

Article Information

Authors: Michael Bacina, Steven Pettigrove, Jake Huang

Service: Blockchain, FinTech

Sector: Financial Services, IT & Telecommunications

ASIC flips Qoin with appeal on scope of authorised rep exemption

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

In May, ASIC scored a win in its legal action against BPS Financial Pty Ltd (**BPS**) with Justice Downes of the Federal Court [finding that BPS had carried on an unlicensed financial service when offering the “Qoin Wallet” to consumers](#) as it did not have a valid Corporate Authorised Representative (**CAR**) arrangement in place with a financial services licensee during certain periods of time. The Court also found that BPS had made certain misleading representations in relation to its product offering.

However, the Federal Court [rejected ASIC’s attempts to argue that the blockchain platform developed by Qoin formed part of the unlicensed “financial product”](#) under Australian law. Justice Downes also rejected ASIC’s long-standing position (as reflected in Regulatory Guide 36 and Information Sheet 251) that the authorised representative exemption cannot be used by a CAR to issue a financial product on the basis that issuance by its nature can only be carried on by a principal and that a CAR, as an agent of a licensee, cannot offer financial services as principal.

This week ASIC confirmed that it has appealed Justice Downes rejecting ASIC’s position on whether the CAR exemption is broad enough to allow a CAR to act as an issuer of a financial product, defending its long-standing guidance with potentially significant implications for the scope of the CAR regime and the types of services which can be offered by an authorised representative under another’s license.

[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. It is one of the more common exemptions relied by many financial service providers, including in the payments industry.

As part of this exemption, an AFSL holder may enter what is known as “Corporate Authorised Representative Agreement”, referred to as a CAR agreement, with a licensed entity within or outside of its own group structure.

ASIC’s long-standing view, as outlined in [ASIC Regulatory Guide 36](#) and [Information Sheet 251](#) is that the 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).

However, in the BPS decision, Justice Downes found that, among other things, the defendant *could* rely on the authorised representative exemption in respect of the period in which it was covered by the AFSL of PNI Financial Services Pty Ltd as the terms of the CAR agreement properly authorised BPS to issue the relevant financial product and to provide financial product advice. In this case, the product that BPS issued was a crypto payment product called Qoin Wallet.

In reaching this view, Justice Downes said that the exemption is available to an authorised representative regardless of whether it is acting as an agent for the AFSL holder. In other words, the exemption allows the authorised representative to act as a principal and issue financial products on its own behalf, including a payment product like the Qoin Wallet.

The decision sparked heated debate among financial services experts and industry professionals, as it not only challenged ASIC’s posture which was widely accepted by the industry, and potentially foreshadowed a broader ability for authorised representatives to issue financial services under a CAR arrangement.

In the circumstances, it is not surprising that ASIC has chosen to challenge Justice Downes' decision, although the fact this has only come to light now through [a note inserted in Information Sheet 251](#) and [an editor's note to an earlier ASIC Press Release](#) is surprising given the potentially significant implications of the appeal for the financial services industry. The note does not explain the potential consequences of the BPS litigation or Justice Downes' view on the correctness of ASIC's guidance which otherwise remains unchanged.

Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

This information sheet was issued in November 2020.

Last updated: 13/08/2024 12:40

ASIC's update to Information Sheet 251 states:

Note: The decision in *ASIC v BPS Financial Pty Ltd [2024] FCA 457* is relevant to this information sheet. The decision confirmed that, to rely on the intermediary authorisation exemption under section 911A(2)(b), the product provider must be a separate person from the person making the offers.

The decision also addressed the question of whether BPS Financial Pty Ltd was entitled to rely on the authorised representative exemption under section 911A(2)(a). ASIC has appealed part of the judgment in this matter in relation to the operation of the authorised representative exemption under section 911A(2)(a): see Editor's Note 2 in Media Release ([MR 24-090](#)) ASIC wins first court outcome regarding a non-cash payment facility involving crypto assets (3 May 2024). In our appeal, ASIC has not challenged the court's findings in relation to the intermediary authorisation exemption. We will update this information sheet once there is a decision in the appeal proceeding.

Meanwhile, Justice Downes' finding and reasoning in identifying the scope of the unlicensed financial services offered by BPS (which was confined to its wallet product) remains undisturbed [with potentially significant implications for the legal treatment of blockchain based product offerings](#).

At this stage, no date has been set for the hearing of ASIC's appeal. The appeal will be watched with interest given its potentially significant implications for the scope of the Australian financial services licensing regime and the authorised representative exemption.

Written by Jake Huang and Steven Pettigrove