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CONTENTS

Preface	Josias N. Dewey, *Holland & Knight LLP*	
Foreword	Daniel C. Burnett, *Enterprise Ethereum Alliance*	
Glossary	The Contributing Editor shares key concepts and definitions of blockchain	
Industry chapters	*The evolution of global markets continues – Blockchain, cryptoassets and the future of everything* Ron Quaranta, *Wall Street Blockchain Alliance*	1
	Cryptocurrency and blockchain in the 117th Congress Jason Brett & Whitney Kalmbach, *Value Technology Foundation*	7
	Six years of promoting innovation through education: The blockchain industry, law enforcement and regulators work towards a common goal Jason Weinstein & Alan Cohn, *The Blockchain Alliance*	20
Expert analysis chapters	*Blockchain and intellectual property: A case study* Ieuan G. Mahony, Brian J. Colandreo & Jacob Schneider, *Holland & Knight LLP*	24
	Cryptocurrency and other digital asset funds for U.S. investors Gregory S. Rowland & Trevor Kiviat, *Davis Polk & Wardwell LLP*	41
	Not in Kansas anymore: The current state of consumer token regulation in the United States Yvette D. Valdez, Stephen P. Wink & Paul M. Dudek, *Latham & Watkins LLP*	56
	An introduction to virtual currency money transmission regulation Michelle Ann Gitlitz, Carlton Greene & Caroline Brown, *Crowell & Moring LLP*	82
	Decentralized finance: Ready for its "close-up"? Lewis Cohen, Angela Angelovska-Wilson & Greg Strong, *DLx Law*	101
	Legal considerations in the minting, marketing and selling of NFTs Stuart Levi, Eytan Fisch & Alex Drylewski, *Skadden, Arps, Slate, Meagher & Flom LLP*	115
	Cryptocurrency compliance and risks: A European KYC/AML perspective Fedor Poskriakov & Christophe Cavin, *Lenz & Staehelin*	130
	Distributed ledger technology as a tool for streamlining transactions Douglas Landy, James Kong & Ben Elron, *White & Case LLP*	146
	Ransomware and cryptocurrency: Part of the solution, not the problem Katie Dubyak, Jason Weinstein & Alan Cohn, *Steptoe & Johnson LLP*	161
	A day late and a digital dollar short: Central bank digital currencies Richard B. Levin & Kevin R. Tran, *Nelson Mullins Riley & Scarborough LLP*	171
	U.S. federal income tax implications of issuing, investing and trading in cryptocurrency Pallav Raghuvanshi & Mary F. Voce, *Greenberg Traurig, LLP*	185
	Raising capital: Key considerations for cryptocurrency companies David Lopez, Colin D. Lloyd & Laura Daugherty, *Cleary Gottlieb Steen & Hamilton LLP*	196

Expert analysis chapters cont'd

Smart contracts in the derivatives space: An overview of the key issues for buy-side market participants
Jonathan Gilmour & Vanessa Kalijnikoff Battaglia, *Travers Smith LLP* 208

Tracing and recovering cryptoassets: A UK perspective
Jane Colston, Jessica Lee & Imogen Winfield, *Brown Rudnick LLP* 214

Jurisdiction chapters

Australia Peter Reeves, Robert O'Grady & Emily Shen, *Gilbert + Tobin* 224

Austria Ursula Rath, Thomas Kulnigg & Dominik Tyrybon, *Schönherr Rechtsanwälte GmbH* 237

Brazil Flavio Augusto Picchi & Luiz Felipe Maia, *FYMSA Advogados* 245

Canada Simon Grant, Kwang Lim & Matthew Peters, *Bennett Jones LLP* 256

Cayman Islands Alistair Russell, Chris Duncan & Jenna Willis, *Carey Olsen* 268

Cyprus Akis Papakyriacou, *Akis Papakyriacou LLC* 276

France William O'Rorke & Alexandre Lourimi, *ORWL Avocats* 284

Gibraltar Joey Garcia, Jonathan Garcia & Jake Collado, *ISOLAS LLP* 295

India Nishchal Anand, Pranay Agrawala & Dhrupad Das, *Panda Law* 305

Ireland Keith Waine, Karen Jennings & David Lawless, *Dillon Eustace LLP* 317

Italy Massimo Donna & Chiara Bianchi, *Paradigma – Law & Strategy* 327

Japan Takeshi Nagase, Tomoyuki Tanaka & Takato Fukui, *Anderson Mōri & Tomotsune* 334

