



K&L GATES

**FinTech Australia**

**FINTECH IN AUSTRALIA**

# AUSTRALIAN FINTECH REGULATORY MAP

	CRYPTO	PAYMENTS	OPEN BANKING	LENDING	NEOBANK	WEALTHTECH	INSURTECH	REGTECH
	TOKEN ISSUER EXCHANGE	WALLETS/ CARDS CARD ACQUIRING	DATA RECIPIENT INTERMEDIARY	CONSUMER LENDER SME LENDING/ INVOICE FINANCE BUY NOW PAY LATER	FOR EXAMPLE: LENDING + DEPOSITS	FOR EXAMPLE: ROBOADVICE	FOR EXAMPLE: DISTRIBUTION, RISK RATING	FOR EXAMPLE: AML COMPLIANCE
AFSL	TYPICALLY NOT REQUIRED (EXCEPT FOR SECURITY TOKENS, DERIVATIVES)	REQUIRED (NCPF)	NOT REQUIRED*	TYPICALLY NOT REQUIRED (EXCEPT FOR MARKETPLACE LENDING)	REQUIRED (BANKING)	REQUIRED (ADVICE/DEAL)	NOT REQUIRED*	NOT REQUIRED*
ACL	NOT REQUIRED*	TYPICALLY NOT REQUIRED (UNLESS CREDIT)	NOT REQUIRED*	REQUIRED (LENDER/ BROKER)	REQUIRED (LENDER/ BROKER)	NOT REQUIRED*		
OTHER		APRA/RBA REGULATION, DEPENDING ON VOLUME	ACCREDITATION REQUIRED		APRA LICENSING REQUIRED FOR FULL BANKING SERVICES		APRA REQUIRED FOR INSURERS (NOT DISTRIBUTORS)	
AML	REQUIRED (FIAT <=> CRYPTO)	REQUIRED	NOT REQUIRED*	REQUIRED	REQUIRED			NOT REQUIRED*

## AFSL

- Australian Financial Services License
- Administered by ASIC
- Generally required for issuing and dealing in "financial products", such as investments, payment facilities, insurance, bank account, super
- Not required for credit products

## ACL

- Australian Credit License
- Administered by ASIC
- Generally required for lending or loan broking
- Not required for products where there is no charge for the credit and some short term products (such as some buy now pay later products)
- Exemptions exist for certain free/short term credit and some referrals to lenders

## OTHER REGULATORY

- APRA regulates banks, insurers and superannuation funds
- Neo-banks can apply for a restricted banking license for 2 years as a potentially easier path to market
- ACCC regulates Open Banking
- Accreditation is typically required for data recipients

## AML

- Administered by AUSTRAC
- Captured entities need to enroll or register
- Customer due diligence / KYC is required
- Transaction and periodic reporting to AUSTRAC

## DOING BUSINESS IN AUSTRALIA

- Overseas fintechs can use a local subsidiary or operate through a branch
- Key considerations tend to be tax related
- Australian companies need to have at least one resident director, while fintechs operating through a local branch need to nominate an Australian agent (for example: for service of documents)
- Australian tax arrangements involve income tax, capital gains tax (for residents), withholding tax (for non-residents, subject to tax treaty arrangements)

## FINTECH EXEMPTIONS

- Fintechs can often take advantage of regulatory exemptions
- Fintechs which provide services to other financial institutions (for example: regtech, technology platform/solution, back office service) may not need licensing in their own name
- Many fintech choose to partner with an existing regulated entity. This can also mean the fintech does not need licensing in their own name
- The "regulatory sandbox" provides a broad exemption from AFSL and ACL requirements for a range of products and services, subject to various thresholds and limitations

## FINTECH ECOSYSTEM

- Government and regulators, who are very engaged in fintech (including ASIC's innovation hub)
- Fintech Australia and other industry bodies
- Co-working spaces, incubators, accelerators
- Corporates/banks

\*Further consideration of all circumstances will be required.

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## FINTECH IN AUSTRALIA

With unprecedented engagement from all levels of Government and Australia's financial regulators, Australia represents an attractive destination for fintech. Australia's legal and regulatory system operates predictably and provides a level of certainty to business and consumers.

The fintech industry is experiencing an extraordinary rise, buoyed in part by the growing surge in investments, collaboration between incumbents and market disruptors, and regulatory advancement across the globe. These developing trends have been occurring in the industry as companies capitalise on current and future value.

