COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

Australia

BLOCKCHAIN

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This country-specific Q&A provides an overview of blockchain laws and regulations applicable in Australia.

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AUSTRALIA
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1. Please provide a high-level overview of the blockchain market in your jurisdiction. In what business or public sectors are you seeing blockchain or other distributed ledger technologies being adopted? What are the key applications of these technologies in your jurisdiction?

The Commonwealth Government of Australia (**Government**) has generally been supportive of driving innovation in the technology sector and as part of this, there has been sustained attention on blockchain in Australia with a number of leading blockchain initiatives, including industry-specific trials in financial services, energy, minerals, agriculture, food and beverage and the public sector.

In the public sector, the Government has considered blockchain application with the Australian Taxation Office (ATO) using blockchain to validate the dealer history of cars in a hackathon around Luxury Car Tax compliance. The Government's National Disability Insurance Scheme has also experimented with blockchain and the New Payments Platform to create "smart money" that has the capability of managing insurance pay-outs, budgeting and trust management.

Fintech businesses have also begun formalising use cases for blockchain such as managing supply chains, making cross-border payments, trading derivatives, managing assets and managing digital currency exchanges.

With respect to platform operation, Australia's primary securities exchange, the Australian Securities Exchange (**ASX**), is in the process of implementing and transitioning to a new blockchain-based system covering clearing, settlement, asset registration, and other post trade services. This replacement system represents the first mainstream, scaled use of blockchain by any securities exchange globally and is likely to yield valuable insight as policymakers and regulators consider their approach to blockchain in future.

While there has been increased regulatory involvement particularly following the completion of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in 2019, businesses (notably fintechs) have seen a unique opportunity to develop and position themselves in Australia's economy. The expansion of the fintech sector has (in part) been led by businesses in the payments, lending, investment and wealth management, custodial services and new digital asset spaces. In the context of blockchain, this has primarily revolved around the creation of new and innovative trading platforms. However, there is also increasing interest in robo-advice or digital advice models associated with digital assets. Robo-advice traditionally involves algorithms and technology providing automated financial product advice without ongoing human involvement. As cryptocurrencies and other digital assets are increasingly being included in more traditional asset baskets, we expect to see a commensurate increase in cryptocurrency robo-advisers providing advice to clients in relation to various cryptocurrencies, digital tokens and other digital assets.

Australia has also seen a proliferation in the use of blockchain technology across established businesses. Businesses are now moving beyond the concept stage to formalising practical use cases in areas of managing supply chains, trading derivatives, managing and issuing assets, making cross-border payments and operating digital asset exchanges. In particular, there have been numerous private sector projects that have used blockchain to more effectively and securely deliver services to consumers. Three of Australia's four major banks partnered with IBM and Scentre Group to issue the first digital bank guarantee for retail property leases on blockchain. It is expected that issuing via blockchain can reduce the issuance period for a bank guarantee from up to a month to the same day.

2. To what extent are tokens and virtual assets in use in your jurisdiction? Please

mention any notable success stories or failures of applications of these technologies.

There has been general acknowledgement in the Australian blockchain industry that there is significant opportunity for the use of blockchain however part of the associated risk has been the high start-up failure rate with reports noting that only 44% of blockchain start-ups survived 120 days beyond funding via an initial coin offering (**ICO**). However, there have been many notable applications of blockchain in Australia, generally being pilots that are not yet commercialised for mainstream use. Such blockchain implementations are likely to influence the growth and adoption of blockchain in Australia.

Clearing and settling: One of the most prominent is the highly anticipated replacement of the ASX's clearing and settlement process with a blockchain-based system. The ASX is currently in a testing phase and is targeting to go live in April 2023.

Bond issuance: The International Bank for Reconstruction and Development (an arm of the World Bank) selected the Commonwealth Bank of Australia (**CBA**) to arrange for the issue of A$110 million worth of bonds on blockchain, with each bond coined a blockchain operated new debt instrument (BOND-i). The bonds were governed by New South Wales law and were the first bonds to be created, allocated, transferred and managed using blockchain.

Central bank digital currency: The Reserve Bank of Australia has partnered with the CBA, National Australia Bank, Perpetual and ConsenSys Software to investigate the potential use and implications of a wholesale central bank digital currency (**CBDC**) on an Ethereum-based blockchain platform. The CBDC can be used by wholesale market participants for funding, settlement and repayment of a tokenised syndicated loan to cut deal times and reduce potential for human error. The outcomes of this research is expected to be published in late 2021.

Inter-Government Ledger: The Australian Border Force has developed the Inter-Governmental Ledger (**IGL**) which has capability to share documents electronically between participating governments. For international trade purposes, the IGL replaces paper documents at the border by creating a ledger of electronically verifiable digital documents. The IGL provides importing regulators with a high-integrity digital process to verify documents from exporting partners. Smart Trade Mark: IP Australia's Government initiative, Smart Trade Mark is being trialled using blockchain technology and APIs to allow trade mark owners to authenticate products or services and their distribution channels by digitally linking them to government register of trade marks. Smart Trade Mark can be digitally verified online using a trust badge and has been trialled by the National Rugby League to tackle counterfeit merchandise and the Australian Nuclear Science and Technology Organisation for traceability and verification of bush food supply chains ensuring benefit to Indigenous communities and enterprises.

Private sector projects: There have been a number of private sector projects that have used blockchain to deliver services to consumers.