Jersey Christopher Griffin, Emma German & Holly Brown, *Carey Olsen Jersey LLP* 345

Kenya Muthoni Njogu, *Njogu & Associates Advocates* 353

Korea Won H. Cho & Dong Hwan Kim, *D'LIGHT Law Group* 367

Luxembourg José Pascual, Bernard Elslander & Clément Petit, *Eversheds Sutherland LLP* 378

Mexico Carlos Valderrama, Diego Montes Serralde & Evangelina Rodriguez Machado, *Legal Paradox®* 389

Montenegro Luka Veljović & Petar Vučinić, *Moravčević Vojnović i Partneri AOD in cooperation with Schoenherr* 397

Netherlands Gidget Brugman & Sarah Zadeh, *Eversheds Sutherland* 402

Norway Ole Andenæs, Snorre Nordmo & Stina Tveiten, *Wikborg Rein Advokatfirma AS* 413

Portugal Filipe Lowndes Marques, Mariana Albuquerque & Duarte Veríssimo dos Reis, *Morais Leitão, Galvão Teles, Soares da Silva & Associados* 426

Serbia Bojan Rajić & Mina Mihaljčić, *Moravčević Vojnović i Partneri AOD Beograd in cooperation with Schoenherr* 437

Singapore Kenneth Pereire & Lin YingXin, *KGP Legal LLC* 442

Spain Alfonso López-Ibor Aliño & Olivia López-Ibor Jaume, *López-Ibor Abogados* 452

Switzerland Daniel Haeberli, Stefan Oesterhelt & Alexander Wherlock, *Homburger* 460

Taiwan Robin Chang & Eddie Hsiung, *Lee and Li, Attorneys-at-Law* 475

United Kingdom Stuart Davis, Sam Maxson & Andrew Moyle, *Latham & Watkins* 482

USA Josias N. Dewey, *Holland & Knight LLP* 499

Australia

Peter Reeves, Robert O'Grady & Emily Shen
Gilbert + Tobin

Government attitude and definition

Australia has generally been regarded as a relatively friendly and stable jurisdiction for blockchain and cryptocurrency businesses to operate in. This has been driven in part by Australia's overall approach to the financial technology (**fintech**) sector, with the Commonwealth Government of Australia (**Government**) supportive of broad growth and innovation. There has been a proliferation of product offerings from the Australian blockchain and cryptocurrency community, and the Australian approach to the sector has broadly remained supportive of new and innovative financial services and products using or transacting cryptocurrencies. In part, the expansion of the sector in Australia has been led by businesses in the payments, crypto asset, lending, investment and custodial services spaces.

To date, the Government has taken a largely non-interventionist approach to the regulation of cryptocurrency, allowing the landscape to evolve at a faster rate without significant regulatory limitation. Such growth remains a priority for the Government, emphasised by its Select Committee on Australia as a Technology and Financial Centre publishing its third issues paper in March 2021, having amended its scope of matters to include opportunities and risks in the digital asset and cryptocurrency sector.

Currently, Australian law does not equate digital currency with fiat currency and does not treat cryptocurrency as "money". The Reserve Bank of Australia (**RBA**), Australia's central bank, indicates no immediate plans to issue a digital dollar akin to money (often referred to as an "eAUD"). Although the RBA has been involved in numerous projects to explore the potential use and implications of a wholesale central bank digital currency (**CBDC**), it maintains that there is currently no public policy case to issue a retail CBDC.

While the Government has not significantly intervened in cryptocurrencies and related activities, there has been general clarification of the application of Australian regulatory regimes to the sector. For example, since 2018, digital currencies have been caught by Australia's anti-money laundering and counter-terrorism financing (**AML/CTF**) regime. This amendment recognised the movement towards digital currencies becoming a popular method of paying for goods and services and transferring value in the Australian economy and addressed the possibility of digital currencies being used for money laundering and terrorism financing (**ML/TF**).

As well as in payments, there has been a growing expectation that crypto assets (including cryptocurrencies) will become accepted as an investment asset class. In June 2021, Australia's primary corporate, markets, consumer credit and financial services regulator, the Australian Securities and Investments Commission (**ASIC**), launched a consultation process on its proposals to clarify expectations for crypto assets that form part of the underlying assets of exchange-traded products (**ETPs**) and other investment products.

