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Blockchain Bites: SEC greenlights Ether ETFs, Celsius turns up the heat on customer clawbacks, US House passes crypto laws, COPA v Wright Judgment Published, ASIC v BPS on CAR agreements

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

SEC greenlights Ether ETFs

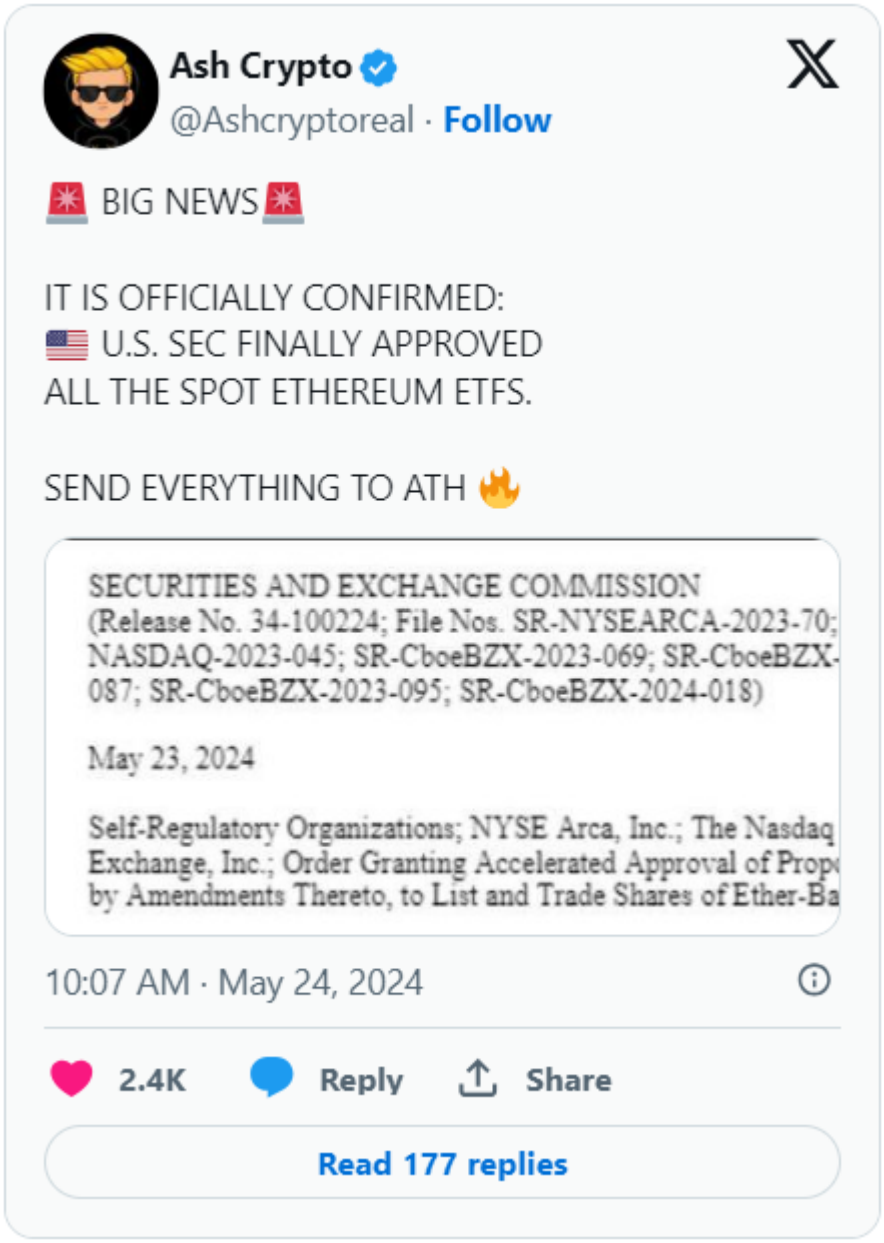
In a significant development for the blockchain ecosystem, the US Securities and Exchange Commission (SEC) has given the greenlight to key regulatory filings for Spot Ether (ETH) exchange-traded funds (ETFs). This milestone represents a significant step toward regulated funds offering the second-largest cryptocurrency by global market capitalisation, ETH.

