placed to adapt to these changes, and seize the opportunity presented by public dissatisfaction with traditional providers. As part of the Government's response to the Royal Commission, the Australian Law Reform Commission (**ALRC**) conducted an inquiry into simplifying Australia's financial services regulatory framework to make it "more adaptive, efficient and navigable for consumers and regulated entities". The ALRC provided interim reports on three areas: the design and use of definitions in corporations and financial services legislation; the regulatory design and hierarchy of laws; and the potential to reframe or restructure Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**) (i.e. the overarching financial services laws). A consolidated final report was tabled in Parliament on 18 January 2024. The final report found that the current legislative framework for corporations and financial services regulation is overly complex, costly to comply with and difficult to enforce, citing 58 recommendations to streamline financial services legislation including the Corporations Act and the *ASIC Act 2001* (Cth) (**ASIC Act**). The Federal Government is now considering the report and practical ways to implement its recommendations.

Regulators and legislators are also looking beyond the findings of the Royal Commission to modernise the regulation of financial services as the financial services sector continues to evolve.

There has been a raft of targeted reviews in this space, including the Council of Financial Regulators' (**CFR**) Stored Value Facility Review, the Treasury Payments System Review, the Senate Select Committee on Australia as a Technology and Financial Centre and the Parliamentary Joint Committee Inquiry into Mobile Payments and Digital Wallets. More recently:

- On 29 March 2023, opposition Senator Andrew Bragg introduced a private members bill, *Digital Assets (Market Regulation) Bill 2023* (**Digital Assets Bill**), proposing to regulate digital assets through introducing licensing requirements for digital asset exchanges, digital asset custody service providers and stablecoin issuers. The Digital Assets Bill is currently before the Senate (see question 3.2).
- On 20 April 2023, the Attorney-General released its proposed reforms to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**). On 2 May 2024, the Attorney-General released its second consultation in relation to the proposed AML/CTF Act reforms (see question 4.5).
- On 22 May 2023, the Government announced its plan to regulate the Buy-Now, Pay-Later (**BNPL**) industry. Under proposed regulation, BNPL providers will be required to obtain an Australian Credit Licence (**ACL**) and comply with a reduce set of obligations under the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**). Exposure draft legislation was expected in late 2023, however the Government has now indicated that due to internal resourcing pressures, draft legislation can be expected later in 2024.
- On 7 June 2023, Treasury released its Strategic Plan for Australia's Payment System (**Payments Strategic Plan**), outlining the policy objectives and priorities to reform Australia's payments system. The Payments Strategic Plan was released alongside two consultations, the first on reforming the *Payments Systems (Regulation) Act 1998* (Cth) (**Payments Systems Act**) and the second on modernising the licensing framework for payment service providers (**PSPs**). Subsequent consultations have been released providing more information on how the Government proposes to implement the Payments Strategic Plan (see question 3.1).
- On 7 August 2023, Treasury released consultation and related exposure draft legislation relating to long-anticipated exemptions for foreign financial service providers (**FFSPs**). After considering consultation submissions, on 30 November 2023 Treasury released amended draft legislation finalising the licensing exemptions available to FFSPs (see question 3.4).
- On 11 October 2023, as part of the Payments Strategic Plan, Treasury released a draft bill and explanatory memorandum for industry comment on proposals to update the Payment Systems Act. The draft bill proposes to expand the Payments Systems Act coverage across key definitional areas and introduce new ministerial powers (see question 3.1).
- On 16 October 2023, Treasury consulted on proposals to regulate digital asset intermediaries under the existing financial services regulatory framework (see question 3.2).
- On 9 November 2023, changes to the Unfair Contract Term (**UCT**) regime came into effect. The reforms made UCTs illegal, attracting significant penalties for contravention of the regime (see question 3.1).
- On 30 November 2023, Treasury released a consultation relating to mandatory industry scam codes for the private sector. The consultation notes that there is currently no overarching regulatory framework to set clear roles for the Government, regulators and the private sector to address and combat scam activity. The Government has committed to mandatory industry codes that outline the responsibilities of the private sector in relation to scam activity, focusing on banks, telecommunications providers and digital platforms. The consultation closed on 29 January 2024.
- On 8 December 2023, as part of the Payments Strategic Plan, Treasury released its second consultation paper in relation to an enhanced regulatory framework for Australian PSPs (see question 3.1).

For the past few years there has been sustained attention on blockchain technology and a growth in interest in the technology by established businesses in the financial services sector. In particular, there has been growing interest in how decentralisation and new governance models such as decentralised autonomous organisations (**DAOs**) can exist and be regulated. It is expected that further clarity on the application of the Australian regulatory regime to such models will come in due course – the Senate Select Committee on Australia as a Technology and Financial Centre recommended the introduction of a new DAO legal entity in Australian corporate law and this recommendation has been agreed to by the Government.

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

2023 saw a number of major Australian banks impose restrictions on customers from contracting with certain "high-risk" cryptocurrency exchanges in an attempt to reduce cryptocurrency related scams. In May 2023 Westpac Banking Corporation (**Westpac**) banned customers from transferring funds to certain high-risk cryptocurrency exchanges. The Commonwealth Bank of Australia (**CBA**) followed by instigating an AUD 10,000 limit on transfers to lower-risk cryptocurrency exchanges. CBA has not imposed limits on withdrawals from cryptocurrency businesses to individual accounts. The National Australia Bank (**NAB**) and the Australia and New Zealand Banking Group (**ANZ**) enacted customer bans to exchanges deemed high risk. Senior leadership from Westpac explained that while digital exchanges have a legitimate role to play in the financial ecosystem, scammers are increasingly relying on overseas crypto exchanges to conduct scam activity. It is anticipated that these protections will reduce as the crypto regulatory environment continues to develop in Australia.