Cryptocurrency regulation

While there have been legislative amendments to accommodate the use of cryptocurrencies, these have predominantly focused on the transactional relationships (e.g., the issuing and exchanging process) and activities involving cryptocurrencies, rather than the cryptocurrencies themselves.

ASIC has reaffirmed the view that 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. While there has been no legislation created to deal with cryptocurrencies as a discrete area of law, this does not hinder them from being captured within existing regimes under Australian law – see under "Sales regulation" below.

ASIC's regulatory guidance informs businesses of its approach to the legal status of coins (or tokens). This depends on how they are structured and the rights attached, which ultimately determines the regulations with which an entity must comply. For example:

- Cryptocurrency that is, or forms part of a collective investment product that is, a financial product under the *Corporations Act 2001* (Cth) (**Corporations Act**) will fall within the scope of Australia's existing financial services regulatory regime. This is discussed in more detail under "Sales regulation" below.
- There has also been a proliferation of lending activities in relation to cryptocurrency. To the extent these lending activities fall within the scope of the credit activities and services caught under the *National Credit Consumer Protection Act 2009* (Cth) (**NCCP Act**), the relevant entities may need to hold an Australian credit licence or be otherwise exempt from the requirement to be licensed.

ASIC has recently launched a consultation process on its proposals to clarify expectations for crypto assets that form part of the underlying assets of ETPs and other investment products. ASIC proposes to set expectations for market operators, retail fund operators (i.e., responsible entities), listed investment entities (including listed investment trusts and listed investment companies) and Australian financial services licence (**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. This broadly requires institutional support of the crypto asset, service providers willing 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, as well as ensuring 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.

There are currently no specific regulations dealing with blockchain or other distributed ledger technology (**DLT**) in Australia. However, ASIC maintains a public information sheet (*INFO 219 Evaluating distributed ledger technology*) (most recently updated in March 2021) outlining its approach to the regulatory issues that may arise through the implementation of blockchain technology and DLT solutions more generally. Businesses considering operating market infrastructure, or providing financial or consumer credit services using DLT, will still be subject to the compliance requirements that currently exist under the applicable licensing

regime. There is a general obligation that entities relying on technology in connection with the provision of a regulated service must have the necessary organisational competence and adequate technological resources and risk management plans in place. While the existing regulatory framework is sufficient to accommodate current implementations of DLT, as the technology matures, additional regulatory considerations will arise.

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

Sales regulation

The sale of cryptocurrency and other digital assets is regulated by Australia's existing financial services regulatory regime. Core considerations for issuers are outlined below.

Licensing

Of particular concern to those dealing with cryptocurrencies is whether the relevant cryptocurrency constitutes a financial product triggering financial services licensing and disclosure requirements. Entities carrying on a financial services business in Australia must hold an AFSL or be exempt. The definitions of "financial product" or "financial service" under the Corporations Act are broad and ASIC has indicated in its information sheet, *INFO 225 Initial coin offerings* (**INFO 225**), that cryptocurrency with similar features to existing financial products or securities will trigger the relevant regulatory obligations.

In INFO 225, ASIC indicated that the legal status of cryptocurrency is dependent upon the structure of the ICO and the rights attaching to the coins or tokens. ASIC indicated that what is a right should be interpreted broadly. 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, all of which are subject to the Australian financial services regulatory regime. In INFO 225, ASIC provided high-level regulatory signposts for crypto asset participants to determine whether they have legal and regulatory obligations. These signposts are relevant to crypto asset issuers, crypto asset intermediaries, miners and transaction processors, crypto asset exchanges and trading platforms, crypto asset payment and merchant service providers, wallet providers and custody service providers, and consumers.

Broadly, entities offering coins or tokens that can be classified as financial products will need to comply with the regulatory requirements under the Corporations Act, which generally include disclosure, registration, licensing and conduct obligations. An entity that facilitates payments by 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.

Generally, ASIC's regulatory guidance is consistent with the position of regulators in other jurisdictions. ASIC has also recommended that companies wishing to conduct an initial coin offering (**ICO**) or other token sale seek professional advice, including legal advice, and contact its Innovation Hub (discussed in detail below, "Promotion and testing") for informal assistance. This reflects its willingness to build greater investor confidence around cryptocurrency as an asset class. However, ASIC has 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 2019, the Treasury consulted on ICOs and the relevant regulatory frameworks in Australia; however, no outcomes of this consultation have been reported to date.