The SEC's stance on Ether ETFs has undergone a remarkable shift. Earlier this year, the agency cleared spot Bitcoin ETFs but seemed less engaged with Ether ETF issuers. Recent days have seen a change in approach, leading to the approval of the "19b-4" filings.

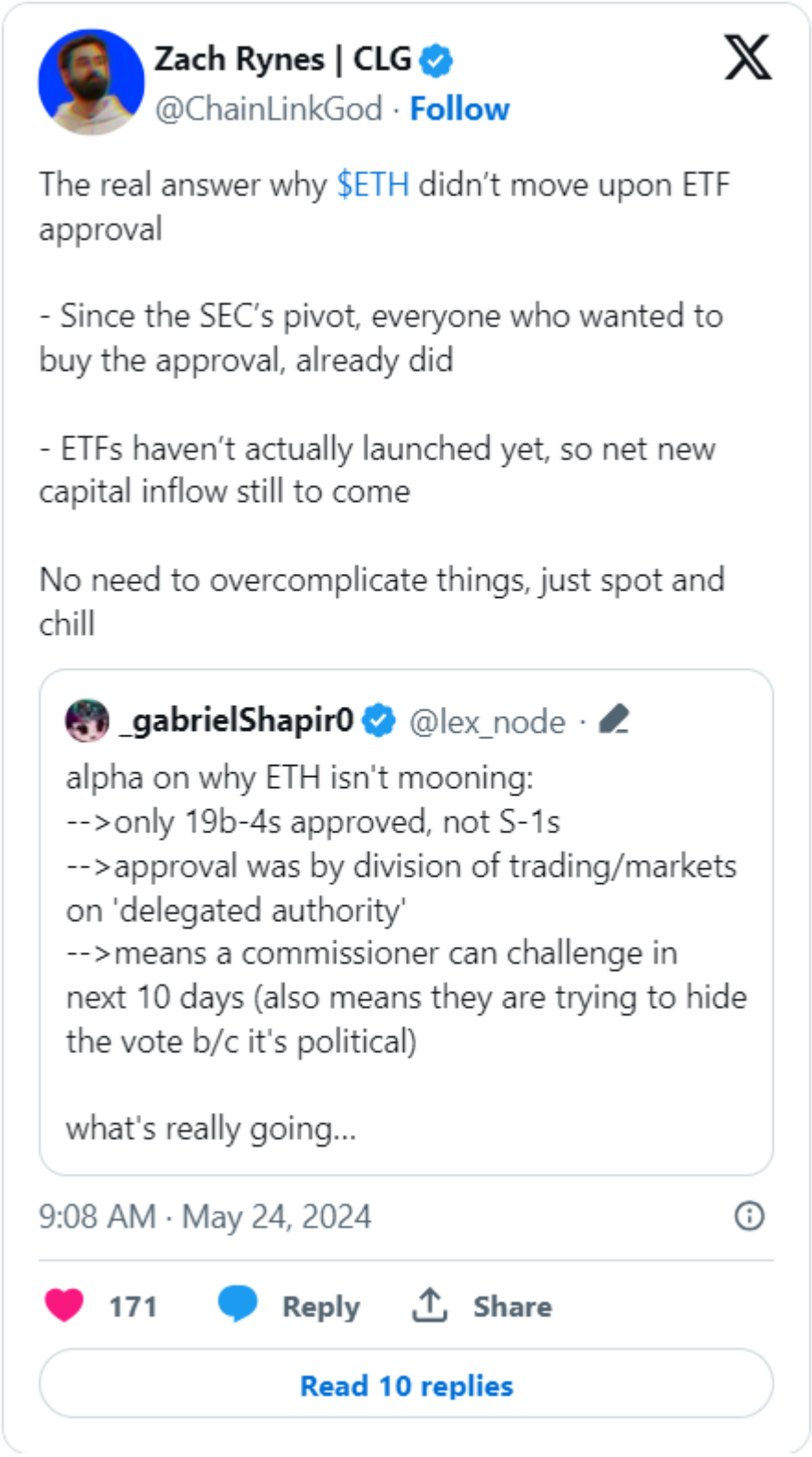
However, before investors can start trading these ETFs, there's a crucial next step. While the 19b-4 forms have been blessed, the final approval hinges on the regulator's assessment of S-1 documents filed by the prospective ETF issuers. The list of potential Ether ETF issuers includes heavyweights like BlackRock, Fidelity, Grayscale, VanEck, Franklin Templeton, Ark/21Shares, and Invesco/Galaxy.