- Three of Australia's four major banks partnered with IBM and Scentre Group to issue the first digital bank guarantee for retail property leases on blockchain earlier this year (discussed in question1).
- Synthetix is a blockchain-based platform that enables users to digitise interests in a new form of product that provides synthetic exposure to real world assets. The Synthetix platform is governed by a decentralised autonomous organisation and incorporates a range of smart contract functionality to allow users to collateralise and synthesise exposure to assets in self-issued derivative like products.
- The Commonwealth Bank of Australia and CSIRO's Data61 conducted a trial for smart money (also known as programmable money), motivated by the context of the Australian National Disability Scheme (NDIS).
- In late 2020 into 2021, Australia experienced an initial boom in the Australian market for non-fungible tokens (NFTs) which represent an ownership interest in tradeable digital assets such as digital art and collectibles. NFTs have previously been used to create digital works of art to illuminate Sydney's Opera House sails for the 2018 Vivid Sydney Festival. Tokens for Humanity is the first blockchain-powered Australian registered charity to issue NFT artwork collectibles in support of fundraising revenue. Blockchain Music created Rarez, a consulting arm that enables artists and musicians to issue NFT collectibles.
- NFT marketplaces have also emerged recently. Immutable X, a startup which offers a back-end trading solution for NFTs by aggregating multiple transactions into a single smart contract using a zero knowledge proof approach. NFT Stars is a digital art marketplace which hosts in-person NFT

exhibitions and auctions NFT digital art. In October 2021, TikTok announced the launch of its first NFT collection called TikTok Top Moments in partnership with Immutable X who will facilitate the initial auction of viral videos in NFT form and subsequent NFT trades.

3. To what extent has blockchain technology intersected with ESG (Environment, Social and Governance) outcomes or objectives in your jurisdiction?

Blockchain technology is beginning to be used by the Government, businesses and not-for-profit organisations to improve their environmental, social and governance (**ESG**) obligations. Blockchain technologies are starting to be used to set up, evaluate and monitor counterparties' ESG-verifiable data.

As part of the Federal Budget 2020-2021, the Government invested over A$5.6 million through the Blockchain Pilot Grants program to develop blockchain technology-based solutions that reduce regulatory compliance burden for businesses and improve processes to track provenance in supply chains. One such pilot is led by Everledger which uses blockchain technology to help companies adhere to compliance regulations and for the ethical certification of critical minerals.

The World Wildlife Foundation Australia is helping the Pacific Islands' tuna industry to implement blockchain technology to verify the sources of tuna sold to fish markets in order to ensure they haven't been sourced from illegal, unreported and unregulated fishing sources.

Blockchain technology has also been used to develop sustainable infrastructure. Power Ledger, an Australian energy trading technology company, has developed secure blockchain based marketplaces for renewable energy. Power Ledger's marketplaces include the buying and selling renewable energy and facilitate fractional ownership of renewable power plants such as solar farms and community battery systems.

Other potential future uses for blockchain to improve ESG outcomes include tracking carbon credits, fuel management, combatting counterfeit drugs and medical devices in the pharmaceutical industry, and improving corporate governance by offering greater transparency and better data protection against threats of hacking.

4. Has COVID-19 provoked any novel applications of blockchain technologies in your jurisdiction?

While there has not been a notable rise of blockchain technologies in Australia in response to COVID-19, we have seen numerous offshore fintech businesses launch innovative platforms and processes to assist with the disruption of COVID-19 in those jurisdictions. For example, to manage the closing of schools, colleges and universities, Switzerland based ODEM launched a blockchain powered platform which assists with enrolment and learning management, issues certificates for educators to teach classes online and digital. As innovations arising in such jurisdictions broadly correlate to similar trends in Australia, we expect to see a corresponding uptake of such platforms and processes in Australia.

One area that has been impacted by COVID-19 is the notable increase in trading volumes experienced by the ASX during the most volatile period of the pandemic in March 2020. In response, the ASX's CHESS replacement system has been adapted to have increased processing capacity that what had been contemplated pre-COVID-19.

5. Please outline the principal legislation and the regulators most relevant to the use of blockchain technologies in your jurisdiction. In particular, is there any blockchain-specific legislation or are there any blockchain-specific regulatory frameworks in your jurisdiction, either now or envisaged in the short or mid-term?

There are currently no specific regulations or legislation dealing with blockchain in Australia. The Australian Securities and Investments Commission (**ASIC**), Australia's primary corporate, markets, financial services and consumer credit regulator, has reaffirmed the view that Australian legislative obligations and regulatory requirements are technology neutral and apply irrespective of the mode of technology that is being used to provide a regulated service.

6. What is the current attitude of the government and of regulators to the use of blockchain technology in your jurisdiction?

Both the Government and regulators have generally been receptive to fintech and innovation and have sought to improve their understanding of, and engagement with businesses by regularly consulting

with industry on proposed regulatory changes. There has been considerable discussion around the opportunities, risks and challenges that have arisen for market participants, customers and regulators. The Government's broader commitment to facilitating growth and innovation within the technology sector has been underpinned by its relatively non-interventionist approach to the regulation of blockchain technology and regulatory and legislative developments have been made to ensure the scope of emerging services is adequately captured within the existing framework. This has included increased fintech specific regulatory guidance to assist businesses in understanding their obligations, amended legislation to bring fintech services providers within the remit of existing regimes, and the introduction of new legislation to provide greater consumer protection (discussed below).

In 2020, the Government launched a National Blockchain Roadmap that focusses on a number of policy areas such as regulation, skill building, investment, and international competitiveness and collaboration. The Government has also invested in supporting a range of blockchain alliance-based initiatives and programs through the Australian Trade and Investment Commission (**Austrade**) to foster larger cross-border projects and knowledge sharing programs.

7. Are there any governmental or regulatory initiatives designed to facilitate or encourage the development and use of blockchain technology (for example, a regulatory sandbox)?

The Government has provided support and funding for government, private sector and researchers to foster innovation and collaboration around blockchain, through programs such as Austrade business missions to international markets, the Entrepreneur's Programme, Australian Research Council Grants, and Business Research and Innovation Initiative pilots. The Government has also provided A$350,000 to Standards Australia to lead the development of international standards for blockchain as an appointee of the International Organisation for Standardisation (**ISO**).