## 1. SETTING UP AN OPERATION IN AUSTRALIA

### 1.1 DETERMINING YOUR CORPORATE STRUCTURE

Australian business structures include:

- companies incorporated in Australia
- Australian branches of foreign companies
- partnerships
- joint ventures
- sole proprietorships
- trusts.

In determining which structure to use, there are a range of legal, tax, accounting and regulatory issues which need to be considered.

### 1.2 COMPANIES INCORPORATED IN AUSTRALIA

In Australia, there are both proprietary (private) companies and public companies. A proprietary company must have at least one director, who must be an Australian resident. An Australian Company Number (ACN) will be assigned to each newly incorporated company by Australia's corporate regulator, the Australian Securities and Investments Commission (ASIC). For most purposes, it is also necessary for a company to obtain an Australian Business Number (ABN).

#### A) REQUIREMENTS TO SET UP A COMPANY

A public company must have at least three directors and with at least two of these directors ordinarily residing in Australia.

A proprietary company must have at least one director with that director being an Australian resident.

Each company must have a share capital and at least 1 share holder.

This person may be either a foreign or Australian resident.

#### B) STEPS TO SET INCORPORATE A PROPRIETARY LIMITED COMPANY

ASIC has identified the below steps to incorporate a proprietary company:

- **Step 1** - Decide whether a company is the right vehicle

- **Step 2** - Choose a company name and check against existing trademarks or names
- **Step 3** - Prepare a company constitution and decide share structure
- **Step 4** - Ensure directors and secretary understand their obligations as a company officeholders
- **Step 5** - Obtain consent from officeholders, members and (where necessary) occupant of registered address.
- **Step 6** - Incorporate the company

Procedures exist for changing the status of a company between proprietary and public, if required as the company and its operations evolve.

The differences between a proprietary company and a public company relate primarily to corporate governance, including disclosure requirements, number of members, audit requirements, etc.

### 1.3 AUSTRALIAN BRANCH OF FOREIGN COMPANY

A foreign company wishing to establish a place of business or carry on a business in Australia without incorporating a local subsidiary must generally register as a foreign company with ASIC and obtain an Australian Registered Business Number (ABRN).

The requirements for registration of a foreign company include:

- appointment of an Australian resident individual or company who will act as an agent for the service of notices and who may also be liable for acts of the foreign company in Australia
- maintenance of a registered office in Australia
- lodgement of certain details about the foreign company.

Registered foreign companies must annually lodge with ASIC a copy of their balance sheet, profit and loss statement and cash flow statement for the previous financial year, though exemptions from these requirements may be available in some circumstances..

### 1.4 TAX CONSIDERATIONS

Tax is imposed in Australia at both a federal and state (or territory) level. The Australian Taxation Office (ATO) is responsible for administering the tax laws which are imposed at the federal level, primarily income tax, capital gains tax and goods and services tax (GST) (a value-added tax on consumption). The states and territories each have their own administrative bodies for the laws imposed in their jurisdiction, primarily property taxes, stamp duty and payroll taxes.

#### A) INCOME TAX

Australia has a self-assessment income tax system where taxpayers are required to lodge annual income tax returns each 12 months (generally for the year ended 30 June each year) and pay tax in accordance with those returns. Returns may be subject to a subsequent audit by the ATO, generally for a period of four years subsequent to lodgement of the returns. Subsidiaries of non-resident companies often obtain permission from the Commissioner of Taxation to lodge tax returns with a year-end other than 30 June (a 'substituted accounting period') corresponding with the accounting and tax year end in their home jurisdiction.

A distinction is drawn between residents and non-residents, with residents being liable to pay tax on their worldwide income and non-residents generally only on their Australian sourced income. Rather than impose a separate tax on capital gains, Australia's Capital Gains Tax (CGT) legislation is incorporated in the income tax legislation and net capital gains are included in a taxpayer's assessable income.

Companies, including non-resident companies, carrying on business in Australia or deriving Australian

sourced income that is not subject to withholding tax or otherwise exempt, are taxed at 30% (although a 27.5% rate applies to some companies with an annual turnover of less than AUD50 million).

## **B) CAPITAL GAINS TAX**

Capital gains are taxed as part of the income tax regime. The CGT rules bring into the tax net gains from the disposal of assets acquired on or after 20 September 1985. Net capital gains are included in a taxpayer's overall assessable income. Net capital gains, on the other hand, can be set off against revenue losses.