Naturally, many predict that there will be a time gap before S-1 form approvals and actual ETF trading. While history suggests this could take months, some experts lean toward a shorter timeline, measured in weeks.

Like most "positive" news in cryptocurrency circles, the SEC move has been met with plenty of hype on social media, with many investors believing the news will send various tokens to new all time highs:



However, noting the price of ETH has risen approximately 30% in the last 7 days according to CoinGecko at the time of writing, others believe that ETH will likely not see anywhere near as much positive movement as some investors may be



hoping for several reasons:

The SEC's nod to Ether ETF filings is significant, but the road to trading remains contingent on further approvals. Industry watchers will be eyeing Edgar (the SEC filing platform) closely as Ethereum inches closer to trading on mainstream markets through ETFs.

Written by Luke Higgins and Steven Pettigrove

Celsius turns up the heat on customer clawbacks

The Litigation Administrator for the bankrupt crypto exchange and lending platform Celsius has started issuing demand emails to former customers who made net withdrawals from Celsius greater than USD$100,000 in the 90 days prior to Celsius' bankruptcy filing date (Withdrawal Preference Exposure). The Administrator is seeking to rely on broad preference rules under the US Bankruptcy Code to clawback withdrawals in the lead up to the exchange's collapse and ultimate bankruptcy filing on 13 July 2022.

The Celsius' bankruptcy administrators have previously made a number of offers to customers with preference exposure to settle clawback claims. The administrators had previously presented creditors with the choice of:

1. paying back 27.5% of their net withdrawals to settle any clawback actions (an offer that it later sweetened to 13.75% of the amount claim); or
2. obtain a court order ruling that the creditor has no preference liability to Celsius; or
3. resolve their Withdrawal Preference Exposure with the Litigation Administrator before receiving any distributions under Celsius' Reorganization Plan (Reorg Plan).

Those who did not take up the settlement offer (i.e. Option 1 above) are now being threatened with preference claims in the Bankruptcy Court for the Southern District of New York if they do not return the preference amount claimed within 30 days. Those who choose to settle will receive a general unsecured claim in the Celsius estate. The value of those claims is not yet clear, although Celsius had previously projected recoveries equivalent to around 67 cents on the dollar, subject to the claim type. We are not aware of Celsius having issued any guidance updating those projections.

There a number of potential defences to preference claims under the US bankruptcy code. Depending on their individual circumstances, some creditor may be able to rely on one of these clawback defences to defeat a preference claim, although this remains a live issue. For now, the Litigation Administrator is arguing that no defences will apply.

Given the Litigation Administrators' 30 day deadline – there is now about 20 days left – creditors will need to assess their options, which may involve seeking legal advice from experienced legal counsel on their potential defences and settlement options.

Piper Alderman is liaising with experienced US counsel on developments in the Celsius bankruptcy and offering assistance to Australian-based customers who may be affected by clawback claims.

Written by Jake Huang and Steven Pettigrove

US House passes crypto laws and President Biden pulls back from veto…

The United States Congress has recently had a flurry of crypto action, with legislation passed which would overturn the US Securities and Exchanges Commission's (**SEC**) rule (also known as the SEC's Staff Accounting Bulletin No. 121, or SAB 121) and a new framework for crypto assets, the Financial Innovation and Technology for the 21st Century Act (**FIT 21**) proposed and passing the House this morning Australia time.