Marketing

ASIC's recognition that a token sale may involve an offer of financial products has clear implications for the marketing of the token sale. For example, an offer of a financial product to a retail client (with some exceptions) must be accompanied by a regulated disclosure document (e.g., 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 in deciding whether to acquire the cryptocurrency from the provider. In some instances, the marketing activity itself may cause the token sale 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

Carrying on a financial services business in Australia will require a foreign financial services provider (**FFSP**) to hold an AFSL, unless relief is granted. Entities, including FFSPs, should note that the Corporations Act may apply to an ICO or token sale regardless of whether it was created and offered from Australia or overseas. Currently, Australia has a foreign AFSL (**FAFSL**) regime for FFSPs regulated in certain jurisdictions that enables FFSPs regulated in those jurisdictions to provide financial services to wholesale clients (similar to the concept of an accredited investor under US law) in Australia without holding an AFSL. The FAFSL regime replaces the previous passporting arrangements Australia had in place (though FFSPs already relying on passport relief may do so until 31 March 2023). The Treasury is currently consulting on unwinding the repeal of passport relief and/or proposing new relief for FFSPs and is also consulting on a fast-track licensing regime for FFSPs seeking to apply for an AFSL. At the time of writing, no outcomes have been released in relation to either of these consultations.

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 (i.e., 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 of 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.

Design and distribution obligations and product intervention powers

From 5 October 2021, issuers and distributors of financial products must comply with design and distribution obligations (**DDO**), which may impact the way cryptocurrencies are structured and token sales are conducted in the future. Issuers and distributors must implement effective product governance arrangements, which include (among other things) a target market determination subject to review triggers. The DDO aim to ensure that financial products are targeted at the correct category of potential investors. Issuers and distributors are required to comply with the DDO from 5 October 2021.

Product intervention powers

ASIC also has temporary product intervention powers where there is a risk of significant consumer detriment, enabling 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 *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and credit products under the NCCP Act. These powers are highly likely to impact marketing and distribution practices in the cryptocurrency sector where cryptocurrencies fall within the remit of the powers.

Consumer law

Even if a token sale 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 token sale 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 that the coins or tokens issued are fit for their intended purpose. The protections of the ACL are generally reflected in the 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 token sales (regardless of whether it involves a financial product). ASIC has indicated that misleading or deceptive conduct in relation to token sales 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 a token sale or a crypto asset by engaging in (or arranging for others to engage in) certain trading strategies;
- failing to disclose appropriate information about the token sale; or
- suggesting that the token sale 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 token 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.

Taxation

The taxation of cryptocurrency in Australia has been an area of much debate, despite recent attempts by the Australian Taxation Office (**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 depend 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 sale or exchange of the cryptocurrency in the ordinary course of that business, 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 businesses.

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 26% 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.

Money transmission laws and anti-money laundering requirements

Since 2018, digital currency exchange (**DCE**) providers are required to register and enrol with the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) as a reporting entity under Australia's AML/CTF regulatory framework. There is a penalty of up to two years' imprisonment or a fine of up to A$111,000, or both, for failing to register. Broadly, registered exchanges will be required to implement know-your-customer processes to adequately verify the identity of their customers, with ongoing reporting obligations such as annual compliance reporting and the requirement 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.

Promotion and testing

Regulators in Australia have generally been receptive to blockchain and cryptocurrency and have sought to improve their understanding of, and engagement with, businesses by regularly consulting with industry on proposed regulatory changes. As part of this mandate, both ASIC and AUSTRAC have established Innovation Hubs designed to assist new market entrants (including those operating in the blockchain and cryptocurrency sectors) more broadly in understanding their obligations under Australian law. ASIC has also entered into a number of cooperation agreements with overseas regulators, which aim to further understand the regulatory approach and product offerings in other jurisdictions (as discussed below).

ASIC Innovation Hub

The ASIC Innovation Hub is designed to foster innovation that could benefit consumers by helping Australian start-ups (including those operating in the blockchain and cryptocurrency sectors) navigate the Australian regulatory system. The Innovation Hub provides tailored information and access to informal assistance intended to streamline the AFSL process for innovative fintech start-ups, which could include cryptocurrency-related businesses.