At the time of writing, there have not been any regulatory prohibitions or restrictions on specific fintech business types. Cryptocurrency-based businesses are permitted in Australia, provided such businesses comply with applicable laws (including financial services and consumer laws).

## 2 Funding For Fintech

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

**Equity funding**

Businesses can raise equity using traditional private and public fundraising methods (e.g. private placement, initial public offering (**IPO**), and seed and venture capital strategies), through grants and initiatives offered by Government and State/Territory agencies, and through crowdfunding.

In late 2017, a regulatory framework was introduced for crowd-sourced equity funding (**CSEF**) by unlisted public companies from retail investors. CSEF involves a company offering its ordinary shares to investors in return for a small cash investment. Eligible companies may raise up to AUD 5 million in any 12-month period under the CSEF framework. While reducing the regulatory barriers to investing in small and start-up businesses, the framework also created certain licensing and disclosure obligations for CSEF intermediaries (i.e. persons listing CSEF offers for public companies). This regime was extended in 2018 to also apply to proprietary companies. While there are a range of reporting requirements imposed on proprietary companies engaging in crowdfunding, there are also a number of concessions made with respect to restrictions that would otherwise apply to their fundraising activities.

Under the CSEF framework, there are exemptions for persons operating markets and clearing and settlement (**CS**) facilities from the licensing regimes that would otherwise be applicable to those facilities. These additional exemptions provide a means by which a person operating a platform for secondary trading can seek an exemption with tailored conditions from more onerous licensing requirements.

ASIC has released *Regulatory Guides 261 Crowd-sourced funding: Guide for Companies* and *262 Crowd-sourced funding: Guide for intermediaries* to assist companies seeking to raise funds through CSEF and intermediaries seeking to provide CSEF services, respectively.

### Debt funding

There have been calls to extend the existing crowdfunding framework to debt funding, and the Government has previously indicated that it intends to consult on this. Debt financing is less common than equity financing in the Australian fintech sector; however, businesses can approach financial institutions, suppliers and finance companies in relation to debt finance.

### Asia Region Funds Passport and Corporate Collective Investment Vehicles

The Asia Region Funds Passport (**Passport**) was introduced in 2018 and is a region-wide initiative designed to facilitate the offer of interests in certain collective investment schemes (**CIS**), established in Passport member economies to investors in other Passport member economies. It aims to provide Australian fund managers and operators with greater access to economies in the Asia-Pacific region by reducing regulatory hurdles.

The Government introduced a new type of corporate fund vehicle known as a "corporate collective investment vehicle" (**CCIV**) from 1 July 2022. The policy behind the CCIV regime was to introduce a new type of investment vehicle which is attractive to foreign investors, thereby improving the competitiveness of Australia's managed funds industry. It is intended to complement the Passport by making Australian funds more accessible to foreign investors.

The Australian funds market is dominated by unit trusts, a structure that historically has been unfamiliar to many offshore jurisdictions where corporate and limited partnership investment vehicles are the norm throughout the Asia-Pacific region. The CCIV was intended to provide an internationally recognised investment vehicle which will be able to be more readily marketed to foreign investors (including through the Passport). However, in practice, unit trusts have continued to be the preferred fund structure for most asset classes.

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

### Incentives for investors

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

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

Investments of less than 30% of the equity in an ESIC would generally qualify for a 20% non-refundable carry forward tax offset (capped at AUD 200,000 per investor and their affiliates combined in each income year, including any offsets carried forward from the prior year's investment) and a 10-year tax exemption on any capital gains arising on disposal of the investment (provided they are held for at least one year but less than 10 years).

(2) **Venture capital investments**

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

For VCLPs, benefits include tax exemptions for foreign investors (limited partners) on their share of any revenue or capital gains made on disposal of the investment by the VCLP, and concessional treatment of the fund manager's carried interest in the VCLP. For ESVCLPs, the income tax exemption for VCLPs is extended to both resident and non-resident investors, plus investors obtain a 10% carry forward non-refundable tax offset for new capital invested in the ESVCLP.

### Incentives for fintechs

The Research & Development (**R&D**) Tax Incentive programme is available for entities incurring eligible expenditure on R&D activities, which includes certain software R&D activities commonly conducted by fintechs. Claimants under the R&D Tax Incentive programme may be eligible for one of the following incentives:

(a) *Small businesses (less than AUD 20 million aggregated turnover)*: a refundable offset of 18.5% above the claimant's corporate tax rate, which is 25% (if the claimant is eligible for the lower corporate tax rate), providing a total 43.5% refundable tax offset; or

(b) *Other businesses (aggregated turnover of AUD 20 million or more)*: a non-refundable tax offset of the claimant's corporate tax rate, plus an incremental premium of either 8.5% (for R&D expenditure between 0% and 2% R&D intensity) or 16.5% (for R&D expenditure above 2% R&D intensity). A claimant's incremental premium is based on its R&D intensity, which is the proportion of the claimant's eligible R&D expenditure as a percentage of total business expenditure.

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

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

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

Consistent with 2022, market instability and other global pressures across 2023 saw the number of notable exits drop. Significant fintech IPOs prior to 2023 include Butn, a payments and funding solution for organisations, Beforepay, an app providing "pay on demand" services, and Halo Technologies Holdings, a fintech specialising in providing technology solutions for all types of investors, streamlining services into one application.

## 3 Fintech Regulation

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

Broadly, the regulatory framework that applies to fintech businesses includes financial services and consumer credit licensing, registration and disclosure obligations, consumer law requirements, privacy and anti-money laundering and counter-terrorism financing (**AML/CTF**) requirements.

