

Article Information

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Blockchain Bites: ASIC eyes tokenised markets, BlackRock tokenised fund catches meme-coin fever, ATO drops guidance for crypto dealings, Tornado Cash developers face trial, US reports on IP implications for NFTs

Michael Bacina, Steven Pettigrove, Tim Masters, Jake Huang, Luke Higgins, Luke Misthos & Kelly Kim of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.

ASIC eyes tokenised markets

Commissioner Alan Kirkland of the Australian Securities and Investments Commission (**ASIC**) delivered a speech on crypto policy, innovation and regulation this week as part of Blockchain APAC's Policy Week.

In [his address, published 20 March 2024](#), the Commissioner commented on ASIC's approach to crypto regulation:

For ASIC's part, we seek to promote the growth of responsible innovation in financial services by balancing our approach to enabling innovation with consumer protection and market integrity outcomes.

Mr Kirkland's comments mirror ASIC Chair, Mr Joe Longo's, past [comments on the regulatory trilemma](#). Mr Longo has previously emphasized a priority on consumer protection over innovation and market integrity, and Mr Kirkland's speeches also indicated a focus on "regulatory outcomes".

Asset tokenisation

Mr Kirkland noted ASIC's increasing interest and focus on tokenisation of financial products and 'real world' assets. ASIC, together with the Reserve Bank of Australia (**RBA**), worked closely [on last year's Central Bank Digital Currency \(CBDC\) pilot](#), with the regulator supporting the trial by assessing use cases and providing relief from the Corporations Act to relevant participants.

With respect to real world asset tokenisation, Mr Kirkland indicated that ASIC will be considering:

- How does tokenisation fit in the current regime?
- What, if anything, may be required by way of law reform or guidance?
- What are the opportunities and risks?
- How can we effectively address the cross-border issues and dynamics?

In recognizing the 'significant operational and other changes' that flow from tokenisation, Kirkland noted that:

Some types of tokenisation will be regulated through the current regulatory regime, while others will be regulated through the Government's digital asset platform proposal.

Regulatory reform

On the topic of regulatory reform, Kirkland reiterated ASIC's support of the International Organization of Securities Commissions (**IOSCO**)'s approach of 'same activity, same risk, same regulatory outcome'.

This approach has been criticized as an inflexible one in some quarters, that a one-size-fits-all approach is not in application "technology neutral", if it does not recognize the risks posed by delivering services in new ways. In that context, a "same activity, same risk, same regulatory outcome" mantra may serve to tip the regulatory scales in favour of incumbents.

According to Kirkland:

[ASIC's] desired outcome is a clear set of rules that maintain market integrity and mitigate the risks to consumers and investors – backed by mechanisms that promote compliance with these rules and enable us to enforce them effectively.

Once a regulatory regime for digital asset platforms is implemented, ASIC expects to play a key role in its ongoing administration and enforcement of laws within their remit.

While the proposed reforms await finalisation, Kirkland revealed that ASIC has 'already begun thinking about implementation' including 'processes and guidance', through discussion with industry participants.

Regardless of the final regime, Kirkland indicated ASIC would not be providing proactive assistance with digital assets:

If you are operating a business engaged in digital assets, the onus is on you to satisfy yourself that you are operating within the law.

This reflects ASIC's guidance on crypto-assets in Information Sheet 225 which emphasizes the importance of persons dealing in crypto-assets obtaining legal advice. A similar approach risks leaving industry guessing, particularly in circumstances where the law isn't clear as demonstrated by ASIC's recent enforcement actions against Block Earner and Finder Wallet.

Regulatory enforcement

Kirkland finally addressed ASIC's 'strategic, risk-based approach to enforcement'. In particular, he cited the regulator's partial defeat in the recent [Block Earner judgment](#), noting that the case turns on its facts and suggesting that industry should approach the decision with caution.

With respect to [the Finder Wallet case where the Federal Court held Finder Wallet had not engaged in unlicensed financial services offering](#), the Commissioner clarified that ASIC is 'still considering the judgment in that matter' which suggests an appeal may still be lodged.

While it is hopeful that ASIC is already contemplating the rules necessary to support regulated digital asset platforms, the details of ASIC's approach remain to be fleshed out. These will be all important to determining the success of reform efforts. In navigating the regulatory trilemma, ASIC faces a difficult task of seeking to establish a regulatory framework that supports consumer access and protections, without stifling innovation or pushing innovators and consumers offshore. Such an approach could perversely undercut the very protections which the industry and regulators are working towards.

Written by Michael Bacina, Steven Pettigrove and Kelly Kim

BlackRock launches tokenised fund, catches meme-coin fever

Investment titan BlackRock has taken another step into digital assets [revealing an Ethereum-based tokenised fund](#), the 'BlackRock USD Institutional Digital Liquidity Fund' (BUIDL). The initiative was [disclosed in a filing with the U.S. Securities and Exchange Commission](#) (SEC) and [public statement this week](#).

Partnering with tokenisation firm [Securitize](#), BlackRock established the fund, domiciled in the British Virgin Islands last year. The Ethereum blockchain serves as the bedrock for the venture, with blockchain data [confirming an initial capitalisation of \\$100 million in Circle's USDC stablecoin](#).