SAB121

SAB 121 is an administrative rule promulgated by the SEC which requires that businesses account for crypto on their balance sheet as an asset and a corresponding liability, effectively preventing highly regulated financial firms, such as banks, from providing custodial services to hold cryptocurrencies for clients, because banks must hold regulatory capital which is calculated with reference to their balance sheets and the volatile nature of crypto-assets means the regulatory capital management requirements are commercially impossible if crypto is held on balance sheet. Put another way, this accounting rule, if it applied to any other asset, would cause custody to be commercially impossible. The legislation passed with a resounding vote of 60 to 38, demonstrating strong bipartisan support with numerous democrats joining the vote.

Notwithstanding the majority vote in the Senate, the White House had made clear that if the bill comes across the desk of President Biden, it will be vetoed. Under the US Constitution, the President can veto a bill which has been passed by the House of Representatives and the Senate.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 8, 2024
(House)

STATEMENT OF ADMINISTRATION POLICY

H.J. Res. 109 – Congressional Disapproval of "Staff Accounting Bulletin No. 121" Issued by the Securities and Exchange Commission

(Rep. Flood, R-NE, and four cosponsors)

The Administration strongly opposes passage of H.J. Res. 109, which would disrupt the Securities and Exchange Commission's (SEC) work to protect investors in crypto-asset markets and to safeguard the broader financial system. H.J. Res. 109 would invalidate SEC Staff Accounting Bulletin 121 (SAB 121), which reflects considered SEC staff views regarding the accounting obligations of certain firms that safeguard crypto-assets. Moreover, as explained in staff's accompanying release, SAB 121 was issued in response to demonstrated technological, legal, and regulatory risks that have caused substantial losses to consumers. By virtue of invoking the Congressional Review Act, it could also inappropriately constrain the SEC's ability to ensure appropriate guardrails and address future issues related to crypto-assets including financial stability. Limiting the SEC's ability to maintain a comprehensive and effective financial regulatory framework for crypto-assets would introduce substantial financial instability and market uncertainty.

If the President were presented with H.J. Res. 109, he would veto it.

* * * * * * *

President Biden has until 28 May to enact his threatened veto, which can itself be overturned by a supermajority vote in the Senate (which is not likely to happen). Reporting is now suggesting that the President will not use his veto on this law.

Advocates for H.J.Res. 109 assert that overturning SAB 121 is vital for consumer protection. The SEC's recent approval of several spot Bitcoin ETFs, which are predominantly held by a few institutions, creates centralisation risks. H.J.Res. 109 aims to break these barriers, enabling more regulated institutions to custody Bitcoin for customers.