Licensing obligations apply to entities that carry on a financial services business in Australia or engage in consumer credit activities. The definitions of *financial service* and *financial product* are broad, and will generally capture any investment or wealth management business, payment service (e.g. non-cash payment (**NCP**) facility), advisory business (including robo-advice), trading platform, and crowdfunding platform, triggering the requirement to hold an Australian financial services licence (**AFSL**) or be entitled to rely on an exemption. Similarly, engaging in peer-to-peer lending activities will generally constitute consumer credit activities and trigger the requirement to hold an ACL or be entitled to rely on an exemption.

Financial services licensing in relation to payments is set to change. In July 2023, Treasury closed a consultation on its proposal to modernise the financial services licensing framework PSPs. The consultation proposes a tiered, risk-based licensing framework to be incorporated in the existing AFSL regime. Regulation will be based on the relevant payment function provided, with corresponding regulatory obligations balanced against the level of risk posed to end customers. The consultation proposes to regulate two main payments categories: stored value facilities (**SVF**); and payment facilitation services (**PFS**), which are further broken down into seven defined payment functions. On 8 December 2023, Treasury released a second consultation paper building on the initial consultation, proposing to impose the AFSL requirement (and accompanying obligations) on PSPs. Treasury has now recommended replacing the NCP facility financial product definition with a new "payment product" definition and including "payment service" as a new financial service. The consultation also includes a range of payment-specific AFSL exemptions and product exclusions as part of the proposed regime. Treasury proposes to implement the payments licensing requirements 18 months after the passage of legislation. The consultation closed on 2 February 2024, with legislation set to follow.

Fintech businesses may also need to hold an Australian market licence where they operate a facility through which offers to buy and sell financial products are regularly made and accepted (e.g. an exchange). If an entity operates a CS mechanism which enables parties transacting in financial products to meet obligations to each other, the entity must hold a CS facility licence or otherwise be exempt.

The *Australian Consumer Law* (**Consumer Law**) applies to all Australian businesses that engage or contract with consumers. The Australian Competition and Consumer Commission (**ACCC**) has regulatory oversight of the Consumer Law. Obligations include a general prohibition on misleading and deceptive conduct, false or misleading representations, unconscionable conduct and UTCs in relation to the offer of services or products. The ASIC Act generally reflects the consumer protections under Consumer Law and is applicable to the provision of financial services and products.

Fintech businesses may also be captured by the UCT regime as regulated by Consumer Law and the ASIC Act. The UCT regime aims to protect consumers against unfair terms in standard form consumer contracts or small business contracts. On 9 November 2023, changes to the UCT regime came into effect, making UCTs illegal. UCTs are now subject to significant penalties and the UCT regime vastly expanded the types of small business contracts now captured which may impact fintech businesses. Terms that are of a standard form consumer or small business contract with an unfair term will now be deemed void by the new regime. The test of how a term is deemed is unfair is assessed on whether the term is (a) not reasonably necessary, (b) causes a significant imbalance in the rights and obligations on the parties, and (c) would cause detriment to the other party if relied upon. The updated UCT regime has also given additional powers to the courts in relation to UCTs; for example, providing the power to injunct people in the future from making contracts that rely on the UCT or from applying or relying on an UCT in an existing contract.

Additionally, in 2018, ASIC received a delegation of power from the ACCC enabling it to take action where there is potential misleading and deceptive conduct associated with crypto assets.

The AML/CTF Act applies to entities that provide "designated services" with an Australian connection. Generally, the AML/CTF Act applies to any entity that engages in financial services or credit (consumer or business) activities in Australia. Obligations include enrolment with AUSTRAC, reporting and customer due diligence.

The *Banking Act 1959* (Cth) regulates those engaged in the business of banking to be authorised by APRA (i.e. be an "authorised deposit-taking institution" or **ADI**) before engaging in such business. It also contains the Banking Executive Accountability Regime (**BEAR**), which is also administered by APRA and establishes, among other things, accountability obligations for ADIs and their senior executives and directors, and deferred remuneration, key personnel and notification obligations for ADIs.

The PSRA provides powers to the RBA to regulate purchased payment facility providers in relation to stored value facilities. Generally, such holders of stored value must be an ADI or be exempt from the requirement. In 2021, the RBA reviewed the regulatory framework for retail payments. A key outcome of the review was the creation of a policy framework designed to encourage least-cost routing functionality that allows contactless (tap-and-go) dual-network debit card transactions at the point of sale to be processed through whichever network on the card is less costly for the merchant.

PSRA reform continues to be a key focus of the Government. Following the release of the Payments Strategic Plan, Treasury released a draft bill and explanatory memorandum for industry comment on proposals to update the PSRA. One such proposal includes expanding the definition of "payment system" under the PSRA to broaden the scope of arrangements caught to capture non-monetary digital assets and other payment facilitation systems. The draft legislation also proposes to widen the definition of "participants" to all entities in the payments value chain, including those that are both directly and indirectly associated with payment systems (i.e. capturing non-traditional payment entities such as ApplePay and Google Wallet). The consultation closed on 1 November 2023. Subject to amendments stemming from the consultation, legislation is expected later in 2024.

The *Financial Sector Collection of Data Act 2001* (Cth) (**FSCODA**) is designed to assist APRA in the collection of information relevant to financial sector entities. FSCODA generally applies to any corporation engaging in the provision of finance in the course of carrying on business in Australia, and APRA collects data from registered financial corporations under FSCODA. Generally, registered financial corporations with assets greater than AUD 50 million need to regularly report to APRA statements of financial position.

The *Financial Sector (Shareholdings) Act 1998* (Cth) creates an ownership limit of 20% in a financial sector company without approval from the Treasurer.

## 3.2 Is there any regulation in your jurisdiction specifically directed at cryptocurrencies or cryptoassets?

Australia's approach to regulating crypto assets is evolving. At the time of writing, there are no laws in Australia that have been implemented to specifically regulate cryptocurrencies or crypto assets.