BUIDL will provide qualified investors with the opportunity to earn U.S. dollar yields by subscribing to the Fund through Securitize Markets, LLC, a tokenisation platform for wholesale investors. Blackrock has also made a strategic investment in the firm.

Fund interests are represented by the blockchain-based BUIDL token. The Fund will hold cash, U.S. Treasury bills, and repurchase agreements. BUIDL seeks to offer a stable value of \$1 per token and pays daily accrued dividends directly to investors' wallets as new tokens each month.

Robert Mitchnick, [BlackRock's Head of Digital Assets stated](#):

This is the latest progression of our digital assets strategy...We are focused on developing solutions in the digital assets space that help solve real problems for our clients, and we are excited to work with Securitize.

The move is a continuation of BlackRock's foray into the digital asset space, evidenced by its [listing of a Bitcoin exchange-traded fund \(ETF\) earlier this year](#), which swiftly amassed over USD \$15 billion in assets. Furthermore, the company has also filed to launch [an Ethereum ETF](#) which is under review by the US Securities and Exchange Commission.

BlackRock's CEO, Larry Fink, has been an ardent proponent of tokenisation in recent times, which he reiterated in [a recent CNBC interview](#), emphasising the transformative potential of tokenization across financial markets.

However, BlackRock's announcement took an unforeseen twist following the public revelation of its Ethereum wallet address. Crypto enthusiasts seized the opportunity to send the wallet which holds \$100 million in USDC an [assortment of tokens, including memecoins and non-fungible tokens \(NFTs\)](#).

It has [also been reported that BlackRock received 0.97 ETH](#) (worth more than USD \$3,000 at current prices) through the Tornado Cash platform. The platform was controversially [sanctioned by the United States Department of the Treasury's Office of Foreign Assets Control \(OFAC\) in 2022](#). This "dusting attack" may require Blackrock to block fund assets due to sanctions considerations. Naturally, some crypto enthusiasts found humour in this development:



Despite these unexpected (and somewhat humorous) developments, BUIDL offers accredited investors an avenue to accrue yield in USD through a tokenised mechanism. Facilitated by Securitize Markets, investors can seamlessly subscribe to the fund, leveraging the benefits of blockchain technology, including direct issuance, enhanced transparency, and immediate settlements.

Once a critic of cryptocurrencies, Larry Fink's evolving stance reflects broader shifts within the financial landscape, signaling a departure from skepticism towards embracing blockchain and digital assets' transformative potential.

Written by Luke Higgins and Steven Pettigrove

ATO drops new small business guidance for crypto dealings

The Australian Taxation Office (ATO) has recently [released new crypto-related guidance](#) for Australian small businesses, noting the trend of cryptocurrency becoming more "mainstream" and being used increasingly within small businesses across Australia.

Here is what you need to know as a small business:

1. **Crypto Asset Business Expenses** If your business involves the buying and selling of crypto-assets, the cost of purchasing those crypto-assets is considered a deductible expense. This means that small businesses can reduce their taxable income by the Australian dollar amount spent on acquiring the crypto-assets for its business operations.
2. **Payments for Services in Crypto** If your business receives crypto-assets as a payment for services, then the Australian dollar value of the crypto-assets is treated as ordinary income for the business. This means that the business will need to report this income when filing its tax returns.
3. **Salary and Wages Paid in Crypto** If your business uses crypto-assets to pay salary or wages to employees under a valid salary sacrifice arrangement, this is considered a fringe benefit. As such, it is important for small businesses to understand the tax implications for fringe benefits as they are often significant (fringe benefits are taxed at the highest marginal rate).
4. **Profits from the Sale of Crypto** The taxation treatment of the profits from the sale of crypto-assets depends on whether the taxpayer is conducting a crypto-asset trading/selling business or simply investing in crypto-assets. If it is operating a crypto-asset trading business, then the assets are treated as trading stock and any proceeds from selling them are assessable as ordinary income. On the other hand, if the business is holding crypto-assets as an investment, then the eventual disposal of crypto would trigger a capital gains tax (CGT) event.
5. **Record Keeping** Record keeping is a problematic issue that has plagued the ATO and taxpayers alike since the inception of cryptocurrency. The ATO reiterates that keeping detailed records of crypto transactions is crucial for tax compliance. The ATO has already [provided some brief guidance](#) on this topic, however the inherent nature of decentralised protocols and cryptocurrency dealings mean that keeping proper records is a task that is a lot easier said than done.

The ATO's latest web guidance on crypto-assets is welcome. However, [there remains substantial tax compliance gaps \(both from a legislative and non-binding web guidance perspective\)](#). Given the inherent complexity of taxation laws and crypto-assets, it is advisable to seek assistance from legal and tax professionals in relation to your tax obligations when engaging in crypto-asset related business. While the use of cryptocurrency offers various opportunities for small businesses, it is essential to stay informed about the associated tax obligations to avoid nasty penalties and unforeseen assessments.