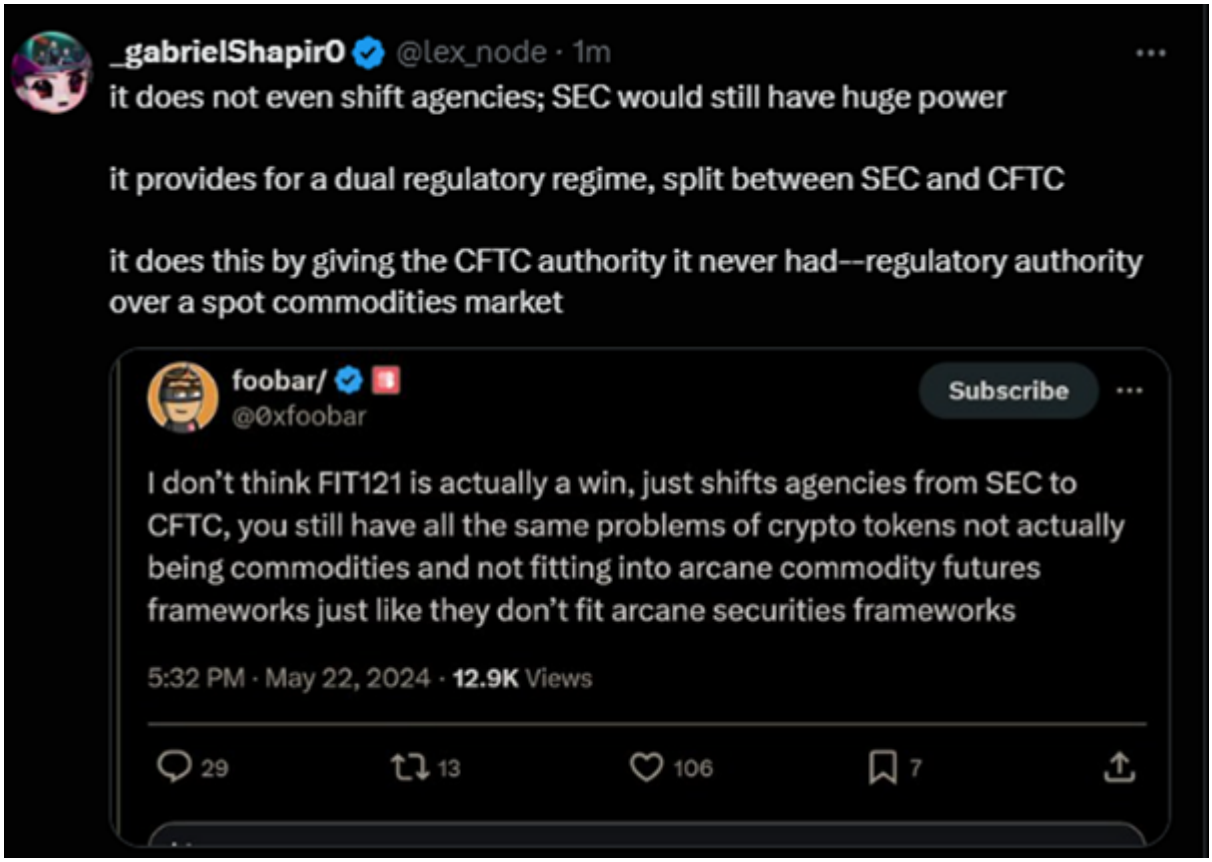
FIT21

In a parallel move, 60 crypto firms, including Coinbase, Kraken, and Andreessen Horowitz, have thrown their support behind FIT21. This bill seeks to establish a comprehensive regulatory framework for digital assets, shifting significant oversight responsibilities to the Commodity Futures Trading Commission (**CFTC**) and away from the SEC.

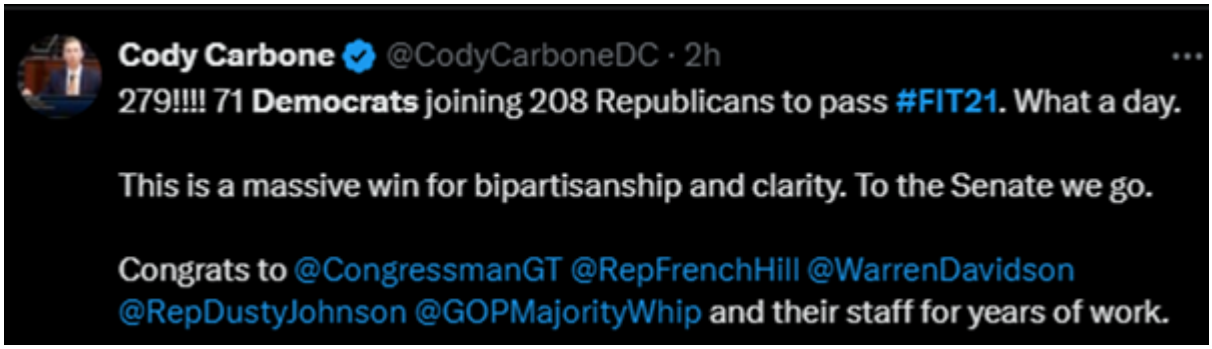
The bill also aims to modernise the regulatory landscape, making it more suitable for the technological advancements in the crypto space. These firms argue that current US securities laws, which were designed nearly a century ago, are not equipped to handle the speed and complexity of digital asset transactions and the regulation-by-enforcement approach of the SEC has been heavily criticised while there is no meaningful path to compliance. FIT 21 is seen by many as a necessary step to provide clear rules and promote innovation while ensuring consumer protection.

Some in crypto have said it is a start, and some have been sharper in criticism, saying it doesn't address the core issue that

crypto doesn't fit into existing laws.