Currently, the only formal monitoring of cryptocurrency activity in Australia is in relation to AML/CTF (see question 4.5). From a regulatory guidance perspective, ASIC has released INFO 225 *Crypto-assets* (**INFO 225**) to assist businesses involved with cryptocurrency or providing cryptocurrency-adjacent services. INFO 225 covers regulatory considerations for cryptocurrency offerings, misleading and deceptive conduct, trading platforms and cryptocurrency offered via a regulated investment vehicle.

It is expected that cryptocurrency and cryptocurrency-adjacent services will soon be regulated in Australia. The predominant focus of crypto asset regulation has revolved around its application to the established regulatory frameworks (e.g. financial services and consumer credit); however, there has been a recent push to introduce bespoke legislation to regulate crypto assets and associated services (see question 1.1). Recently:

- In February 2023, the Government released a consultation on token mapping, which sought to identify the key activities and functions of crypto assets and map them against existing regulatory frameworks. The paper proposes a high-level taxonomy of four product types categorised under two kinds of token systems: intermediated token systems (i.e. systems involving a promise or arrangement for functions to be performed by intermediaries or agents); and public token systems (i.e. systems that involve functions ensured by a crypto network directly).
- In March 2023, Senator Andrew Bragg introduced the Digital Assets Bill, which proposes to regulate digital assets, including by introducing licensing requirements for digital asset exchanges, digital asset custody service providers and stablecoin issuers. The Digital Assets Bill also proposes to introduce disclosure requirements for facilitators of central bank digital currencies in Australia. While the Digital Assets Bill represents a tangible attempt at specific legislation in the crypto space, the Digital Assets Bill was not introduced by the current Government and is a private member's bill that has the capacity to become law if passed by both houses. The Digital Assets Bill follows a similar bill introduced by Senator Bragg in 2022.
- In October 2023, Treasury consulted on proposals to regulate digital asset intermediaries under the existing AFSL framework. Under the proposals, entities operating and providing financial services in relation to "digital asset facilities" (i.e. multi-function platforms that hold client assets and allow clients to transact in platform entitlements) will be required to hold an AFSL. This will be introduced as a new type of financial product. The proposals also apply minimum standards for facility contracts and entities that provide "financialised functions" for non-financial product tokens, including token trading, staking, asset tokenisation and funding tokenisation. It is also expected that enhanced conduct obligations and consumer protections will be imposed in respect of digital asset facilities. The consultation closed on 1 December 2023 and Treasury anticipates releasing draft legislation in 2024, with a 12-month transition period to follow implementation.

## 3.3 Are financial regulators and policy-makers in your jurisdiction receptive to fintech innovation and technology-driven new entrants to regulated financial services markets, and if so how is this manifested? Are there any regulatory 'sandbox' options for fintechs in your jurisdiction?

Regulators in Australia have generally been receptive to the entrance of fintechs and technology-focused businesses. The financial services regulatory regime adopts a technology-neutral approach, whereby services will be regulated equally, irrespective of the method of delivery. However, further concessions have been made by regulators in order to support technologically-focused start-ups entering the market and numerous reviews are ongoing or have recently been completed in connection with how cryptocurrency, payments and stored value should be regulated (see questions 1.1, 3.1 and 3.2).

ASIC has made certain class orders establishing a fintech licensing exemption and released *Regulatory Guide 257*, which detailed ASIC's framework for fintech businesses to test certain financial services, financial products and credit activities without holding an AFSL or ACL by relying on the class orders (referred to as the regulatory sandbox). ASIC has since withdrawn this regulatory guide and now guides participants to Information Sheet 248, the "enhanced regulatory sandbox".

This enhanced regulatory sandbox allows for testing of a broader range of financial services and credit activities for a longer duration. There are strict eligibility requirements for both the type of businesses that can enter the regulatory sandbox and the products and services that qualify for the licensing exemption. Once a fintech business accesses the regulatory sandbox, there are restrictions on how many persons can be provided with a financial product or service and caps on the value of the financial products or services which can be provided.

Regulators have also committed to helping fintech businesses more broadly by streamlining access and offering informal guidance to enhance regulatory understanding. Both ASIC and AUSTRAC have established Innovation Hubs to assist start-ups in navigating the Australian regulatory regime. AUSTRAC's Fintel Alliance has an Innovation Hub targeted at combatting money laundering and terrorism financing and improving the fintech sector's relationship with the Government and regulators. The Innovation Hub also assesses the impact of emerging technologies such as blockchain and cryptocurrency.

ASIC has also entered into a number of cooperation agreements with overseas regulators under which there is a cross-sharing of information on fintech market trends, encouraging referrals of fintech companies and sharing insights from proofs of concepts and innovation competitions. It is also the intention of a number of these agreements to further understand the approach to regulation of fintech businesses in other jurisdictions, in an attempt to better align the treatment of these businesses across jurisdictions.

It is of note, however, that ASIC has been substantially more active with respect to its investigations and enforcement. Between July 2022 and September 2023, ASIC issued 82 DDO stop orders to prevent consumers and investors being targeted by products inappropriate to their objectives, financial situation and needs. ASIC has also pursued a number of high-profile enforcement actions (including commencing proceedings in the Federal Court) for alleged unlicensed activities against fintechs and crypto businesses. This approach is consistent with public statements by ASIC regarding its pursuit of strategic litigation and ASIC's 2023–27 Corporate Plan (**Corporate Plan**), which outlines key focus areas for ASIC to take enforcement action in. ASIC's Corporate Plan highlights core strategic projects as being scams, product design and distribution practices, sustainable finance, retirement outcomes and technology risks (including crypto-related scams). Fintech providers and technology-driven new entrants must be cognisant of their financial services obligations when entering the Australian market to ensure adherence to financial services laws.

