

Article Information

Authors: Barbara Vrettos, Jade McGlynn, Luke Misthos, Michael Bacina

Service: Blockchain, FinTech

Sector: Financial Services, IT & Telecommunications

Blockchain Bites: DAO company structure on the agenda, What Australia can learn from Wyoming's DAO Law, ANZ settles debanking claim brought by DCE operator; Steam boils over when it comes to NFTs, SEC approves Bitcoin synthetic ETF, NFT or Security? OpenSea hesitation halts sales

Michael Bacina, Barbara Vrettos, Jade McGlynn and Luke Misthos of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.

DAO company structure on the agenda

Decentralised Autonomous Organisations (DAOs) are a relatively new way for people to organise and co-ordinate towards common goals, relying heavily on blockchain powered smart contracts and usually lacking a central owner/controller.

DAOs exist on a blockchain and decisions of members are made and recorded automatically using self-executing smart contracts. Entrusting the operation of a company to code and software may seem like walking down a path towards a Skynet for business, but in reality DAOs are an experimental and nascent space, albeit one that boasts many advantages as a modern means of business.

The Select Committee on Australia as a Technology and Financial Centre, chaired by Senator Andrew Bragg, recently released their final report (Bragg Report) which included at Recommendation 4:-

The committee recommends that the Australian Government establish a new Decentralised Autonomous Organisation structure

The full report, proposes progressive developments for FinTech and digital assets. The report notes that a DAO structure is needed so that emerging types of blockchain-based organisations can operate in Australia with clarity and guidance.

DAOs have no leaders, board members or operations beyond what is mutually agreed upon by members in the smart contracts which govern the operation of a DAO. These software enforce rules can cover any aspect of operations, but usually relate to a treasury of digital assets held by the DAO and deployed in grants. No one person can control, profit or endanger the organisation as the model seeks to create a genuine distribution of power among members.

With lessons learned from the COVID-19 pandemic, businesses have been forced to adapt, realising the potential for at home work, and greater digital based collaboration. Global manufacturing, loans and peer-to-peer goods and services all stand to find improvements to their business models using DAO elements.

While appealing in theory, the law has not formally recognise DAOs at present. This means they have no legal personality and cannot enter into contracts, sue, be sued in their own name. The Coalition of Automated Legal Applications (COALA) has [published](#) a [DAO Model Law](#) that aims to assist governments in crafting localised DAO laws to recognise a separate legal personality of DAOs. The Bragg Report refers to the COALA model as a useful starting point for developing a legal structure in Australia and encourages the Australian Government to examine this approach.

COALAs' model posits blockchain powered systems meet most regulatory requirements an organisation is required to

comply with under existing company laws. With tweaks, COALA believes all major principles and regulatory requirements of corporate governance can be met on a decentralised network and allow DAOs to exist as a new company model.

An industry wide shake-up of the limited liability company which has been used for hundreds of years is likely to encounter criticism. Without legal protection however, those operating within a DAO may be considered to be in a general partnership or some form of unincorporated association.

This means that where one member to the DAO commits a wrong, the other members, while perhaps being entirely innocent, could be liable at law. Pinpointing which individual is responsible for a wrongdoing could be a potential issue particularly given the lack of legal regulation and the way in which blockchain systems operate.

One thing is clear, if the Bragg Report's recommendations are adopted, Australia would not just catch-up to other jurisdictions regulating digital assets, it would move to the very forefront.

What Australia can learn from Wyoming's DAO Law

In April this year, Wyoming made headlines when its legislature approved a [first-of-its-kind](#) bill that determined individuals and organisations in the blockchain industry can create a legally recognised Decentralized Autonomous Organisation (DAO) in Wyoming. If countries are spurred to play catch-up and enact their own DAO related laws, like [the recent Bragg Report](#) recommends for Australia, the new type of organisation may no longer need to be viewed as a risky experiment but a possible corporate option.

DAOs (as described in the update above '*DAO Company on the Agenda*'), are a [new type of organisation](#) that, instead of being governed by a central owner or group, operates on a distributed basis with no central authority or decisionmaker. This modern means of business is a new company structure that Bragg Report has recommended be created.

Since the DAO model first emerged, the [series of benefits](#) that an organisation without a centralised controller could provide has been recognised. But the unique features of a DAO has also meant that they operate without a specific legal framework and, as a result, are not given any legal personality at law. Without these protections the legal ownership of assets controlled by a DAO has been unclear, and a DAO can look a lot like a general partnership or unincorporated association, exposing its stakeholders to personal liability for any debts or legal actions against a member of the DAO. These are the core issues which need to be resolved by a DAO law so that emerging types of blockchain-based organisations can operate effectively in Australia.