In 2016, ASIC established the fintech regulatory sandbox, which included a fintech licensing exemption to allow businesses to test certain financial services, financial products and credit activities without holding an AFSL or Australian credit licence. This had strict

eligibility requirements for both the type of businesses and the products and services that qualify for the licensing exemption, as well as restrictions on how many persons can be serviced and caps on the value of the financial products or services that can be provided. In 2020, the Government passed regulation to enhance this regulatory sandbox (aptly named the "enhanced regulatory sandbox"), which expanded the scope of the sandbox to test a broader range of financial services and credit activities for up to 24 months. This is broadly considered to better support innovation in the sector by increasing the cap restrictions as well as providing more nuanced parameters for clients that can be serviced.

Cross-border business

ASIC has engaged with regulators overseas to deepen its understanding of innovation in financial services, including in relation to cryptocurrencies. In particular, ASIC's enhanced cooperation agreement with the United Kingdom's Financial Conduct Authority remains on foot, which allows the two regulators to, among other things, information-share, refer innovative businesses to each regulator's respective regulatory sandbox, and conduct joint policy work. ASIC also currently has either information-sharing or cooperation agreements with regulators in jurisdictions such as Austria, Brazil, Canada, China, Germany, Hong Kong, Indonesia, Israel, Italy, Japan, Kenya, Luxembourg, New Zealand, Singapore, Switzerland and the United States of America. These arrangements facilitate the cross-sharing of information on a range of market trends, many encouraging referrals of new market entrants (including those in the blockchain and cryptocurrency sector) and share insights from proofs of concepts and innovation competitions.

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

ASIC has committed to supporting financial innovation in the interests of consumers by joining the Global Financial Innovation Network (**GFIN**), which was formally launched in January 2019 by a group of financial regulators across 29 member organisations. The GFIN is dedicated to facilitating regulatory collaboration in a cross-border context and provides more efficient means for innovative businesses to interact with regulators.

AUSTRAC Innovation Hub

AUSTRAC's Fintel Alliance is a private-public partnership seeking to develop "smarter regulation". This includes setting up an Innovation Hub targeted at improving the relationship between new businesses operating in innovative spaces like cryptocurrency and blockchain, and the Government and regulators. While the hub has generally been targeted at fintech businesses more broadly, cryptocurrency and blockchain-related businesses can enter the hub's regulatory sandbox to test financial products and services without risking regulatory action or costs.

Ownership and licensing requirements

At the time of writing, there are currently no explicit restrictions on investment managers owning cryptocurrencies for investment purposes. However, investment managers may be subject to Australia's financial services regulatory regime where the cryptocurrencies held are deemed to be "financial products" and the investment managers' activities in relation to those cryptocurrencies are deemed to be the provision of financial services.

For example, investment managers providing investment advice on cryptocurrencies held that are financial products will be providing financial product advice under the Corporations

Act and must hold an AFSL or otherwise be exempt from the requirement to be licensed. ASIC has provided significant guidance in relation to complying with the relevant advice, conduct and disclosure obligations, as well as the conflicted remuneration provisions under the Corporations Act. Further, investment managers may be required to hold an AFSL with a custodial or depository authorisation or be exempt from this requirement if investment managers wish to custody cryptocurrencies that are financial products on behalf of clients.

Australia has also seen a rapidly rising interest in robo-advice or digital advice models. The provision of robo-advice is where algorithms and technology provide automated financial product advice without a human advisor. For investment or fund businesses seeking to operate in Australia by providing digital or hybrid advice (including with respect to investing in cryptocurrencies), there are licensing requirements under the Corporations Act. ASIC guidance contained in *Regulatory Guide 255: Providing digital financial product advice to retail clients* details issues that digital advice providers need to consider generally, during the AFSL application stage and when providing digital financial product advice to retail clients, and complements ASIC's existing guidance on providing financial product advice, including *Regulatory Guide 36: Licensing: Financial product advice and dealing*. Financial product advisers also need to consider their conduct and disclosure obligations. ASIC has released *Regulatory Guide 175: Licensing: Financial product adviser – conduct and disclosure* with respect to this.

Mining

At the time of writing, there are no prohibitions on mining Bitcoin or other cryptocurrencies in Australia.

Cryptocurrency mining taxation

As above, the taxation of cryptocurrency and associated activities in Australia has been an area of much debate, and this has extended to taxation relating to mining cryptocurrency. See "Taxation" above for further information.

Cybersecurity

More generally, with the rise of cloud-based Bitcoin mining enterprises in Australia, mining businesses should carefully consider cybersecurity issues in relation to mining activities.