Written by Luke Higgins and Steven Pettigrove

Tornado Cash accusations fly as software developers face trial

Alexey Pertsev, one of the software developers involved in the development of the software underpinning the sanctioned crypto mixing service, Tornado Cash, has been [accused of laundering over USD\\$1.2B ahead of his Dutch criminal trial scheduled to begin on 26 March](#). The 3-page indictment issued by Dutch prosecutors alleges that [between 9 July 2019 and 10 August 2022, Pertsev](#) had:

at least in the Netherlands and/or in Russia and/or the United States and/or in Dubai, together and in association with one or more others, at least alone,... made a habit of committing money laundering

Pertsev has denied all allegations since being arrested in August 2022, shortly after a number of wallet addresses associated with Tornado Cash were sanctioned by the US Treasury's Office of Foreign Assets Control (OFAC). After being detained for nearly 9 months, he is now monitored under a GPS tracker and faces a travel ban.

The recent indictment identified 36 allegedly illicit transactions from decentralised protocols to the mixer, with the largest amount coming from the Ronin Bridge hack, responsible for over 175 ETH. Other illicit flows include hacked funds from

the Harmony protocol and the Nomad Bridge.

Separately, co-developers, Roman Storm and Roman Semenov are awaiting their US trial, due to commence in September over alleged money laundering and sanctions violations.

The case against the Tornado Cash developers [has sparked great controversy in the developer community](#), with concerns that the indicted developers had been prosecuted for their involvement in software development rather than dealing in illicit funds. Semenov likened the case to fights for online privacy in the early days of the web, with supporters advocating that developers should be able to

write open-source [code] and not be afraid that they will be put in jail

The Dutch prosecutors addressed this point in a statement to DL News:

A cryptocurrency mixing service is not inherently illegal

And clarified

Simply writing code is not punishable...mixing criminal assets and concealing the origin of criminal funds is punishable

With the continued controversy, all eyes are on Pertsev's upcoming trial, including the details of the Dutch authorities' case. The forthcoming US and Dutch trials will not just test those allegations, but also define the boundaries of legitimate software development activities and developers' liability where that software facilitates illicit funds flows.

Written by Kelly Kim and Steven Pettigrove

US reports on IP implications for NFTs

The United States Patent and Trademark Office (**USPTO**) and the US Copyright Office have issued a report examining applications of non-fungible tokens (**NFTs**), intellectual property laws and challenges associated with NFTs, and potential ways to use NFTs to secure and manage intellectual property rights.

The report, entitled [Non Fungible Tokens and Intellectual Property](#), was issued after a study requested by two US senators. Through three public roundtables, the USPTO and the Copyright Office received input from a broad spectrum of commenters, including creators, brand owners, innovators, entrepreneurs, technologists, academics, industry associations, and intellectual property practitioners.

The feedback received included a diversity of views about the opportunities and intellectual property challenges associated with NFTs.

NFTs and copyright

The report says some artists saw promise in the potential to use NFTs to obtain royalty payments on downstream sales. However, this will depend on various licensing terms incorporated within the NFTs:

As U.S. copyright law does not expressly provide for such remuneration, these opportunities depend on the code underlying the NFTs and the rules of the platforms on which they're sold rather than any statutory entitlement.

Meanwhile, others expressed concerns about forms of copyright infringement associated with NFTs. The report says certain features of NFTs—such as typically pseudonymous ownership and decentralised storage—can raise challenges to enforcing a copyright (and similarly to trademark and patent rights). However, the report says these are not new problems in the online space, and existing laws should be sufficient to protect copyright owners.

NFT and trademarks

The report says NFT technology and blockchain networks present new opportunities for trademark owners to

build their brands, reach new consumers with interactive products and services, document the provenance of products, and manage trademark rights.

However, the report says there is a prevalence of trademark infringement associated with NFT marketplaces, although

some NFT platforms have developed protocols to help trademark owners enforce their rights...

The report points out that the lack of central authority to require all platforms to implement similar protocols, decentralised and anonymous nature of some NFT platforms, and the immutability of blockchain transactions all add to the difficulty in enforcing trademark rights.

Nevertheless, the report says most commenters disfavoured new, NFT-specific laws to address trademark infringement both because NFT technology is still evolving rapidly and because many federal court cases involving these issues are still pending and will likely provide answers regarding whether existing trademark laws are sufficient.

NFT and patents

The report says blockchain technology and NFTs can play a role in supporting management, transfer, and licensing of patent rights. However, it says some commenters were concerned about identifying bad actors on NFT platforms and correcting inaccurate or fraudulent information stored on blockchain networks.

Commenters also had diverse views as to whether designs associated with NFTs can meet the requirements for design patent protection.

The report identifies possible uses of NFTs in patents, but recent fluctuations in value and uncertainty in the markets for NFTs make predictions about the adoption of NFT technology difficult.

In conclusion, the report found that current intellectual property laws are adequate to deal with intellectual property right infringements for now. Moreover, it is concerned that NFT-specific legislation would be premature at this time and could impede the development of new NFT applications, given the evolving nature of the technology. It appears that the US authorities will take a “wait and see” position on changes to intellectual property laws and IP registration practices.

Written by Jake Huang and Steven Pettigrove