Much like the DAO model law proposed by the [Coalition Of Automated Legal Applications \(COALA\)](#), [Wyoming's DAO law](#) attempts to resolve these issues. At a high-level, the Wyoming law prohibits lawsuits against DAOs as general partnerships and enforces the rights of DAOs as legal persons in state court to protect individual DAO members. As a result, the law extends traditional legal protections to DAO members in aims to minimise the risk of DAO members being held personally liable by a DAO.

That's not to say the new law has been free of criticisms. Since Wyoming's recognition of DAOs, there have been some [strong opinions](#) shared on the law, including questions about the additional and allegedly unnecessary burdens it creates for DAOs, an "*unsound definition of smart contracts*" as a form of a constituent company document, and the law's [lack of significant guidance](#) for the ways in which a DAO company in Wyoming practically differs from a traditional company in Wyoming. The discourse is all useful if Australia wishes to follow Wyoming in formulating a DAO structure.

[Comments from US lawyers](#) note the approach of Wyoming's DAO legislation is to give maximum effect to the freedom of contract principle, including by waiving the fiduciary duties of DAO members by default. Under the new law, while members of traditional Wyoming companies still owe fiduciary duties of loyalty and care to the company and other members, DAO members participating in a DAO company are only subject to an implied contractual covenant of good faith and fair dealing.

Like the COALA model, the Wyoming Law will benefit from improvements as it is deployed and used. As is always the case, the law lags behind technology, but if DAO members are to enjoy limited liability protection this usual gap may need to converge.

ANZ settles debanking claim brought by Digital Currency Exchange operator Allen Flynn

ANZ Bank has settled a case brought by a DCE operator, Allen Flynn who alleged he was discriminated against over the bank's decision to close his bank accounts because he used them to engage in cryptocurrency trading.

Mr Flynn, having had bank accounts closed by ANZ and Westpac, launched action against both banks on the grounds that the cancellation of his bank accounts breached his human rights and unfairly discriminated against Flynn on the basis of

his occupation. Senator Andrew [Bragg has highlighted](#) the approach by major banks to granting digital currency players (like Flynn) access to transaction bank accounts is a growing concern.

ANZ has denied any wrongdoing and not been found responsible for any discrimination but also said:

ANZ further acknowledges that this could, subject to the defence in section 57N, have amounted to unlawful discrimination contrary to sections 7(1)(p) and 20 of the Discrimination Act 1991.

[Crypto News Australia](#) questioned whether this settlement will set some kind of unofficial precedent (which isn't likely to be the case in our view). The case comes amid a [national conversation growing around de-banking](#).

Co-author and Partner at Piper Alderman, Michael Bacina was [interviewed by Forkast News](#) and in being asked about the bigger picture of ANZ and Flynn's settlement Mr Bacina, shared his hopes that the settlement would be a positive contribution to the topic of debanking:

Crypto businesses are wary about speaking out lest they be debanked as a result. Many will view this as a positive development, but I expect there will be a healthy dose of scepticism.

He continued:

The myth of digital assets being predominantly used for money laundering or crime is slowly being dispelled but conservative businesses will take time to educate themselves and understand that a traceable public blockchain is one of the worst places to launder money or commit crimes. Busts by the U.S. Department of Justice and work involving Chainalysis make this point quite clearly. Hopefully the actions that Mr. Flynn is bringing will help push that conversation forward.

Steam boils over when it comes to NFTs

Popular video game digital distribution service Steam has discretely changed their [rules and guidelines](#) to preclude and kick games built on the blockchain network that issue or allow cryptocurrencies or Non-Fungible Tokens (NFTs).

Valve Corporation, the owner of Steam, have updated Steam's user rules much to the dismay of many blockchain game developers. SpacePirate Games, responsible for the creation of Age of Rust, took to [Twitter](#) to say it had been notified that their game was going to be removed from Steam:

*Community: A few minutes ago, we were notified that @Steam will be kicking *all blockchain games* off the platform, including Age of Rust, because NFTs have value.*

Age of Rust is single-player sci-fi action adventure game that rewards users with NFTs and cryptocurrencies upon completion of challenges and puzzles. Valve has yet to provide any reason for reaching the decision to kick all blockchain and NFT capable games, but according to SpacePirate Games it appears that Steam does not allow items that have 'real world value'.

Steam's [Community Market](#) boasts a range of products available for purchase in local currency. These range from NFT-style trading cards to 'booster packs' for specific games. Last year a [Chinese collector paid USD \\$100,000](#) for a gun skin in Valve's own game: 'Counter Strike: Global Offensive' (CSGO).