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

Regulatory hurdles include registering with ASIC in order to carry on a business in Australia (generally satisfied by incorporating a local subsidiary or registering a branch office), satisfying applicable licensing, registration and disclosure requirements if providing financial services or engaging in consumer credit activities in Australia (or qualifying to rely on an exemption to such requirements), as well as privacy requirements, and complying with the AML/CTF regime. Broadly, these regulatory hurdles are determined by the extent to which the provider wishes to establish an Australian presence, the types of financial products and services provided, and the type of Australian investors targeted.

In the past, it has been common for foreign financial services providers (**FFSPs**) to provide financial services to wholesale clients in Australia by relying on ASIC's "passport" or "limited connection" relief from the requirement to hold an AFSL. In March 2020, ASIC repealed both passport and limited connection relief and announced the implementation of a new foreign AFSL regime and funds management relief. As part of the 2021–2022 Budget, the Government of the time announced its intention to "restore previously well-established regulatory relief for foreign financial service providers". On 17 February 2022, the Government introduced the *Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022*, which sought to introduce:

- the comparable regulator exemption, exempting FFSPs authorised to provide financial services in a comparable regime from the requirement to be licensed when dealing with wholesale clients;
- the professional investor exemption, exempting FFSPs that provide financial services from outside Australia to professional investors from the requirement to be licensed in Australia; and
- an exemption from the fit and proper person assessment to fast track the AFSL process for FFSPs authorised to provide financial services in a comparable regulatory regime.

However, this Bill lapsed as a result of a change in Government. Subsequently, on 7 August 2023, Treasury released much-anticipated consultation and related exposure draft legislation on licensing exemptions for FFSPs. The licensing exemptions were broadly based on the 2022 legislation, including a professional investor exemption, comparable regulator exemption, market maker exemption and fit and proper person test exemption. On 30 November 2023, the *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023* was introduced to Parliament, an updated bill considering the feedback from the August 2023 consultation. The draft bill has been referred to the State Economics Legislation Committee, who were due to release a report in April 2024 determining whether the draft bill will proceed to a third and potentially final reading in Parliament. The Senate granted an extension of time to the State Economics Legislation Committee for reporting until 10 May 2024, with the findings expected to be delivered in May 2024. If the draft bill is passed, it will take effect from 1 April 2025. While the new law is being considered, FFSPs may rely on transitional relief for sufficient equivalence and limited connection until 31 March 2025.

## 4 Other Regulatory Regimes / Non-Financial Regulation

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

**The Privacy Act**

In Australia, the *Privacy Act 1988* (Cth) (**Privacy Act**) regulates the handling of personal information by Commonwealth Government agencies and private sector organisations with annual turnover of more than AUD 3 million. In some instances, the Privacy Act will apply to businesses (e.g. credit providers and credit reporting bodies) regardless of turnover.

The Privacy Act includes 13 Australian Privacy Principles (**APPs**), which impose obligations on the collection, use, disclosure, retention and destruction of personal information.

The Privacy Act includes a Notifiable Data Breaches (**NDB**) scheme. The NDB scheme mandates that entities regulated under the Privacy Act are required to notify any affected individuals and the Office of the Australian Information Commissioner (**OAIC**) in the event of a data breach which is likely to result in serious harm to those individuals.

It should be noted that in December 2019, the Attorney-General announced that the Commonwealth Government would conduct a review of the Privacy Act. The review forms part of the Commonwealth Government's response to the ACCC's Digital Platforms Inquiry, with the aim to investigate the effectiveness of Australia's current privacy regime. Following the release of the Issues Paper in October 2020 and a Discussion Paper in October 2021, on 16 February 2023 the Attorney-General released the *Privacy Act Review Report* (**Privacy Report**). The Privacy Report details 116 proposals at a principles level but does not provide an exposure draft of any reform legislation. The Government published its response to the Privacy Report on 28 September 2023 indicating which of the proposals it agreed with, "agreed in principle" with, or merely "noted". It is expected that the Government will publish draft legislation in 2024, although no timetable has been set.

**Consumer data right and access**

In response to the Productivity Commissions' report on Data Availability and Use, the Government is implementing the national consumer data right (**CDR**) framework which will give customers a right to share their data with accredited service providers (including banks, comparison services, fintechs or third parties), encouraging the flow of information in the economy and competition within the market.

The banking sector was the first sector to be subject to the CDR framework under the "Open Banking" regime. Under this framework, consumers are able to exercise greater access and control over their personal banking data as well as data connected to home loans, personal loans, overdrafts, and business finance. These sharing arrangements are intended to facilitate easier swapping of service providers, enhancement of customer experience based on personal and aggregated data, and more personalised offerings.

In November 2022, the Government introduced the *Treasury Laws Amendment (Consumer Data Right) Bill 2022* (**Data Right Bill**) into Parliament which would implement action initiation (also known as "write access") under the Open Banking regime. The Data Right Bill will allow consumers to instruct accredited organisations to initiate actions, such as payments, on their behalf.

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

Yes, the Privacy Act has extra-territorial operation and applies to acts and practices undertaken outside Australia and its external territories in respect of entities that have an "Australian link". That is, where the entity is either an Australian citizen or otherwise established in Australia or "carries on business" in Australia (an **APP entity**).

Under the framework for cross-border disclosure of personal information, APP entities must take reasonable steps to ensure that overseas recipients handle personal information in accordance with the APPs, and the APP entity is accountable if the overseas recipient mishandles the information.

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

The Privacy Act confers on the OAIC a variety of investigative and enforcement powers to use in cases where a privacy breach has occurred, but it is largely a complaints-based regime. The enforcement regime empowers the OAIC to:

- investigate a matter following a complaint made by an individual or on the OAIC's own initiative;
- make a determination requiring the payment of compensation or other remedies, such as the provision of access or the issuance of an apology;
- require enforceable undertakings;
- seek an injunction; and
- seek civil penalties not exceeding the greater of:
  - AUD 50 million for a body corporate; or
  - three times the benefit directly or indirectly obtained from the contravention, if this can be determined by a court; or
  - if the court cannot determine the value of the benefit obtained from the contravention, 30% of turnover during the breach period.