## **C) DOUBLE TAX TREATIES AND WITHHOLDING TAX**

Australia is a party to many bilateral double tax treaties dealing with income and, in most cases, capital gains. These treaties set out to regulate the taxing rights between the countries involved. Most of the treaties follow the OECD model agreement and provide for reduced rates of withholding tax as well as relief from double taxation by either foreign tax credit or exemption. Business profits earned by a resident of one country from sources in the other country are generally exempt from tax in the source country, unless the profits have been earned through a permanent establishment in the source country.

Unfranked dividends, interest and royalties paid to non-residents are subject to withholding tax. If withholding tax is paid, then no further tax is payable in Australia on that income. The rates of withholding tax depend on the nature of the income and any relevant double tax treaties.

## **D) GOODS AND SERVICES TAX**

A 10% GST applies to most supplies connected with Australia, at each step along the production chain. It also applies to most importations. Registered suppliers are obliged to remit GST on supplies they make. For the most part, registered recipients of supplies will be entitled to a credit for any GST included in the price of acquisitions they make. Non-residents may be entitled to register, thereby enabling input tax credits (GST credits) to be claimed in relation to expenses incurred in Australia.

GST does not apply to limited categories of goods and services, including (amongst others):

- exports
- certain financial supplies
- residential accommodation
- basic food
- a supply of a going concern.

From an administrative perspective, the GST system relies on registration of businesses and the issuance of tax invoices by the suppliers of taxable goods and services.

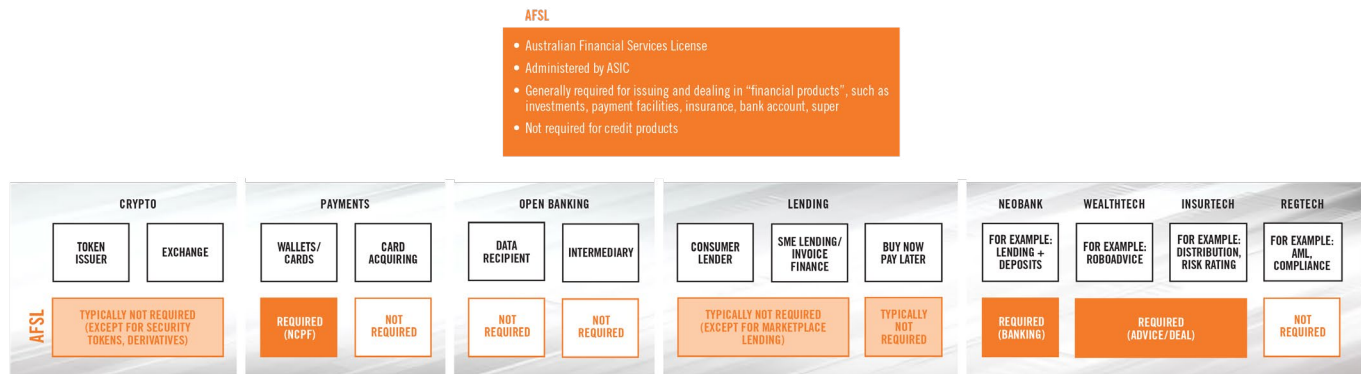
## **1.5 ABN REGISTRATION**

An Australian Business Number (ABN) is a unique identifying number used by all businesses in their dealings with the ATO and for a range of other purposes. All companies (and other business types) seeking to be registered for GST must have an ABN. An ABN can be obtained online (via [abr.gov.au](http://abr.gov.au)) and it is free to do so.

## **1.6 EMPLOYMENT ISSUES**

In Australia, contractors and employees benefit from a range of protections, including a range of minimum conditions, compulsory superannuation contributions and restrictions on termination.

## 2. AUSTRALIAN FINANCIAL SERVICES LICENCE



### 2.1 FAST FACTS

- If an entity is providing “financial services”, then it will need to hold an AFSL, be authorised under an AFSL or qualify for an exemption
- There are a range of financial services covered by the AFSL regime.
- Exemptions are available in a number of circumstances.

### 2.2 REQUIREMENT FOR A LICENCE

An AFSL is only required for entities which are providing “financial services” in Australia. Financial services are defined in the Corporations Act 2001 (Cth) (Corporations Act) to include:

- providing recommendations or statements of opinion about “financial products”; and
- dealing in “financial products”.

Financial products include securities, interests in managed investment schemes (such as units in a unit trust), debentures, derivatives, foreign exchange contracts, non-cash payment facilities, insurance and other products listed in the Corporations Act.

### 2.3 LICENCE EXEMPTIONS

#### A) EXEMPTIONS FOR SPECIFIC SERVICES AND PRODUCTS

There are a variety of exemptions available, including for the following products and services.