On the regulatory front, ASIC and the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) have established Innovation Hubs designed to assist fintech businesses more broadly in understanding their obligations under Australian law. The ASIC Innovation Hub is designed to foster innovation that could benefit consumers by helping Australian fintech start-ups navigate the Australian regulatory system. The Innovation Hub provides tailored information and access to informal assistance intended to streamline the Australian financial services licence (**AFSL**) application process for innovative fintech start-ups, which could include blockchain-related businesses.

Since 2016, ASIC has made certain class orders establishing a fintech licensing exemption which allows fintech businesses to test certain financial services, financial products and credit activities without holding an AFSL or Australian credit licence by relying on the class orders (referred to as the regulatory sandbox). Since September 2020, this has been further developed into an enhanced regulatory sandbox, which allows testing for a broader range of financial services and credit activities up to 2 years. 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. 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.

8. Have there been any recent governmental or regulatory reviews or consultations concerning blockchain technology in your jurisdiction and, if so, what are the key takeaways from these?

Data61, the digital research network of Australia's national science agency (CSIRO), partnered with the Australian Computer Society to release a report titled *Blockchain 2030: A look at the future of blockchain in Australia* (**Report**). The Report notes that blockchain has grown in popularity and use over the last decade and has been used to create vast opportunity in many sectors across the economy but there are key trends that will impact whether there is mainstream adoption of blockchain.

While blockchain has become more efficient and user-friendly, the Report states that it shows signs of limited scalability. Similarly, while there is great demand for blockchain developers, there is a short supply of talent, which may inhibit blockchain adoption. The Report highlights the opportunities for more transparent and efficient governance methods using blockchain particularly where consumer trust has been eroded in traditional institutions but there are also increased risks associated with scams and illegal activities.

Examining eight scenarios for future adoption of blockchain in Australia, the Report concludes that Australia should leverage its competitive advantage in blockchain with respect to talent and transitioning

industry and business. The Report suggests Australia should develop the appropriate skill mix, grow the information technology talent pool, address the blockchain knowledge gap and resolve digital infrastructure bottlenecks. The Report also suggests that the Government should play an active role in regulating the blockchain sector while both the Government and businesses should adopt a rolling strategy approach to implementing blockchain, develop a plan to manage cybersecurity and use research and data to drive decision-making.

The Report's publication follows two earlier reports produced by Data61 for the Government on blockchain use cases for government and industry in Australia. The findings from the three reports will be used to inform the Government's National Blockchain Roadmap (as discussed at question 6).

9. Has any official guidance concerning the use of blockchain technology been published in your jurisdiction?

ASIC has published (and periodically updates) an information sheet (*INFO 219 Evaluating distributed ledger technology*) outlining its approach to the regulatory issues that may arise through the implementation of blockchain technology and solutions. In it, ASIC has reinforced its "technology neutral" approach to regulation and has re-asserted that businesses considering operating market infrastructure or providing financial or consumer credit services using blockchain will still be subject to the compliance requirements that currently exist under the applicable licensing regimes. This includes the requirement to have the necessary organisational competence, adequate technological resources, and risk management systems in place. ASIC has provided businesses with the following six questions by which to evaluate whether to use blockchain having regard to those requirements:

1. How will the DLT be used?
2. What DLT platform is being used?
3. How is the DLT using data?
4. How is the DLT run?
5. How does the DLT work under the law?
6. How does the DLT affect others?

More broadly, the Government's Digital Transformation Agency has published a blockchain guide for Australian Government executives who operate in technology roles. The brief guide is based on the United States Government's National Institute of Standards and Technology. The guide directs Government agencies to key areas of consideration when responding to blockchain technologies, including governance and ownership, trust, encryption and access and correcting errors.

10. What is the current approach in your jurisdiction to the treatment of cryptocurrencies for the purposes of financial regulation, anti-money laundering and taxation? In particular, are cryptocurrencies characterised as a currency?

The Government shares a broad commitment to facilitating productivity and economic growth and innovation within the technology and financial services sector and improving the efficiency and inclusiveness of the financial system over the long term. Though the Government has remained relatively non-interventionist in the cryptocurrency sector, in recent times market regulators have become more engaged with industry developments and have focused on consumer education and issued warnings on the risks of trading and investing in cryptocurrencies. This has happened simultaneously to the sharp rise in the creation and use of cryptocurrencies in Australia in the past few years, with platforms such as Synthetix and Enosi raising millions through the creation of digital tokens. However, as the volume of new tokens has stabilised, regulators have generally taken a commensurately contracted response to ICOs.

In Australia, cryptocurrencies (also known as virtual assets, digital assets, crypto assets or digital currencies) refer to digital tokens created from code using blockchain that do not exist physically in the form of notes or coins. The current position in Australian law is that cryptocurrency is to be treated as an asset and not as fiat currency or money. Amendments to existing legislation over the last few years to accommodate increasing use of cryptocurrencies have generally been focused on transactional relationships (ie, issuing and exchanging) rather than on cryptocurrencies themselves. As a result, while cryptocurrencies themselves are not restricted under Australian law, dealings in relation to, or services involving, cryptocurrencies are likely to be captured within existing regulatory regimes.

Australia's regulatory framework (including how this relates to cryptocurrencies) is currently under review by multiple government bodies and agencies, such as the Treasury review of the Australian payments system, the Reserve Bank of Australia review of retail payments regulation, the Senate Select Committee review on

Australia as a Technology and Financial Centre, and the Australian Law Reform Commission review into Chapter 7 of the Corporations Act. It is anticipated that there will be recommendations and amendments coming out of these reviews that will impact how cryptocurrencies and cryptocurrency-adjacent services are treated by regulators.

Financial regulation

A person who carries on a financial services business in Australia must hold an AFSL or be exempt from the requirement to be licensed. Persons or entities dealing with, or providing services involving cryptocurrencies should consider whether the cryptocurrency constitutes a financial product, which may trigger the licensing requirement as well as other obligations in relation to disclosure, registration and conduct. The definitions of "financial product" and "financial service" under the *Corporations Act 2001* (Cth) (**Corporations Act**) are broad, and cover facilities through which a person makes a financial investment, manages a financial risk or makes a non-cash payment. ASIC continues to reiterate its view that cryptocurrencies with similar features to existing financial products will trigger the Australian financial services laws.