In its Corporate Plan 2020 to 2024, ASIC stated that a key priority was to improve management of key risks and that, partly as a result of the COVID-19 pandemic, entities "without appropriate systems in place are increasingly vulnerable to cyber attacks, data breaches, technology failures and system outages". CERT Australia (now part of the Australian Cyber Security Centre) noted that there has been an increase in cryptomining malware affecting businesses' resources and processing capacity.

ASIC has also released regulatory guidance to help firms improve their cyber resilience, including reports, articles and practice guides. ASIC's most recent report, *Report 651 Cyber resilience of firms in Australia's financial markets: 2018–19*, identifies key trends in cyber resilience practices and highlights existing good practices and areas for improvement. ASIC has previously provided two reports, namely *Report 429 Cyber resilience: Health check* and *Report 555 Cyber resilience of firms in Australia's financial markets*, which examine and provide examples of good practices identified across the financial services industry. The reports contain questions that board members and senior management of financial organisations should ask when considering cyber resilience.

Border restrictions and declaration

There are currently no border restrictions or obligations to declare cryptocurrency holdings when entering or leaving Australia.

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) mandates that both individuals and businesses must submit reports where physical currency in excess of A$10,000 (or foreign currency equivalent) is brought into or taken out of Australia. This requirement is restricted to "physical currency", which AUSTRAC has defined as being any coin or printed note of Australia or a foreign country that is designated as legal tender, and is circulated, customarily used and accepted as a medium of exchange in the country of issue. Although market commentary indicates that some governments have created or are attempting to issue official cryptocurrencies, the intangible nature of cryptocurrency remains a bar to cryptocurrency being captured by declaration obligations under the AML/CTF Act for the time being.

While the AML/CTF Act was amended to address some aspects of cryptocurrency transfer and exchange in 2017, this amendment did not see the scope of AML/CTF regulation widen the border restrictions. At the time of writing, there appears to be no indication that any such further amendment to include border restrictions is being contemplated.

Reporting requirements

The AML/CTF Act imposes obligations on entities that provide certain "designated services" with an Australian connection. Generally, the AML/CTF Act applies to any entity that engages in financial services or credit (consumer or business) activities in Australia, including the provision of DCE services. These obligations include record-keeping and reporting requirements.

For example, the AML/CTF Rules outline reportable details for matters including, but not limited to, threshold transaction reports (**TTRs**). TTRs will be required to be submitted where a transfer of physical currency of A$10,000 or more (or the foreign currency equivalent) has occurred. As above, the intangible nature of digital currencies means that DCE providers generally are not required to make TTRs in connection with digital currency transactions. However, the rules associated with the AML/CTF Act set out specific details to be reported by DCE providers (such as digital currency type, value, description and relevant wallet addresses) in connection with TTRs, which may indicate scope for DCE providers to be caught by TTR obligations in the future.

In April 2016, the Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations (**AML/CTF Report**), which contained 84 recommendations to improve Australia's AML/CTF regime, was released. The AML/CTF Report contemplated two phases of consultation and implementation, with Phase 1 including priority projects completed in 2017, while Phase 2 progresses major, long-term reforms. These reforms should, among other things, clarify record-keeping requirements and reporting obligations for reporting entities.

Estate planning and testamentary succession

To date, there has been no explicit regulation or case law surrounding the treatment of cryptocurrency in Australian succession law. Generally, if estate plans do not cater for the specific nature of cryptocurrency and steps are not taken to ensure that executors can access a deceased's cryptocurrency (e.g., by accessing the private key), it may not pass to the beneficiaries.

A will should be drafted to give the executor authority to deal with digital assets. It may be helpful to select an executor with some knowledge of or familiarity with cryptocurrencies. As cryptocurrencies are generally held anonymously, a will should also establish the existence of the cryptocurrency as an asset to be distributed to beneficiaries. A method must also be established to ensure that passwords to digital wallets and external drives storing cryptocurrency are accessible by a trusted representative. Unlike a bank account, which can be frozen upon death, anyone can access a digital wallet, so care should be taken to ensure that external drives and passwords are not easily accessible on the face of the will. This may include providing a memorandum of passwords and accounts to the executor to be placed in a safe custody facility that remains unopened until a will is called upon.

There may also be tax implications arising for the beneficiaries of cryptocurrencies, which are similar to the tax implications for cryptocurrency holders. See "Taxation" above for further details.

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