As more developers explore the potential of NFTs and cryptos as a means of engaging users and giving users value, companies like Steam, who currently charge a 5% transaction fee for marketplace sales, may feel threatened.

Could Valve have banned NFT and crypto capable games to avoid any fallout from [NFT scams](#)? Perhaps they simply wish to limit any game which might cause them a legal headache, particularly after being sued for involvement in an [online gambling network facilitated through CSGO](#).

Whatever the reason, it is unlikely to stifle NFT and crypto capable games for long as others step into the breach. SpacePirate Games announced on [Twitter](#) that gaming and entertainment platform [Ultra](#) has offered a new home for Age of Rust.

SEC approves Bitcoin synthetic ETF

The Securities and Exchanges Commission (**SEC**) has granted approval for the operation of a Bitcoin-linked Exchange-Traded Fund (**ETF**). The landmark ETF from ProShares will debut on the New York Stock Exchange (**NYSE**) this week under the ticker 'BITO' following a 75 day review by the SEC.

The news comes after a significant year for crypto ETFs with [Brazil](#) and [Canada](#) both boasting the launch of their own ETFs in March and February respectively.

The new ETF will hold bitcoin futures contracts rather than the cryptocurrency itself, meaning it is what's known as a *synthetic* fund. The ETF is a significant regulatory feat for the crypto industry, which has had to deal with recent comments made by SEC chair Gary Gensler, [who likened crypto to poker chips last month](#).

[In a statement](#), ProShares CEO Michael Sapir said:

BITO will open up exposure to bitcoin to a large segment of investors who have a brokerage account and are comfortable buying stocks and ETFs

Many have been seeking permission from the SEC to launch a Bitcoin ETF in the United States, many applications were delayed or denied while others remain pending. ProShares gained approval despite the SEC's view that there are too many bitcoin-related risks for consumers.

These stated risks, such as volatility and the potential for market manipulation, may underpin why the SEC has rejected every application for "spot" or physical bitcoin ETFs which would allow consumers to purchase a fund which holds bitcoin itself, rather than holding only derivatives priced with reference to bitcoin.

The Greyscale Bitcoin Trust [has also indicated](#) that it plans to apply to become an ETF and that it believes an Ethereum ETF is likely in the works as well.

NFT or Security? OpenSea hesitation halts sales

NFTs have had quite the year. From relatively nascent tokens to growing a market cap of [over USD\\$10 billion](#) the increased interest in NFTs is marked. We are also seeing NFT creators experimenting with the rights attached to their NFTs from being able to [redeem an experience](#) to [redeeming unique artwork](#). Increasingly NFT marketplaces such as NFTs are asking the question – what features make a NFT a security?

This question has been gaining significant attention after [OpenSea](#), one of the worlds largest NFT marketplaces, put a [freeze on trading](#) for a project called [DAO Turtles](#). DAO Turtles queried the freeze with OpenSea who [stated that](#) the project breached OpenSea's terms by either – but without specifying:

1. Us[ing] the Service to carry out any financial activities subject to registration or licensing, including but not limited to creating, listing, or buying securities, commodities, options, real estate, or debt instruments; or
2. Us[ing] the Service to participate in fundraising for a business, protocol, or platform, including but not limited to creating, listing, or buying assets that are redeemable for financial instruments, assets that give owners rights to participate in an ICO or any securities offering, or assets that entitle owners to financial rewards, including but not limited to, DeFi yield bonuses, staking bonuses, and burn discounts.

The DAO Turtles project advertises that users will [passively generate utility tokens](#) but also said that these tokens would be used within a game that was being developed. DAO Turtles engaged in whataboutism, that if this was seen as a high risk feature, existing NFTs listed on OpenSea such as Axie Infinity or Mutant Cats [may also be caught by the terms](#).

FTX, a digital currency exchange, is looking to branch into an NFT marketplace but has [said:-](#)

we will reject any NFT from a collection/project that distributes or advertises the distribution of royalties to NFT holders

FTX also [added:-](#)

A token which guarantees you a percentage income stream from the sales of a pool of assets starts to look like a security

While NFTs involving linked art alone are more akin to a collectable, the rights which attach to a NFT can mean that it

takes on attributes of a financial product in Australia or an investment contract in the US. This is an important reminder that those who deal in financial products require an Australian Financial Services Licence. We caution those launching NFTs to carefully consider what rights will attach to the NFTs, what this will enable users to do, what this will allow NFT holders to access.