ASIC has published (and periodically updates) its regulatory guidance on cryptocurrencies, *INFO 225 Initial coin offerings and crypto-assets* (**INFO 225**) to inform a greater range of crypto asset participants, including issuers, crypto asset intermediaries, miners and transaction processors, crypto asset exchange and trading platforms, crypto asset payment and merchant services providers, wallet providers and custody service providers, and consumers. INFO 225 sets out ASIC's approach to determining the legal status of cryptocurrencies, which is dependent on the rights attached to the cryptocurrencies – ASIC has indicated this should be interpreted broadly – as well as their structure. Depending on the circumstances, coins or tokens may constitute interests in managed investment schemes (ie, collective investment vehicles), securities, derivatives, or fall into a category of more generally defined financial products, all of which are subject to the Australian financial services regulatory regime.

An entity that facilitates payments using cryptocurrencies may also be required to hold an AFSL and the operator of a cryptocurrency exchange may be required to hold an Australian market licence if the coins or tokens traded on the exchange constitute financial products.

There has been a growing perception of crypto assets (including cryptocurrencies) as an accepted investment asset class. In June 2021, ASIC launched a consultation process on its proposal to clarify expectations for crypto assets that form part of the underlying assets of exchange traded products and other investment products. ASIC proposes to set expectations for market operators, retail fund operators, listed investment entities and AFSL holders dealing in crypto assets. This primarily centres around criteria that ASIC expects market operators to apply when determining whether a specific crypto asset is an appropriate asset for market traded products. Crypto asset service providers are broadly required to support the use of the crypto asset, maturity of the spot market for the crypto asset, regulation of derivatives linked to the crypto asset, and the availability of robust and transparent pricing mechanisms for the crypto asset. The consultation also includes ASIC's proposed good practices in relation to how fund asset holders are required to custody crypto assets and ensure that adequate risk management systems are in place.

ASIC proposes to include crypto assets as a distinct asset class on AFSL authorisations for managed investment schemes but expects that this will only authorise the holding of Bitcoin and Ether in the short term. The consultation process remains open at the time of writing and it is expected that industry feedback will inform how ASIC intends to apply the proposals in the future.

Marketing

ASIC's recognition that an ICO may involve an offer of financial products has clear implications for the marketing of an ICO. For example, an offer of a financial product to a retail client (with some exceptions) must be accompanied by a regulated disclosure document (eg, a product disclosure statement or a prospectus and a financial services guide) that satisfies the content requirements of the Corporations Act and regulatory guidance published by ASIC. Such a disclosure document must set out prescribed information, including the provider's fee structure, to assist a client to decide whether to acquire the cryptocurrency from the provider. In some instances, the marketing activity itself may cause the ICO to be an offer of a regulated financial product.

Under the Corporations Act, depending on the minimum amount of funds invested per investor and whether the investor is a "sophisticated investor" or "wholesale client", an offer of financial products may not require regulated disclosure.

Cross-border issues

The regulation of foreign financial service providers (**FFSPs**) in Australia is in a state of flux. At the time of writing, carrying on a financial services business in

Australia will require a **FFSP** to hold an AFSL, be an authorised representative of an AFSL holder or hold a foreign AFSL (**FAFSL**) unless relief is granted. Entities, including FFSPs, should note that the Corporations Act may apply to an ICO regardless of whether it was created and offered from Australia or overseas. Australia has historically held cooperation (passporting) arrangements with regulators in foreign jurisdictions (including the United States of America and the United Kingdom), which enabled FFSPs regulated in those jurisdictions to provide financial services in Australia without holding an AFSL. This relief was only available in relation to the provision of services to wholesale clients (ie, accredited investors), and the FFSP could only provide the services it was authorised to provide in its home jurisdiction. In March 2020, ASIC repealed passport relief for FFSPs, and introduced a new regime that requires FFSPs to apply for a new FAFSL. The FAFSL regime requires FFSPs to undergo a more involved application process and FAFSL holders will be subject to a subset of obligations ordinarily applicable to AFSL holders. FFSPs that have previously relied on passport relief have until 31 March 2022 to transition to an FAFSL or satisfy licensing requirements in some other way.

As part of the 2021-2022 Australian Federal Budget (**Federal Budget**) announcement, the Federal Government indicated that it is rethinking the above changes, which may be unwound. The Australian Commonwealth Treasury (**Treasury**) is undertaking a consultation and review process on options that could include reinstating passporting relief and proposals to fast track applications for FAFSL relief. The consultation period closed on 30 July 2021 with the responses now being reviewed by Treasury, and further details regarding timing and implementation of the outcomes of the consultation process are not yet known as at the time of writing. Due to Treasury consultation and review process, ASIC have paused the acceptance of FAFSL applications unless the applicant can show a pressing need for their application to be considered at this time.

Foreign companies taken to be carrying on a business in Australia, including by issuing cryptocurrency or operating a platform developed using ICO proceeds, may be required to either establish a local presence (ie, register with ASIC and create a branch) or incorporate a subsidiary. Broadly, the greater the level of system, repetition or continuity associated with an entity's business activities in Australia, the greater the likelihood that registration will be required. Generally, a company holding an AFSL will be carrying on a business in Australia and will trigger the requirement.

Promoters should also be aware that if they wish to market their cryptocurrency to Australian residents, and the coins or tokens are considered a financial product under the Corporations Act, they will not be permitted to market the products unless the requisite licensing and disclosure requirements are met. Generally, a service provider from outside Australia may respond to requests for information and issue products to an Australian resident if the resident makes the first (unsolicited) approach and there has been no conduct on the part of the issuer designed to induce the investor to make contact, or activities that could be misconstrued as the provider inducing the investor to make contact.