- non-cash payment facilities, where payments can only be made to a single payee;
- non-cash payment facilities, where the amount available to make payments is limited to \$1,000 per person and \$10 million in aggregate;
- credit products, such as loans and credit cards. However, consumer credit is subject to an alternative licensing regime (discussed in section 4 below).

## **B) REGULATORY “SANDBOX”**

In order to facilitate fintechs and others developing innovative financial products and services, the Australian government has created a “regulatory sandbox”. The sandbox allows businesses to test certain innovative financial services over a period of 24 months without first obtaining an AFSL. The regulatory sandbox has a number of eligibility criteria, including:

- the financial services and products you propose to provide are consistent with the eligible financial products and eligible financial services set out in ASIC Information Sheet: Enhanced Regulatory Sandbox (Information Sheet 248). In summary, eligible products and services relate to:
  - non-cash payment facilities;
  - general insurance products;
  - certain domestic and international securities; and
  - bank deposit products (though the sandbox does not extend to permit a fintech to offer bank deposit products in their own name).
- a \$10,000 individual limit on the value of certain financial services that you can provide to retail clients; and
- an aggregate \$5 million total exposure limit for all financial services you provide to your clients.

To apply to participate in the regulatory sandbox, you must complete the forms set out in Information Sheet 248. ASIC will assess your application for eligibility and against the following criteria.

- The probity, fitness and propriety of you, your officers, your controllers, the officers of your controllers and your significant decision makers.
- A net public benefit test. This involves ASIC considering why exempting each eligible financial service or financial product will result, or be likely to result, in a benefit to the public. The benefit must outweigh any detriment to the public that will result, or be likely to result, from exempting that service.
- An innovation test. This involves ASIC considering why each eligible financial service or product is considered either new or a new adaptation or improvement of another service.

The regulatory sandbox also provides an exemption from the need to hold an Australian Credit Licence in some circumstances (see section 3.4).

## **2.4 ALTERNATIVES TO HOLDING AN AFSL**

Obtaining an AFSL can be a substantial commitment. Fintechs looking to launch in Australia will often look for alternatives, particularly for an exploratory phase or proof of concept.

### **A) PARTNERING WITH AN AFSL HOLDER**

An entity may not need to obtain its own AFSL where it is authorised to provide its services by an existing AFSL holder.

The AFSL holder will then be responsible for supervising and monitoring the provision of the entity's services. The agreement between the AFSL holder and that entity will set out the authorised services and the AFSL holder's supervision and monitoring requirements.

Many AFSL holders are willing to enter into arrangements of this kind with fintechs. Once a suitable partner has been found, an arrangement can typically be put in place relatively quickly.

Fintechs which choose to partner with an existing AFSL holder may choose to transition to their own AFSL over time, for example, once the market for their products in Australia has been proven.



## **B) MUTUAL RECOGNITION**

An offshore entity that is authorised to provide financial services under a 'sufficiently equivalent' overseas regulatory regime may be eligible to provide financial services in Australia to wholesale clients without holding an AFSL. To rely on mutual recognition arrangements, it is necessary to register with ASIC.

## **C) FINTECH AS ENABLING TECHNOLOGY**

Where a fintech is not directly customer-facing, but provides a technology service to another financial institution, the fintech may not itself need an AFSL. Much will depend on the precise nature of the services and contractual arrangements. If an AFSL is not required, this can provide a faster path to market. However, some financial institutions have a preference for dealing with regulated entities, even where this may not strictly be required.

## **2.5 AFSL APPLICATION PROCESS**

In order to apply for an AFSL, a fintech needs to demonstrate to ASIC that it has the systems, capacity and experience to provide financial services in compliance with Australian law. This involves demonstrating that the key individuals in the business have the necessary skills and experience, as well as being of suitable character. Some fintechs launching in Australia choose to supplement their internal resources with external consultants to demonstrate some of this experience.

The application process can typically take in the order of 6 - 9 months, from beginning the application until a decision is made by ASIC. Fees for the application vary between \$2,300 and \$12,000.

Both local and foreign companies are eligible to obtain AFSLs.