The White House has indicated overnight that Biden will not veto this law if it passes Congress, despite being opposed to its passage generally. The law will now move onto the Senate where Democrat Whips have been rousing opposition but a growing base of Democrats are giving possible support with 71 Democrats in the House voting the law through.



What's Next?

The convergence of these legislative efforts highlights the growing recognition of the need for updated regulations in the rapidly evolving crypto industry. While Australia contends with a new slew of AML/CTF reforms and the recently implemented digital ID bill, we remain well behind the US with respect to crypto reform, with ASIC enforcing traditional financial services laws, and no real attempt in ongoing policy discussions to deal with a the core issue of when a token would be (or not) a financial product.

As Australia is likely to follow the ilk of the United States, the upcoming weeks could provide significant insight into Australia's own future given that we often follow the US lead.

Written by Michael Bacina, Steven Pettigrove, and Luke Misthos

COPA v Wright Judgment Published: Details on how Wright is wrong

The UK High Court of Justice has published a 231 page judgment which is nothing short of a scathing critique of Dr Craig Wright's claims that he is Satoshi Nakamoto, the mysterious creator of Bitcoin.

Following repeated lawsuits by Dr Wright against others, and assertions that he owned the copyright in the Bitcoin Whitepaper, the Crypto Open Patent Alliance (**COPA**) sued Dr Wright, seeking declarations that Dr Wright was not Nakamoto. The case was important as it impacts several cases which Dr Wright has brought against others, including members of COPA.

In March, Justice Mellor delivered an oral judgment, finding for COPA and slamming Dr Wright. This judgment sets out in painstaking detail the inconsistencies in Dr Wright's evidence and assertions that he is Nakamoto, starting with a bold assessment of Dr Wright's honesty with Justice Mellor saying:

Dr Wright presents himself as an extremely clever person. However, in my judgment, he is not nearly as clever as he thinks he is. In both his written evidence and in days of oral evidence under cross-examination, I am entirely satisfied that Dr Wright lied to the Court extensively and repeatedly.

On the question of Nakamoto and the litany of lawsuits started by Dr Wright against those who stated he was not Nakamoto:

Satoshi Nakamoto was and remains a pseudonym….having heard all the evidence in this Trial, …it is likely that a number of people contributed to the creation of Bitcoin…

I consider it is likely that the real Satoshi would never have set out to prove in litigation that he actually was Satoshi and certainly not in the way that Dr Wright attempted to do so.

The discrepancies in Dr Wright's initial defence and later documents produced by Dr Wright was noted:

his Defence is notable for referring largely to documents which were made public by Satoshi. Bearing in mind the number of documents Dr Wright later disclosed as supporting his claim to be Satoshi, it is notable that the Defence did not make reference to any of them.

Many of those later documents were concluded to be altered or otherwise suspect. Much of the judgment recounted the chronology of Dr Wright's lawsuits and claims to be Nakamoto. The Court went into detail on a number of documents found to be forgeries and dissected how Dr Wright had modified documents. Ultimately His Honour said:

It is sometimes said that a good lie contains a kernel of truth. In my judgment, on many and frequent occasions, Dr Wright adhered to this proposition. I sensed there was often something in his answer which was true, but the answer as a whole was a plain lie or not an answer to the question put.

The Court repeated the declarations made at the end of the trial, that:

1. Dr Wright is not the author of the Bitcoin White Paper.
2. Dr Wright is not the person who adopted or operated under the pseudonym Satoshi Nakamoto in the period between 2008 and 2011.
3. Dr Wright is not the person who created the Bitcoin system.
4. Dr Wright is not the author of the initial versions of the Bitcoin Software.

An appeal by Dr Wright is highly likely, and it will take some time for the ramifications of this decision to flow through to other cases, but it will be greeted by most of the crypto world favourably by drawing a line under several ongoing disputes, and ending at least one man's claims to be the creator of bitcoin.

Written by Michael Bacina and Steven Pettigrove

ASIC v BPS: time to book your CAR agreement in for a service?