Consumer law

Even if an ICO is not regulated under the Corporations Act, it may still be subject to other regulation and laws, including the Australian Consumer Law set out at Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**) relating to the offer of services or products to Australian consumers. The ACL prohibits misleading or deceptive conduct in a range of circumstances including in the context of marketing and advertising. As such, care must be taken in ICO promotional material to ensure that buyers are not misled or deceived and that the promotional material does not contain false information. In addition, promoters and sellers are prohibited from engaging in unconscionable conduct and must ensure the coins or tokens issued are fit for their intended purpose.

The protections of the ACL are generally reflected in the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), providing substantially similar protection to investors in financial products or services.

ASIC has also received delegated powers from the Australian Competition and Consumer Commission to enable it to take action against misleading or deceptive conduct in marketing or issuing in ICOs (regardless of whether it involves a financial product). ASIC has indicated misleading or deceptive conduct in relation to ICOs may include:

- using social media to create the appearance of greater levels of public interest;
- creating the appearance of greater levels of buying and selling activity for an ICO or a crypto-asset by engaging in (or arranging for others to engage in) certain trading strategies;
- failing to disclose appropriate information about the ICO; or
- suggesting that the ICO is a regulated product or endorsed by a regulator when it is not.

ASIC has stated that it will use this power to issue further inquiries into ICO issuers and their advisers to identify

potentially unlicensed and misleading conduct.

A range of consequences may apply for failing to comply with the ACL or the ASIC Act, including monetary penalties, injunctions, compensatory damages and costs orders.

Anti-money laundering and counter-terrorism financing

Cryptocurrencies and tokens were brought within the scope of Australia's anti-money laundering and counter-terrorism financing (**AML/CTF**) regulatory framework as a result of legislative amendments in the *Anti-Money Laundering and Counter-Terrorism Amendment Act 2017* (Cth) which came into force in April 2018. The legislation was introduced to recognise the movement towards digital currencies becoming a popular method of payments and the transfer of value in the Australian economy while posing significant money laundering and terrorism financing risks.

Broadly, digital currency exchange (**DCE**) service providers are required to register with AUSTRAC in order to operate, with a penalty of up to two years' imprisonment or a fine of up to A$111,000, or both, for failing to register. Registered exchanges will be required to implement know-your-customer processes to adequately verify the identity of their customers, with ongoing obligations to monitor and report suspicious and large transactions. Exchange operators are also required to keep certain records relating to customer identification and transactions for up to seven years. DCE providers are required to renew their registration every three years.

The DCE sector has been of great interest to AUSTRAC, in particular monitoring the ML/TF risks associated with digital currency. In June 2021, AUSTRAC promoted the Financial Action Task Force's (of which Australia is a member nation) red flags guidance for indicators of ML/TF, which sets out best practice for regulators and reporting entities and is expected to inform how AML/CTF legislation relating to digital currency is developed.

Taxation

The taxation of cryptocurrency in Australia has been an area of much debate, despite recent attempts by the ATO to clarify the operation of the tax law. For income tax purposes, the ATO views cryptocurrency as an asset that is held or traded (rather than as money or a foreign currency).The tax implications for holders of cryptocurrency depends on the purpose for which the cryptocurrency is acquired or held. The summary below applies to holders who are Australian residents for tax purposes.

Sale or exchange of cryptocurrency in the ordinary course of business

If a holder of cryptocurrency is carrying on a business that involves the sale or exchange of the cryptocurrency, the cryptocurrency will be held as trading stock. Gains on the sale of the cryptocurrency will be assessable and losses will be deductible (subject to integrity measures and "non-commercial loss" rules). Examples of relevant businesses include cryptocurrency trading and cryptocurrency mining.

Whether or not a taxpayer's activities amount to carrying on a business is a question of fact and degree, and is ultimately determined by weighing up the taxpayer's individual facts and circumstances. Generally (but not exclusively), where the activities are undertaken for a profit-making purpose, are repetitious, involve ongoing effort, and include business documentation, the activities would amount to the carrying on of a business.

Isolated transactions

Even if a holder of cryptocurrency did not invest or acquire the cryptocurrency in the ordinary course of carrying on a business, profits or gains from an "isolated transaction" involving the sale or disposal of cryptocurrency may still be assessable where the transaction was entered into with a purpose or intention of making a profit, and the transaction was part of a business operation or commercial transaction.

Cryptocurrency investments

If cryptocurrency is not acquired or held in the course of carrying on a business, or as part of an isolated transaction with a profit-making intention, a profit on sale or disposal should be treated as a capital gain. In this regard, the ATO has indicated that cryptocurrency is a capital gains tax (**CGT**) asset. Capital gains may be discounted under the CGT discount provisions, so long as the taxpayer satisfies the conditions for the discount (that is, the cryptocurrency is held for at least 12 months before it is disposed of).

Although cryptocurrency may be a CGT asset, a capital gain arising on its disposal may be disregarded if the cryptocurrency is a "personal use asset" and it was acquired for A$10,000 or less. Capital losses made on cryptocurrencies that are personal use assets are also disregarded. Cryptocurrency will be a personal use asset if it was acquired and used within a short period of time for personal use or consumption (that is, to buy goods or services).

Note that the ATO's views on the income tax implications of transactions involving cryptocurrencies is

in a state of flux due to the rapid evolution of both cryptocurrency technology and its uses.

Staking cryptocurrency

An entity may hold units of cryptocurrency (i.e. tokens) to validate and verify transactions within a blockchain. The "validator" may be rewarded with additional tokens for its role in this process. Token holders who participate in proxy staking or who vote their tokens in "proof of stake" or other consensus mechanisms may also be rewarded with additional tokens. The value of such tokens should be treated as ordinary income of the recipient at the time they are derived.