## **2.6 ONGOING LICENCE OBLIGATIONS**

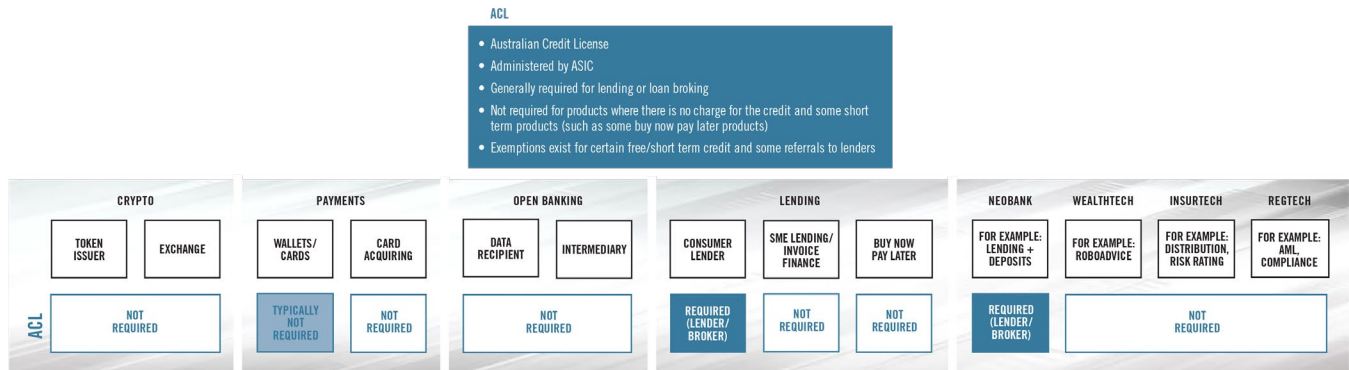
Once an entity has obtained an AFSL, it is required to comply with a range of ongoing obligations, including the following:

- a) provide financial services efficiently, honestly and fairly; and
- b) have in place adequate arrangements for the management of conflicts of interest;
- c) comply with the conditions on the licence; and
- d) comply with the financial services laws; and
- e) take reasonable steps to ensure that its representatives comply with the financial services laws; and
- f) have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and
- g) maintain the competence to provide those financial services; and
- h) ensure that its representatives are adequately trained, and are competent, to provide those financial services; and
- i) have a dispute resolution system; and
- j) have adequate risk management systems; and
- k) comply with any other obligations that are prescribed by Corporations Regulations.

To this end, the AFSL holder should put in place a compliance program which provides specific details as to how it ensures its ongoing compliance with the above obligations.



## 3. AUSTRALIAN CREDIT LICENCE



### 3.1 FAST FACTS

- An Australian Credit Licence (ACL) is generally required for lenders and loan intermediaries, where credit is provided for consumer purposes.
- Lending for business purposes is exempt.
- Other exemptions exist for a range of products and services (such as where there is no charge for the credit and some short term products, including some buy now pay later products).

### 3.2 REQUIREMENT FOR A LICENCE

An ACL is typically required for credit providers (eg lenders) and (eg credit brokers and some other persons facilitating credit being provided).

An ACL is only required for “consumer credit”, being credit that is predominantly provided for personal, household or domestic purposes or for investment in residential property.

Goods leases and some hire purchase arrangements are also regulated by the ACL regime.

### 3.3 LICENCE EXEMPTIONS

There are a number of exemptions from the ACL regime for certain kinds of persons and activities.

For example, exemptions may be available for

- lending where there is no charge for providing credit;
- credit provided for a short term where costs are limited;
- making referrals to lenders at a retail point-of-sale;
- merely referring a consumer to a lender in other circumstances, provided certain formalities and timelines are followed.

Many of the exemptions from the licensing requirements only apply in certain circumstances, and if certain requirements are met.

### 3.4 REGULATORY “SANDBOX”

As with the AFSL regime, fintechs may be able to rely on the regulatory sandbox to avoid the need for holding an ACL. The regulatory sandbox is discussed in more detail in section 3.3(b) above.

### 3.5 ALTERNATIVES TO HOLDING AN ACL

Obtaining an ACL can be a substantial commitment. Fintechs looking to launch in Australia will often look for alternatives to holding an ACL.

In some circumstances, a fintech can engage in credit activities on behalf of an existing ACL holder as its authorised credit representative. ACL holders are responsible for the conduct of their representatives.

### 3.6 APPLICATION PROCESS

In order to apply for an ACL, a fintech needs to demonstrate to ASIC that it has the systems, capacity and experience to engage in credit activities in compliance with Australian law. This involves demonstrating that the key individuals in the business have the necessary skills and experience, as well as being of suitable character. Some fintechs launching in Australia choose to supplement their internal resources with external consultants to provide some of this experience.

