

Article Information

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ASIC Updates crypto-asset guidance - it's one small step for man...

On Thursday 30 May 2019, ASIC [updated its guidance on initial coin offerings \(ICOs\)](#) and crypto-assets. Since being last updated in May 2018, INFO225 has become more comprehensive and now specifically refers to more business models, with a number of new examples included in order to provide readers with a better idea of how ASIC will likely treat their use of crypto-assets.

Despite these updates, INFO225 might be said to represent one small step for man, with a giant leap yet to be made in regulatory treatment to embrace blockchain concepts such as smart contracts and crypto-currencies in Australia (and likely a leap that only Parliament or Treasury can take). The equivalent guidance released by [the UK](#), [Singapore](#) and [Switzerland](#) provides clearer categorisation of tokens and paths forward for the issue of cryptographic tokens in those jurisdictions, a point not missed by ASIC in this guidance.

INFO225 has been renamed to include a consideration of crypto-assets, rather than only crypto-currency, indicating a broadening of the intended guidance and acknowledging the changing nature of the crypto-asset market away from ICO offerings of cryptocurrencies and towards tokenized funds and Security Token Offerings (STOs)

Regulatory signposts

ASIC identifies at the start of INFO225 stakeholder groups and ASIC Regulatory Guides which cover the potential obligations of those stakeholders. These groups include:

- Issuers of crypto-assets;
- Crypto-asset intermediaries;
- Miners and transaction processors;
- Crypto-asset exchange and trading platforms;
- Crypto-asset payment and merchant service providers; and
- Wallet providers and custody service providers.

When could an ICO be or involve a financial product?

Reiterating that Australian laws will apply to all token issues, regardless of what the label of the offering, INFO225 expands on the earlier guidance to provide further details of when ASIC will consider the characteristics of the ICO or token to indicate that the offer is of an interest in a managed investment scheme, a security, a derivative or a non-cash payment facility.

In doing so ASIC has provided some examples of laws or regulations applicable to each financial product.

In keeping with ASIC's position that there is a high risk of most ICOs or token generation events being characterised as a managed investment scheme (MIS), INFO225 has now updated the previous guidance concerning MIS's significantly. As well as adding a graphic which directs readers to contemplate whether their offering is likely to be considered an MIS by ASIC, this section has included a noteworthy amount of detail regarding the requirements of retail and wholesale MIS offerings. The guidance explicitly provides that relying on an appointment as a corporate authorised representative of another Australian Financial Services License (AFSL) holder will not alone be sufficient to issue interests in an ICO or crypto-asset which has been characterised as an MIS.

ASIC has also indicated in Part A of the guidance that it expects entities to:

- be able to justify a conclusion that their token or ICO is not a financial product; and
- know who their investors are if the entity intends to rely on wholesale/sophisticated investor exemptions.

The guidance is at pains to note the discussion of what Australian laws might apply to a particular token is not exhaustive, and the responsibility lies with entities to ensure their own compliance with laws.

As an interesting aside, ASIC also removed that part of the previous guidance sentence which stated that:

“(for example, ASIC has stated that it does not consider bitcoin to be a financial product)”

Financial markets and licensing

The guidance for crypto-asset trading platforms (that is, crypto exchanges) only includes minor changes, however there are two interesting takeaways from this Part:

1. ASIC has strengthened its language to clarify that to operate in Australia, exchanges which list (or issue) tokens that can be characterised as financial products **will** need to hold an Australian market licence unless covered by an exemption – as opposed to the previous wording, which indicated that those exchanges **may** need to hold Australian market licence; and
2. ASIC states that currently there are no licensed or exempt exchanges in Australia that enable consumers to buy (or be issued) or sell crypto-assets which are financial products.

How do overseas categorisations of crypto-assets translate to the Australian context?

Now that the [Financial Conduct Authority \(FCA\)](#) in the United Kingdom, the [Securities and Exchange Commission \(SEC\)](#) in the United States, the [Monetary Authority of Singapore \(MAS\)](#) and the [Swiss Financial Market Supervisory Authority \(FINMA\)](#) (among others) have provided very comprehensive approaches to establishing categories and defining token sales, ASIC has included a new Part F in INFO225 stating that overseas token categorisations do not automatically translate to equivalent products in Australia.

More specifically, INFO225 reminds readers that the Australian definition of a financial product is broader than in other jurisdictions, and it is necessary to be prudent in determining whether a crypto-asset may fall in a domestic regulatory perimeter in Australia, despite it not doing so overseas. This may be a subtle reference to the clearer guidance present in other jurisdictions which may lure potential issuers into a false sense of security in copying what has been done offshore.

The amendments to INFO225 will be underwhelming to crypto focused industry participants, but can only be seen as positive that the Australian regulators are taking the initiative to update guidance and include more information, even if it is not to the liking of the local crypto industry. Blockchain projects that don't involve crypto will remain largely unaffected by this guidance save to the extent that it further encourages projects to leave Australia for jurisdictions with clear paths to compliant offerings of crypto-graphic tokens.

However, with ICOs long having fallen out of favour, the new guidance still remains fairly narrow in scope, and fails to offer a substantial amount of specific guidance or certainty to other participants in the crypto-asset and blockchain industry.

Will Australia get some clear guidance one day on what **will** be considered to be a compliant offering and how that offering can be issued and compliance maintained during the course of a project? It might be a moonshot, but it's not one entirely without hope.