Issuers of cryptocurrencies

In the context of an ICO, a coin issuance by an entity that is either an Australian tax resident, or acting through an Australian "permanent establishment", may be assessable in Australia. The current corporate tax rate in Australia is either 25% or 30%. However, if the issued coins are characterised as equity for tax purposes or are issued in respect of a borrowing of money, the ICO proceeds may not be assessable to the issuer.

Australian goods and services tax (GST)

Supplies and acquisitions of digital currency made from 1 July 2017 are not subject to GST on the basis that they will be input-taxed financial supplies. Consequently, suppliers of digital currency will not be required to charge GST on these supplies, and a purchaser would prima facie not be entitled to GST refunds (i.e. input tax credits) for these corresponding acquisitions. On the basis that digital currency is a method of payment, as an alternative to money, the normal GST rules apply to the payment or receipt of digital currency for goods and services.

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

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

In relation to a holder carrying on an enterprise of cryptocurrency mining, whether or not GST is payable by the miner on its supply of new cryptocurrency depends on a number of factors, including its specific features, whether the miner is registered for GST, and whether the supply is made in the course or furtherance of the miner's enterprise.

A miner will carry on an enterprise where it conducts an activity, or a series of activities, in the form of business or in the form of an adventure or concern in the nature of trade, but it does not include activities conducted for a private recreational pursuit, as a hobby or as an employee. The scope of carrying on an "enterprise" can be broader than carrying on a "business" (as outlined above), and some miners may unintentionally be carrying on an "enterprise" for GST purposes.

The specific features of cryptocurrency include it: being a type of security or other derivative; being "digital currency" as defined in the GST legislation; or providing a right or entitlement to goods or services. If the cryptocurrency is a security, derivative or digital currency, its supply will not be subject to any GST because it will be an input-taxed financial supply (assuming the other requirements are satisfied).

A cryptocurrency miner would generally be required to register for GST if its annual GST turnover is A$75,000 or more, excluding the value of its supplies of digital currencies and other input-taxed supplies. However, a miner who does not satisfy this GST registration threshold may nevertheless elect to register for GST in order to claim from the ATO full input tax credits (i.e. GST refunds) for the GST cost of its business acquisitions (but acquisitions that relate to the sales or acquisitions of securities, derivatives or digital currencies are prima facie non-creditable or non-refundable).

A supply made in connection with a miner's enterprise, including the enterprise's commencement or termination, will generally be "made in the course or furtherance" of their enterprise, and may attract GST should other requirements be satisfied.

Enforcement

The ATO has created a specialist task force to tackle cryptocurrency tax evasion. The ATO also collects bulk records from Australian cryptocurrency designated service providers to conduct data matching to ensure that cryptocurrency users are paying the right amount of tax. With the broader regulatory trend around the globe moving from guidance to enforcement, it is likely that the ATO will also begin enforcing tax liabilities more aggressively.

11. Are there any prohibitions on the use or trading of cryptocurrencies in your jurisdiction?

There are currently no express prohibitions on the use or trading of cryptocurrencies in Australia. However, to the extent that cryptocurrencies are financial products, trading or on-selling financial products fall within the existing regulatory regime.

Design and distribution obligations

Since 5 October 2021, issuers and distributors of financial products must comply with design and distribution obligations (**DDOs**) which may impact the way cryptocurrencies are structured and token sales are conducted in the future. Issuers and distributors will be required to implement effective product governance arrangements including a target market determination subject to review triggers.

Product intervention powers

ASIC also has product intervention powers (**PIPs**) where there is a risk of significant consumer detriment. This enables ASIC to address market-wide problems or specific business models and deal with certain "first mover" issues. The power covers financial products under the Corporations Act and ASIC Act and credit products under the National Consumer Credit Protection Act 2009 (Cth) (**NCCPA**). These powers are highly likely to impact marketing and distribution practices in the cryptocurrency sector where cryptocurrencies fall within the scope of these powers.

The purpose of these regulations is to ensure that financial products are targeted at the correct category of potential investors. ASIC has already commenced using its PIP to address issues relating to short term credit products and various derivatives. However, these have not yet been directed specifically toward cryptocurrencies. It is anticipated that ASIC will use its PIP should a risk of significant consumer detriment arise in relation to certain cryptocurrency types and structures.

12. To what extent have initial coin offerings taken place in your jurisdiction and what has been the attitude of relevant authorities to ICOs?

While the data on ICO activity in Australia is opaque, a number of Australian businesses such as Synthetix, Power Ledger and CanYa have previously raised significant funds via ICOs.

Regulators such as ASIC and AUSTRAC have generally been receptive to fintech and innovation but at the same time, regulators have been active in highlighting the risks of trading and investing in cryptocurrencies particularly in respect of retail consumers. ASIC has referred to ICOs as being "a highly speculative investment" and that "while the potential returns may look attractive, these projects are mostly unregulated and the chance of losing your investment is high". This approach to issue public statements and warnings to consumers specific to ICOs aligns with the approach of many members of the International Organization of Securities Commissions.

ASIC has also emphasised consumer protection and compliance with the relevant laws and has taken action as a result to stop proposed token sales targeting retail investors due to issues with disclosure and promotional materials (the requirements of which are discussed below), as well as offerings of financial products without an AFSL. In August 2021, ASIC urged consumers to be wary of investing in crypto-asset related financial products, such as options and futures, through unlicensed entities.

The ASX has generally taken a staunch stance towards cryptocurrency in its crackdown on cryptocurrency related entities (primarily to help protect consumers investing in speculative investments). The ASX has compared the increase in investments of cryptocurrency to the tulip crisis in Holland stating that "cryptocurrency has been used for fraud right around the world" and "needs to be stopped". However, while the ASX has generally opposed cryptocurrencies, it has accepted listing applications for cryptocurrency related entities that comply with increasingly stringent listing requirements.