The application process can typically take in the order of 6 months, from beginning the application until a decision is made by ASIC.

Both local and foreign companies are eligible to obtain ACLs.

### 3.7 ONGOING LICENCE OBLIGATIONS

Once an entity has obtained an AFSL, it is required to comply with a range of ongoing obligations, including the following:

- acting efficiently honestly and fairly;
- being competent to engage in credit activities, and ensuring your representatives are competent;
- being able to ensure your clients are not disadvantaged by an conflicts of interest that you or your representatives may have in relation to your credit activities;
- ensuring you and your representatives comply with the credit legislation;
- having appropriate dispute resolution systems (including both internal systems and being a member of an external dispute resolution scheme);
- having appropriate compensation arrangements in place (which for some will include holding professional indemnity insurance);
- having adequate resources (including financial, technological and human resources) and risk management systems;
- having appropriate arrangements and systems to ensure compliance;
- the responsible lending requirements (ascertaining and verify a consumer’s financial situation and assessing whether the credit contract is not unsuitable); and
- requirements in the National Credit Code dealing with precontractual disclosure and conduct in relation to the terms of credit contracts and consumer leases.

## 4. APRA LICENCES

### 4.1 FAST FACTS

- The Australian Prudential Regulatory Authority (APRA) regulates a number of aspects of the Australian financial system, primarily in relation to prudential and governance issues.
- APRA directly regulates superannuation funds, insurers and bank. Each of these entities need to hold a licence from APRA and may also need an AFSL.
- APRA licensing is typically more involved and carries greater ongoing compliance obligations than other Australian licensing regimes (such as the AFSL and ACL).

### 4.2 OVERVIEW

APRA is Australia's prudential regulator and its role is to supervise the banking, insurance and superannuation industries. It supervises participants in these industries to ensure that they are generally in a position to keep their financial promises made to their beneficiaries (i.e. depositors, policyholders and superannuation fund members).

Where an entity is proposing to operate a banking, insurance or superannuation businesses in Australia, it must determine whether it needs to obtain a licence to do so with the prudential regulatory, APRA.

The rules and requirements for obtaining authorisation from APRA vary across these industries.

Foreign ownership of APRA regulated entities is subject limitations, but there are a number of thresholds, qualifications and exemptions.

### 4.3 GENERAL APPLICATION PROCESS

The application process for all APRA licences broadly follow the same steps being:

#### **A) STEP 1 - EARLY ENGAGEMENT WITH APRA:**

prior to making an application with APRA, an applicant is encouraged to speak directly with APRA's licensing team in order for APRA to identify the specific licensing process that the applicant must go through, the documentation that APRA will require, as well as any early concerns APRA may have prior to application lodgement.

#### **B) STEP 2 – LODGING AN APPLICATION:**

in this stage, applicants will be required to complete and provide the relevant forms and documentation requested by APRA which will include, at a minimum, details of the applicant's:

- i) ownership, board and management;
- ii) three-year business plan;
- iii) financial resources; and
- iv) risk and information management frameworks.

Depending on the type of licence being obtained, application fees vary from \$30,000 to \$110,000.

#### **C) STEP 3 – ASSESSMENT:**

APRA will assess the application materials, with a particular focus on the applicant's financial and risk management capabilities, whether key personnel meet 'fit and proper person' expectations, and whether the entity poses a risk to stability of the financial system.

As a guide, APRA has flagged that it may take up to 18 months for it to approve an application and grant a licence.

## 4.4 SUPERANNUATION - RSE LICENCE

An entity seeking to operate as a trustee of a superannuation fund (known as a “registerable superannuation entity” or RSE) must have an RSE Licence.

As part of the application process, each RSE Licence applicant is required to demonstrate that they are able to comply with the various prudential standard requirements. One of the key considerations for APRA when considering an RSE Licence is ensuring that the superannuation fund has a plausible path to achieving sufficient scale, such that the fund will be large enough to achieve efficiencies of scale. This stems from a concern from APRA that it can be more difficult for smaller funds to operate with competitive fees.

Many fintechs seeking to be involved in superannuation look to partner with an existing RSE Licensee, as a promotor or provider of technology, tools or other back office services.

## 4.5 BANKING - ADI LICENCE

### A) REQUIREMENT FOR A LICENCE

An entity which conducts a “banking business” must have an ADI authorisation. Banking business is defined to consist of, among other things, both taking money on deposit and making loans. Providing loans on its own would not generally be sufficient to require an entity to be an ADI. Rather, it is the provision of a deposit account which is the key trigger for needing to become an ADI.