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

Cyber security regulation has been a key focus of regulators and the Government given the recent high-profile cyber-attacks and the interplay between financial services, financial products and new technologies. However, there are no specific, standalone mandatory cyber security laws or regulations which would apply to fintech businesses.

In August 2020, the Commonwealth Government released its Cyber Security Strategy 2020, which will invest AUD 1.67 billion over 10 years in a tripartite approach to protecting, improving and enforcing Australia's cyber resilience. This will be delivered through action by governments, businesses and the community. The Government has also established an Industry Advisory Committee to shape the delivery of short- and longer-term actions as set out in its strategy. Following a number of high-profile cyber-attacks, in November 2023 the Commonwealth Government released a 2023–2030 Australia Cyber Security Strategy (**Cyber Strategy**) and a 2023–2030 Australia Cyber Security Action Plan (**Cyber Action Plan**). The Cyber Strategy captures the Government's vision to collaborate with industry to improve Australia's management of cyber risks. The Cyber Action Plan supplements the Cyber Strategy and provides clear steps and deliverables to be undertaken across the next two years in pursuit of a stronger cyber environment. Alongside the Cyber Strategy and Cyber Action Plan, the Government has released a consultation paper and is seeking public input in relation to the future of Australian cyber security and resilience. _Submissions were sought until March 2024.

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

In December 2019, ASIC released the first report into the cyber resilience of firms in Australia's financial markets (REP 651). ASIC has since released an updated report for 2020–2021 (REP 716). The reports identify key trends in cyber resilience practices and highlights existing good practices and areas for improvement. REP 651 identified investment, education, acquisition and retention of skilled resources, and strong leadership from senior management as being core factors to maintaining strong cyber resilience. However, ASIC expressed concern towards the trend of outsourcing non-core functions to third-party providers, as this created difficulty when managing cyber security risks in a business' supply chain. In the December 2021 report, ASIC notes a general improvement in cyber reliance but states that there were no material improvements in supply chain risk management and encourages firms to consider supply chain risk management as an ongoing priority.

Australia has ratified the Council of Europe Convention on Cybercrime (the Budapest Convention), which codifies what constitutes a criminal offence in cyber space and streamlines international cyber crime cooperation between signatory states. Australia's accession was reflected in the passing of the *Cybercrime Legislation Amendment Act 2011* (Cth).

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

The AML/CTF Act applies to entities that provide "designated services" with an Australian connection. Fintech business will often have obligations under the AML/CTF Act as financial services and lending businesses typically involve the provision of designated services. Obligations include:

- enrolling with AUSTRAC;
- conducting due diligence on customers prior to providing any designated services;
- adopting and maintaining an AML/CTF programme; and
- reporting annually to AUSTRAC and as required on the occurrence of a suspicious matter, a transfer of currency with a value of AUD 10,000 or more, and all international funds instructions.

Digital currency exchange providers also have obligations under the AML/CTF Act and must register with AUSTRAC or face a penalty of up to two years' imprisonment or a fine of up to AUD 156,500 (or both) for failing to register. Digital currency exchange providers must renew registration every three years. Exchange operators are required to keep certain records relating to customer identification and transactions for up to seven years.

On 20 April 2023, the Attorney-General released its proposed reforms to the AML/CTF Act. The reform package accepts all recommendations made by the Senate Legal and Constitutional Affairs Reference Committee Inquiry into the Adequacy and Efficacy of Australia's AML/CTF Regime, now proposing to extend the AML/CTF Act to "tranche-two entities" for the first time. These reforms would result in lawyers, accountants, trust and company service providers, real estate agents and dealers in precious metals and stones becoming in scope for the operation of the AML/CTF Act. The proposed model also suggests expanding the regulation of digital currency exchanges from the types of services currently regulated (that being the exchange of cryptocurrency for fiat currency and *vice versa*) to include:

- exchanges between one or more other forms of digital currency;
- transfers of digital currency on behalf of a customer;
- safekeeping or administration of digital currency; and
- provision of financial services related to an issuer's offer and/or sale of a digital currency (e.g. Initial Coin Offerings where start-up companies sell investors a new digital token or cryptocurrency to raise money for projects).

The consultation also proposes expanding the travel rule to remittance service providers and digital currency exchange providers, in line with international standards.

On 2 May 2024 the Attorney-General commenced the second stage of consultation on the proposed reforms to Australia's AML/CTF regime in line with the Financial Action Task Force recommendations. The second consultation includes five consultation papers, with the first four comprising of further information relating to the reforms for real estate professionals, professional services providers, dealers in precious metals and stones and digital currency exchange providers, remittance services providers and financial institutions and a general paper that discusses the broader reforms to simplify, clarify and modernise the regime. The first three papers provide context to the proposals relating to new reporting entities and the last two consider the changes that will impact existing reporting entities.

Relevantly for fintech businesses, Paper 4 outlines a number of changes applicable to payments services and digital currency providers, including:

- updating the definition of "digital currency" to "digital assets" to ensure consistency with reform in other regimes (such as financial services);
- including a new digital asset definition and expanding designated service item 50A, being the designated service relating to exchanging digital currency for money or for digital currency in the course of providing a digital currency exchange business, to include "making arrangements" for the exchange of digital assets;
- replacing designated services relevant to "remittance" (items 29, 30, 31 and 32) with new designated services that are linked to value transfer rather than instructions and updating designated services to now capture digital assets as part of the remittance designated service;
- expanding the travel rule in relation to remittance and digital asset transfers;
- streamlining of international funds transfer instruction (**IFTI**) reporting and expanding of the definition of item 50 designated service (being the designated service relevant to foreign exchange services) to now include digital assets and transfers incidental to foreign currency conversion; and
- introducing a suitability test for fit and proper individuals with respect to registrable designated services (e.g. remittance and digital currency exchange services).