It has been just a few weeks since the Federal Court decision in ASIC v BPS Financial Pty Ltd (Qoin) was handed down, and industry professionals are continuing to weigh in on the consequences of the decision. The case is ASIC's first court win relating to a crypto-asset wallet, but also provides court guidance on what is a "facility" in the context of a non-cash payment facility (NCPF) and the scope of the exemptions from holding an AFSL in the Corporations Act 2001 (Cth).

The "authorised representative" exemption allows a person or entity to provide a financial service under the Corporations Act on behalf of the holder of an Australian Financial Services Licence (AFSL) as the authorised representative of the

license holder under a written agreement, without having to hold an AFSL itself.

AFSL holders often enter into what are known as "Corporate Authorised Representative Agreements", referred to as CAR agreements, with other entities within or outside of its own group structure for various reasons, including:

1. Business expansion – the AFSL holder may want to broaden their business operations geographically or in terms of its service offerings;
2. Operational efficiency – the appointment of CARs allows AFSL holders to focus on core business activities while the CARs handle specific services and interactions; and
3. Risk management – by distributing responsibilities and leveraging the specific experience of CARs, AFSL holders can manage and mitigate certain risks.

Another exemption from holding an AFSL is the "intermediary authorisation exemption", which allows a person to issue a financial product pursuant to an "intermediary authorisation" arrangement, whereby the holder of an AFSL makes a contractual offer to people to arrange for the provision of the actual financial product by the product issuer. This is usually governed between the two parties by an "Intermediary Agreement" or an "Introducer/Referrer Agreement".

BPS did not deny that it was carrying on a financial services business, accepting that the Qoin Wallet was a non-cash payment facility. It may have been a more interesting decision had BPS sought to challenge this point. However, BPS sought to rely on both the authorised representative exemption and the intermediary authorisation exemption by entering into various CAR agreements and Intermediary Agreements with existing AFSL holders, Billzy Pty Ltd and PNI Financial Services Pty Ltd.

On the other hand, ASIC argued that because BPS was the issuer of the relevant financial product, it was not providing financial services as an "agent" of Billzy or PNI and therefore was not acting "as a representative of" or "on behalf of", as required by the above exemptions. Her Honour disagreed with ASIC's contentions and stated that an AFSL holder was free to determine the circumstances in which it will be prepared to authorise a person to act on its behalf.

Nonetheless, Her Honour ultimately found that BPS:

1. *could* rely on the authorised representative exemption for its arrangement with PNI during the term of the arrangement as the terms of the CAR agreement properly authorised BPS to issue the relevant financial product and to provide financial product advice in relation to it;
2. *could not* rely on the authorised representative exemption for its arrangements with Billzy as the *specific language of the CAR arrangement* did not allow BPS to issue the relevant financial product (rather, merely arrange for it to be issued); and
3. *could not* rely on the intermediary authorisation for its arrangements with Billzy as the language of the Intermediary Agreement required the provider of the financial product (which was BPS) to be a separate entity to the entity making offers for the relevant financial product.

The outcome of the case may call into question ASIC's long-standing policy (which is outlined in Information Sheet 251 and ASIC Regulatory Guide 36) that the authorised representation exemption is only available to persons acting as an "agent" of the AFSL holder, but cannot be relied upon if the person is acting as a "principal" (i.e., by actually offering or issuing the particular product). The decision will likely impact ASIC's future approach to the application of the exemptions and the interpretation of CAR agreements.

Beyond its potential implications to crypto wallet offerings, but noting that because BPS admitted the wallet was a financial product the case has limited impact in that regard, the Federal Court's decision is a useful reminder to licence holders and their authorised representatives to review the scope of their CAR or Intermediary agreements very carefully and ensure they understand the language of the contract.

Authorised representatives should take care to ensure that their CAR Agreement properly covers the financial services they are providing and that they are indeed exempt from holding an AFSL themselves. Given the serious consequences of carrying on an unlicensed financial services business, and the approach of ASIC in looking closely at crypto financial service providers, it will often be prudent to seek external legal advice on the drafting of the relevant agreements to ensure your CAR is roadworthy. Is it is time to book your CAR in for a service?

Written by Michael Bacina, Steven Pettigrove and Luke Higgins