Certain payment facilities which are determined by APRA to be “widely available” and meet certain other criteria may also amount to a “banking business” for which an ADI authorisation may be required.

There are a number of financial, capital and liquidity requirements that apply to ADIs. Due to the nature and role of ADIs in the financial system, APRA sets rigorous and extensive minimum capital requirements on ADIs. The financial requirements applying to an ADI will be tailored during the course of the application process with APRA.

Many fintechs seeking to be involved in banking explore ways to unbundle the suite of services typically provided by a bank and, at least initially, limit its activities to those which do not require them to hold an ADI authorisation. For example, fintechs involved in lending, some payment facilities and investment products may not need to be authorised as an ADI.

### B) RESTRICTED ADI LICENCE (“ADI LITE”)

New entrants to the banking industry may be able to apply for a Restricted ADI licence, which will have a lower barrier to entry than a full ADI licence, to assist their transition into the industry over a two-year period.

Entities holding a Restricted ADI licence will be able to conduct limited lower risk banking business, while seeking investment and developing their resources and capabilities in order to comply with the full prudential framework, for a period of two years. Restricted ADIs will be subject to an aggregate deposit limit of \$2 million and are subject to a range of other limitations and restrictions.

### C) REGULATION OF PURCHASED PAYMENT FACILITIES

In addition to the ADI and AFSL regimes, certain “purchased payment facilities” (PPFs) are subject to an additional regulatory framework.

Currently, PPFs above certain volumes need to have a “holder of stored value” which is an ADI, subject to a range of exemptions.

There are currently proposals from the Australian Government to make changes to how PPFs are regulated. A recent report published by a council of Australia’s financial regulators proposes to introduce a new tailored regulatory regime for large PPFs above a particular threshold and to clarify the regulatory treatment of smaller PPFs under the AFSL regime. The details of any changes have not yet been determined.

## 4.6 INSURTECH AND INSURANCE

Conducting insurance business or life insurance business in Australia as an insurer requires an authority from APRA.

As part of the application process, each Insurance Licence applicant is required to meet applicable capital adequacy requirements and comply with the various prudential standard requirements.

However, insurtech often involves partnering with existing insurer and other players in the insurance market, rather than the insurtech becoming an insurer. As a result, APRA licensing is often not required for fintechs operating in insurance. Specifically, APRA licensing is not required for certain insurance broking and distribution activities. Fintechs operating in this sector are likely to be regulated by the AFSL regime.

## 4.7 ONGOING OBLIGATIONS

All APRA regulated entities are required to continue to comply with their respective prudential standard obligations. This includes having adequate insurance arrangements, information security arrangements, risk management protocols, investment governance frameworks, outsourcing policies and minimum capital / financial reserve requirements.

## 5. LENDING

### 5.1 GENERAL APPROACH TO LENDING

“Credit” is defined in both the National Credit Code, Corporations Act and ASIC Act as a contract or understanding under which:

- payment of a debt owned by one person to other person is deferred; or
- one person incurs the debt to another person.

However, lending is only regulated for some types of “credit”.

### 5.2 CONSUMER LENDING REGIME

The National Credit Code applies to instances where the debtor is a natural person (ie not a company or other structure) and the credit is provided for, among other things, personal, domestic or household purposes or to purchase, renovate or improve residential property.

Where this is the case, the lender need to obtain an Australian Credit Licence (discussed in section 3 above).

### 5.3 CREDIT ACTIVITIES OUTSIDE OF THE CONSUMER LENDING REGIME.

There are several kinds of credit activities that fintechs may engage in which do not constitute the provision of consumer credit.

#### A) SME LENDING

There is an emergence of Fintech non-bank lenders that seek to challenge traditional banks for small and medium sized enterprises (SMEs).

SME lending is not covered by the National Credit Code as it is not for personal, household or domestic purposes. Accordingly, lenders to SMEs therefore do not need to obtain an Australian Credit Licence (as discussed in section 3 above).

#### B) INVOICE FINANCING

Invoice financing, factoring and other forms of supply chain finance are not covered by the National Credit Code, as they are not for personal, household or domestic purposes. Accordingly, lenders / finance providers in this sector do not need to obtain an Australian Credit Licence (as discussed in section 3).

#### C) BUY NOW PAY LATER ARRANGEMENTS

A buy now pay later (BNPL) is a kind of arrangement that usually involves a contract between the consumer and the BNPL provider, a contract between the consumer and the merchant, and a contract between the BNPL provider and the merchant.