The Attorney-General is seeking views from stakeholders on the proposed reforms. Consultation on the reforms close 13 June 2024.

#### 4.6 Are there any other regulatory regimes that may apply to fintech businesses operating in your jurisdiction (for example, AI)?

An entity that conducts any "banking business", such as taking deposits (other than as part-payment for identified goods or services) or making advances of money, must be licensed as an ADI. For locally incorporated entities, APRA offers a restricted pathway to becoming an ADI, known as a restricted ADI (**RADI**) licence. Becoming a RADI may be appealing to new entrants that do not have the resources and capabilities to establish an ADI and need time to develop these resources and capabilities. The restricted pathway allows entrants to conduct limited banking business as a RADI for a maximum of two years, before needing to meet the requirements of the full prudential framework and applying for an ADI licence. The initial conditions on a RADI licence are more restricted than those of a full ADI licence, reflecting the restricted range of activities permitted under the licence. This pathway can assist entrants in seeking the investment required to operationalise the business while progressing compliance with the full prudential framework and an ADI licence application. Entrants that cannot meet the requirements of an ADI are expected to exit banking business. Generally, APRA will subject new ADIs and RADIs to greater prudential supervision than established ADIs in the initial years of being licenced. This includes APRA accounting for the heightened risk profile of new ADIs and RADIs by adopting adjusted capital requirements, contingency planning and deposit restrictions. For new ADIs, APRA will assess the sustainability and track record of the new ADI when determining whether the ADI is established and these adjustments are no longer necessary.

Australia's approach to regulating artificial intelligence (**AI**) has generally been a soft-law, principles-based approach. This approach has led to the development of a set of eight voluntary principles by the Australian Government Department of Industry, Science and Resources (**AI Ethics Principles**). The AI Ethics Principles are designed to be utilised by participants when developing, designing, integrating or implementing AI systems to achieve safer, more reliable outcomes. The AI Ethics Principles are part of a larger AI Ethics Framework which is holistically aimed at assisting businesses and governments to responsibly develop and implement AI – known as the AI Action Plan. The AI Action Plan has not been developed in isolation but is to be employed alongside other AI initiatives (such as the Australian Human Rights Commission's Human Rights and Technology Project and the OECD's Principles on AI). Although there are legal regimes that impact how AI is used in the Australian landscape (for example, the privacy regime), there are currently no current laws or regulations that apply specifically to AI in Australia, and it is not anticipated that Australia will move away from the current approach.

Fintech businesses are subject to the prohibitions laid out in Consumer Law, which is administered by the ACCC (see question 3.1).

## 5 Accessing Talent

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

The hiring and dismissal of staff in Australia is governed under the *Fair Work Act 2009* (Cth) (**Fair Work Act**). In relation to hiring, minimum terms and conditions of employment for most employees (including professionals) are governed by modern awards, which sit on top of the National Employment Standards. However, modern awards do not apply to employees earning over a threshold of AUD 167,500 (from 1 July 2023, threshold indexed annually), provided their earnings are guaranteed by written agreement with their employer.

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

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

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

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

Australia also has 11 National Employment Standards. These include maximum weekly hours, requests for flexible working arrangements, parental leave and related entitlements, annual leave, long service leave, sick leave, compassionate leave, public holidays, notice of termination and redundancy pay, and a fair work information statement.

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

In 2022, the Government passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. This legislation includes a raft of reforms targeting pay secrecy and gender equality and provides amendments to the operation of bargaining and enterprise agreements. Notably, since 7 March 2023, sexual harassment in connection to work has been prohibited.

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

Migrants require working visas from the Department of Home Affairs (**DOHA**) in order to work in Australia, and each type has its own eligibility requirements. Businesses can nominate or sponsor such visas.

The Temporary Skill Shortage visa (subclass 482) (**TSS visa**) is the most common form of employer-sponsored visa for immigration to Australia. To be eligible for the TSS visa, an applicant must:

- have an occupation that is on the short-term skilled occupations list, with a maximum visa period of two years or up to four years if an International Trade Obligation applies (Hong Kong passport holders are eligible to stay up to five years), with an option to apply for permanent residency subject to eligibility requirements;
- have an occupation that is on the medium- and long-term strategy skills list or the regional occupational list, with a maximum period of four years (or five years for Hong Kong passport holders) and an option to apply for permanent residency, subject to eligibility requirements; or
- have an employer that has a labour agreement with the Government in effect, with a maximum period of up to four years (or five years for Hong Kong passport holders).

However, on 11 December 2023 the Government released its Migration Strategy where it acknowledged that the TSS visa was not fit for purpose, proposing to replace it with a new four-year temporary skilled worker visa (**Skills in Demand visa**). The Skills in Demand visa aims at giving workers more opportunity to move employers and is targeted at providing clearer pathways to permanent residence. The Skills in Demand visa is expected to be implemented by the end of 2024.

Migrants can also apply for the Business Innovation and Investment (Provisional) visa (subclass 188) or associated Business Innovation and Investment (Permanent) visa (subclass 888), which are for people who wish to operate a new or existing business in Australia, conduct business and investment activity in Australia or undertake an entrepreneurial activity in Australia. Further, DOHA has created a Global Business & Talent Attraction Taskforce to attract high-value businesses and individuals to Australia (along with their ideas, networks and capital). The Taskforce facilitates the Global Talent Visa programme and Global Talent Employer Sponsored programme. To be invited to apply for a visa under the Global Talent Visa programme, a candidate must be highly skilled in one of the 10 target sectors (including digitech, blockchain and digital ledger technologies, and financial services and fintech) and be able to attract a salary that meets the high-income threshold (as of 1 July 2023, the high-income threshold is AUD 167,500). In its Migration Strategy, the Government stated that both the Business Innovation and Investment visas and the Global Talent visas were areas susceptible to future reform.