The Reserve Bank of Australia (**RBA**), Australia's central bank, has confirmed that it has no immediate plans to issue a retail CBDC akin to money. The RBA noted that the rise of new technology associated with cryptocurrencies has the capacity to challenge the role of traditional financial institutions with regard to payments. Similarly, it has explored the potential structure of a retail CBDC but continues to conclude that there is currently no public policy case for the RBA to issue a retail CBDC. Despite this, the RBA has taken active steps in exploring applications for a wholesale CBDC (discussed in question 2).

The use of digital wallets in Australia has also continued to grow. The Council of Financial Regulators (comprised of Australia's major financial regulators) has made recommendations to the Government for a new framework for stored value facilities to be overseen by

APRA. Stored value facilities include digital wallets that are increasingly being used as a means of payment and store significant value for a reasonable period of time. The new framework is intended not only to be fit for purpose for the emerging financial system but also be able to accommodate future developments and technological advances, such as proposals for global stable coin ecosystems.

13. If they are permissible in your jurisdiction, what are the key requirements that an entity would need to comply with when launching an ICO?

The legislative amendments introduced to provide for the regulation of cryptocurrencies have generally focused on the transactional relationships (eg, the issuing and exchanging process) and activities involving cryptocurrencies, rather than the cryptocurrencies themselves. We have outlined in question 10 the key aspects of Australia's financial services regulatory regime as it relates to the sale of cryptocurrency through an ICO including licensing requirements, marketing requirements, cross border issues and consumer law issues.

Depending on the circumstances, coins or tokens may constitute interests in managed investment schemes (collective investment vehicles), securities, derivatives, or fall into a category of more generally defined financial products (including the ability to make non-cash payments), all of which are subject to the Australian financial services regulatory regime.

ASIC has provided high-level guidance to assist in determining whether an ICO may fall within the Australian financial services regulatory framework in INFO 225 (discussed above). A summary of ASIC's guidance is provided in the Australian Treasury Issues Paper on Initial Coin Offerings published in 2019.

14. Is cryptocurrency trading common in your jurisdiction? And what is the attitude of mainstream financial institutions to cryptocurrency trading in your jurisdiction?

There has been a dramatic increase in cryptocurrency trading since the beginning of 2020 as indicated by the ATO data analysis. The ATO also estimates that over 600,000 Australians have invested in crypto assets in recent years. Digital currencies have seen strong growth particularly among women and young people in the Australian market. According to comparison site Finder's Cryptocurrency Report 2021, about 1 in 6 Australians own cryptocurrency comprising 31% of generation Z.

Mainstream financial institutions in Australia have historically stayed away from any involvement with cryptocurrency trading citing money laundering and terrorism financing risks. Industry association bodies have also raised concerns of "de-banking" with banks closing the accounts of a notable number of Australian digital currency exchanges to meet "compliance and assurance requirements". However, in recent times numerous institutional market makers and liquidity providers have increased their scope to provide broader corporate solutions across cryptocurrency and digital asset trading. Similarly, there is a growing presence of cryptocurrency and digital asset-based classes of underlying assets within managed funds. Such inclusion has indirectly increased the volume of trading in these assets.

While the ASX has endorsed blockchain with development plans for its own blockchain-based replacement for its equities clearing and settlement operations, the embracing of blockchain has not generally extended to cryptocurrencies. In late 2019 the exchange released updated compliance guidance regarding cryptocurrency-related activity, stating that such activities raise "significant legal, regulatory and public policy issues" and its "concerns regarding cryptocurrency-related activities have been reinforced and amplified". The ASX's position remains that listing a crypto-currency business will need to satisfy stringent listing requirements. Despite these higher barriers to entry there have been numerous cryptocurrency related businesses and funds listed on the ASX in the last year.

15. Are there any relevant regulatory restrictions or initiatives concerning tokens and virtual assets other than cryptocurrencies (e.g. trading of tangible property represented by cryptographic tokens)?

There are no specific regulatory restrictions concerning tokens and other virtual assets. The legal obligations and requirements applicable to any cryptocurrency, token or virtual asset will depend upon the rights which are attached to them and their features (as discussed at question 10).

While Australia has not adopted any specific initiatives concerning tokens, virtual assets or cryptocurrencies, ASIC and AUSTRAC have established initiatives to assist fintech businesses more broadly in understanding their obligations such as setting up innovation hubs (see question 7).

16. Are there any legal or regulatory issues concerning the transfer of title to or the granting of security over tokens and virtual assets?

ASIC has indicated how Australian financial services laws may apply to ICOs as an alternative form of funding. This includes how the legal status of an ICO may trigger licensing, registration and disclosure requirements if the tokens represent financial products (see question 10). Regardless of whether a token constitutes a financial product, ICOs and security token offerings will be subject to ACL restrictions and AML/CTF reporting requirements. Entities engaging in lending activities within the scope of the National Credit Code (which may capture lending associated with security taken over digital assets), as contained in Schedule 1 of the NCCPA, will need to hold an Australian credit licence or be exempt from the requirement to be licensed. Credit licensees must also comply with a range of obligations including in relation to responsible lending.

As digital assets are increasingly included in underlying baskets of fund assets, there have been concerns regarding the ability of an appointed custodian to hold legal title to digital assets to the exclusion of other fund participants and beneficiaries. These concerns relate to the ability to comply with existing laws regulating the holding of fund assets (for example, having exclusive possession of assets held on trust for beneficiaries). Solutions have primarily revolved around a series of cold storage and multi-signature access and trade execution processes. However, these have not been widely solved in a manner that allows for relative ease of trade execution in high volume trading schemes.

As mentioned in question 2 there has been continuous development in the use of blockchain in bond issuances. Currently, the majority of blockchain issued bonds only mirror off-chain transactions on the on-chain ledger, rather than effecting the transaction using blockchain. The technology generally has not yet extended to allow for the recordings in the ledger to constitute a transfer of legal title to the bonds and consequently, transactions are executed through an off-chain bond register and then replicated on the blockchain.