The consumer buys and receives goods from the merchant, the BNPL provider pays the merchant for the goods (minus merchant fees) and then consumer then repays the BNPL provider over a fixed period.

In 2018, ASIC published Report 600: Review of buy now pay later arrangements. ASIC acknowledges that the National Credit Code generally does not apply BNPL arrangements, for the following reasons:

- the BNPL arrangements are often “continuing credit contracts” that are exempt under the National Credit Code; and/ or
- the BNPL arrangements often do not charge the consumer for the provision of credit that is exempt under the National Credit Code.

#### **D) OTHER REGULATORY CONSIDERATIONS**

Even where licensing is not required for particular lending, there may be other regulatory requirements. These include:

- consumer protection laws;
- prohibition of unfair contract terms;
- in some instances, design and distribution obligations (commencing in October 2021).



## 6. CRYPTOCURRENCIES, DIGITAL ASSETS AND BLOCKCHAIN TECHNOLOGY

### 6.1 GENERAL APPROACH TO CRYPTOCURRENCIES

For most purposes in Australia, cryptocurrencies are treated as assets (like another commodity), rather than as money or a currency.

This has a range of flow on implications, including in relation to tax. For example gains made on trading cryptocurrency may be taxable as capital gains (or as income, in certain circumstances). Previously, this classification has also created GST issues, but these issues have now largely been addressed.

Furthermore, cryptocurrencies are generally not treated as financial products, however there are a number of exceptions to this (see section 5.3 below).

### 6.2 CRYPTO-EXCHANGES

#### A) ANTI-MONEY LAUNDERING

Australia's anti-money laundering laws apply to Australian entities which provide "designated services" and imposes a range of reporting, record-keeping and other obligations.

Australia's anti-money laundering laws define operating a digital current exchange as being a designated service.

This designated service only arises where an entity is providing the on- or off-ramp between fiat currency and digital currency. It does not apply to entities which only facilitate exchanges between two cryptocurrencies.

#### B) OTHER REGULATION

For crypto-exchanges that exchange "pure" cryptocurrencies (i.e currencies like bitcoin and ethereum which are not financial products as described below), there are generally no other regulatory licences required.

### 6.3 TOKENS WHICH ARE FINANCIAL PRODUCTS

Australia's financial services regulatory regime operates, for the most part, in a technology neutral manner. As such, while crypto-assets represent a relatively new asset class, they will be regulated in accordance with their particular features. In particular, it is possible that a crypto-asset may be characterised by ASIC as a security, derivative, interest in a managed investment scheme or a non-cash payment facility. This will depend on an assessment of the features of the asset and rights of the holders.

#### A) SECURITIES

If a crypto-asset carries rights such as the ownership of a company, voting rights in decisions affecting a company, some entitlement to share in future profits (e.g. through dividends or a profit share arrangement) or a claim on the residual assets of a company, the asset may be characterised as a security.

#### B) INTERESTS IN MANAGED INVESTMENT SCHEMES

Collective investment vehicles are regulated as "managed investment schemes" (MISs). Crypto-assets which enable pooling of money (or other assets) to generate collective returns may also be regulated as interests in an MIS.

In addition to AFSL requirements, there are a range of other obligations relating to MISs, including consumer disclosures.

### **C) DERIVATIVES**

Crypto-assets may also be regarded as derivatives. This is particularly the case for stable-coins and other tokens whose price or value is linked to another asset or commodity.

### **D) NON-CASH PAYMENT FACILITIES**

Pure cryptocurrencies are not generally regarded as non-cash payment facilities. However, a crypto-asset with additional payment features or a cryptocurrency with additional payment features may be.

If the asset or service involves a non-cash payment facility, it will be a financial product for which an AFS licence is required.

## **6.4 NFTS**

Non-fungible tokens (NFTs) are digital crypto-assets which generally provide a unique representation of an underlying item or object.

There is a potential for an NFT to be regarded as a financial product, which would mean the NFT issuer would need to hold an AFSL (or qualify for an exemption). Similar to the above, whether an NFT is a financial product will depend on the features of the NFT and the rights of token holders. For example, a token which gives the holder a right to share in the profits of the issuing company is likely to be a financial product. Similarly, a token would be a financial product where its price or value is linked to another index or commodity.

The additional consideration for NFTs is the extent to which they are regarded as a digital currency for anti-money laundering purposes. If NFTs are a digital currency, exchanges which enable users to purchase them using fiat currency could be subject to Australia's anti-money laundering laws.