## 6 Technology

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

Patent protection is available for certain types of innovations and inventions in Australia. A standard patent provides long-term protection and control over a device, substance, method or process, lasting for up to 20 years from the filing date. The requirements for a standard patent include:

- an invention or technology must be "patentable" (e.g. new products or processes), as not all inventions can be protected by patent registration. For example, the High Court of Australia recently held that only software that creates an "artificial state of affairs" and a "useful result" can be protected by patent registration (see *Aristocrat Technologies Australia Pty Ltd v Commissioner of Patents* [2022] HCA 29);
- the invention must be new (i.e. you cannot patent something that is already publicly known). For this reason, it is critical to sign confidentiality agreements before discussing the invention with any third parties;
- there must be an inventive step. This means if the invention is "obvious" to a skilled person, then the invention cannot be protected by patent registration; and
- the invention must have "utility". This does not mean the invention must be useful, but rather the invention must be capable of being made in accordance with the claims and information in the patent specification.

Previously, inventions could be patented under an innovation patent (targeted at inventions with short market lives); however, these can no longer be applied for. Pre-existing innovation patents are still enforceable.

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

Design protection is available, for any design that is both new and distinctive. Where patent registration protects an invention or process, design protection grants an applicant monopoly over the visual features of a product (which include the shape, configuration, pattern and ornamentation) for a maximum period of up to 10 years.

Inventions or 'know-how' may also be protected as a trade secret provided the information is clearly articulated, has the necessary quality of confidentiality and was provided to another person on a confidential basis.

An Australian patent or design only provides protection in Australia. To obtain patent protection abroad, the applicant will need to file separate patent applications in each country or file a single international application under the Patent Cooperation Treaty (**PCT**), which gives the application effect in 155 countries including Australia. PCT applications based on a provisional application must be carried out within 12 months of filing the provisional application.

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

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

Under the *Copyright Act 1968* (Cth) (**Copyright Act**), creators of copyright works such as literary works (including software) also retain moral rights in the work (for example, the right to be named as author), unless these rights are effectively assigned in writing. Moral rights are considered under the Copyright Act and are rights that automatically arise when someone creates work (e.g. art, music, writing, etc.), and include: (i) the right to be identified as the creator or author of a work (e.g. art, music, writing, etc.); (ii) the right not to have others being credited as the creator; and (iii) the right to not have their work used in a way that hurts their reputation. Moral rights cannot be sold or given away, so "waivers and consents" from the creators are needed in relation to these rights when the works are used by third parties. In Australia, only moral rights consents are effective at law, so the creator needs to agree to someone else using their works without referencing them (for example) in order to mitigate the risk of moral rights infringement claims.

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

Options available to protect or enforce IP rights depend on the type of IP.

Copyright software (including source code for software) is automatically protected under the Copyright Act. Australia is a signatory to the Berne Convention for the Protection of Literary and Artistic Works, meaning that copyright-protected material that is created overseas is also recognised and protected in Australia.

In relation to registered IP rights, in particular patents, trade marks and designs, it is necessary to have a local registration in order to enjoy protection in Australia. An owner may apply to IP Australia (the Government body administering IP rights and legislation) for registered protection of these types of rights. This application can be done via an "international" channel. Specifically, an Australian patent application can be made by way of a Patent Convention Treaty (**PCT**) application. A PCT application is automatically registered as a standard patent application within Australia; however, the power to successfully grant patent rights remains with IP Australia. Similarly, Australia is a signatory to the Madrid Protocol, which means it is possible to register a trade mark within Australia through the Madrid "international" trade mark application system.

Finally, Australia does not have a registration scheme or explicit ownership scheme for trade secrets, confidential information and trade secrets are protectable through a cause of action known as breach of confidence which applies to information that "has the necessary quality of confidentiality" and was provided in confidence. Australian authorities also recognise a principle known as the "springboard doctrine", meaning that even if a confidential solution is not used directly by the recipient, a breach of confidence will still arise if the knowledge of the confidential solution enables the recipient to bring its own solution to market more quickly.

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

In Australia, there are generally five approaches to commercialising IP. These are:

- *Assignment*: An outright sale of IP, transferring ownership to another person without imposing any performance obligations. However, there are some limitations to be considered in the context of assignments. For example, the assignment of an unregistered mark is only valid when there is also an assignment of the goodwill in the business (see *Kraft Foods Group Brands LLC v Bega Cheese Limited* [2020] FCAFC 65).
- *Direct in-house use of IP*: Owners of IP may commercialise the IP within an existing entity already in their control. This is generally common if the IP was originally created in-house or was acquired as described above.
- *Licensing*: Permission is granted for IP to be used on agreed terms and conditions. There are three types of licence (exclusive licence, non-exclusive licence and sole licence) and each comes with conditions. Similarly to assignments, there are certain limitations to licensing IP. For example, unregistered trade marks cannot be validly licensed (see *Kraft Foods Group Brands LLC v Bega Cheese Limited* [2020] FCAFC 65).
- *Franchising*: A method of distributing goods and services, where one party (franchisor) grants another party (franchisee) the right to use its trade mark or trade name as well as the use of its business systems and processes in return for payment and royalties. These licensed rights are used by the franchisee to provide goods or services to agreed specifications controlled by the franchisor.
- *Start-up or spin-off*: Where a separate company (either new (start-up) or partitioning from an existing company (spin-off)) is established to bring a technology developed by a parent company to the market. IP activities to be carried out for spin-offs include due diligence, confidentiality, employment contracts, assignment agreements and licence agreements.

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

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