17. How are smart contracts characterised within your legal framework? Are there any enforceability issues specific to the operation of smart contracts which do not arise in the case of traditional legal contracts?

Smart contracts (including self-executing contracts) are permitted in Australia under the *Electronic Transactions Act 1999* (Cth) (**ETA**) and the equivalent Australian state and territory legislation. The ETA provides a legal framework to enable electronic commerce to operate in the same manner as paper-based transactions. Under the ETA, self-executing transactions are permitted in Australia, provided that they meet all traditional elements of a legal contract, including an intention to create legally binding obligations; offer and acceptance; certainty; and consideration.

The pre-determined and self-executing form of smart contracts creates difficulties where there is a required element of discretion by either party, particularly relating to dispute mechanisms (e.g. arbitration and mediation) and non-deterministic provisions. There has been very little case law on the subject. Self-executing contracts may alter traditional dispute resolution in Australia if online platforms can facilitate self-executing dispute resolution.

18. To what extent are smart contracts in use in your jurisdiction? Please mention any key initiatives concerning the use of smart contracts in your jurisdiction, including any examples relating to decentralised finance protocols.

Aside from a small number of pilot phase testing programs, the use of smart contracts has historically been limited to the cryptocurrency sector. This has predominantly occurred through ICOs in which smart contracts are used to automatically mint and issue tokens upon payment. Additionally, they have also been used through numerous cryptocurrency exchanges and digital asset platforms for order matching and transaction execution (with increasing regularity for atomic swaps).

However, the past few years have seen an increase in institutional adoption of smart contracts to digitise readily automatable processes. This has primarily taken hold in the financial services sector with multiparty arrangements (for example, issuing bank guarantees or debt instruments, issuing and dealing with fund interests through smart contracts). The most prominent implementation of smart contracts in Australia is the ASX's proposed replacement of its clearing and settlement system with a blockchain-based system as discussed in question 2.

There have also been a number of initiatives and consortia established that aim to develop a framework for the standardisation and regulation of smart contracts

(for example, through Australia's national science agency, CSIRO's Data61). However, there is yet to be a widely-adopted framework.

19. Have there been any governmental or regulatory enforcement actions concerning blockchain in your jurisdiction?

There have not been any governmental or regulatory enforcement actions taken specifically against the use of blockchain in Australia. However, regulators have continued to move from observational positions to enforcement with respect to fintech solutions more generally (some of which may involve the use of blockchain). This has predominantly occurred in the context of ICOs where ASIC has undertaken multiple actions against issuers where they have attempted to offer a regulated product outside of the financial services framework or have materially failed to appropriately disclose important information to retail investors.

While not specifically related to blockchain, the ATO has established a special taskforce that actively investigates potential tax evasion arrangements that are facilitated through blockchain-based cryptocurrency transactions. Aligning with this approach, AUSTRAC requires digital currency exchanges to register, monitor and report on transactions occurring on these platforms. However, at the time of writing, no public information has been released regarding any enforcement actions that may have been taken against entities by these agencies.

As discussed above, ASIC has released extensive and regularly updated guidance on ICOs and blockchain implementations, which outline how arrangements may be treated and the steps that ASIC will expect entities to undertake to comply with applicable obligations. Overall, this represents a pre-emptive mitigation approach by the regulators, rather than an after the fact enforcement strategy.

20. Has there been any judicial consideration of blockchain concepts or smart contracting in your jurisdiction?

While there has been passing references to blockchain in Australian case law, at the time of writing there has not been any specific judicial consideration of blockchain or smart contracts in Australia.

21. Are there any other generally-applicable laws or regulations that may present issues for the use of blockchain technology (such as privacy and data protection law or insolvency law)?

In Australia, the *Privacy Act 1988* (Cth) (**Privacy Act**) regulates the handling of personal information by Government agencies and private sector organisations with an aggregate group revenue of at least A$3 million with a jurisdictional link to Australia. 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, which impose obligations on the collection, use, disclosure, retention and destruction of personal information. Relevantly, before entities collect personal information, they must disclose the way in which this data will be used, the purposes for which it will be used and third parties to which it is likely to be disclosed. This is the basis on which individuals provide consent for their personal information to be collected, used and disclosed.

Blockchain arrangements can be structured in various ways, from information being readily visible to all participants on a network, to closed networks where information is limited to specific participants in specific instances. Therefore, entities wishing to collect and use personal information through blockchain implementations must ensure that they have gained appropriate consents for the contemplated use and disclosure.

The Notifiable Data Breaches (**NDB**) scheme was implemented in 2018. 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 in the event of a data breach (i.e. unauthorised access to or disclosure of information) which is likely to result in serious harm to those individuals. The NDB scheme applies to agencies and organisations that the Privacy Act requires to take steps to secure certain categories of personal information. Therefore, entities will also need to ensure that any blockchain implementations are sufficiently protected from security issues such as unauthorised access and operational failure, and in the case of a data breach, ensure that they have adequate processes in place to comply with the NDB scheme.

22. Are there any other key issues concerning blockchain technology in your jurisdiction that legal practitioners should be aware of?

Entities offering solutions that incorporate blockchain

technology (as well as their legal advisers) should be aware of the regulations that may apply to the broader context in which the solution is offered. This particularly relates to the extent to which the general public may not accurately understand how the blockchain components operate, and how they fit within the overall solution.

The ACL provides various consumer protections in relation to goods and services sold to Australian consumers (irrespective of where the business is located). These protections include prohibitions against:

- misleading and deceptive conduct;
- false or misleading representations;
- unfair contract terms; and
- unconscionable conduct.

Where the blockchain solution forms part of a financial services offering, the ASIC Act will apply, and sets out identical consumer protections as the ACL.

Therefore, where an offering incorporates blockchain technology, entities must ensure that consumers have the necessary information to understand how the solution works, the purpose and use of the blockchain components and what that means from an end-user perspective.

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