Article Information

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So you want to run an Initial Coin Offering/Token Sale in Australia...

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1. Some ICOs could be managed investment schemes

On 3 May 2018, ASIC updated their guidance document INFO225 which provides a timely reminder that ASIC may consider ICOs to be managed investment schemes (**MIS**) that require licensing and disclosure documents under the *Corporations Act*. Whether this will in fact be the case will depend on whether the offer of tokens is found to be the offer of an interest in an MIS.

The definition of "managed investment scheme" is found in s.9 of the *Corporations Act* as:

(a) a scheme that has the following features:

*(i) people contribute money or money's worth as consideration to acquire rights (**interests**) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);*

*(ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the **members**) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);*

(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions);

An "interest" in an MIS is defined as:

"a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not)"

There is an absence of court decisions in Australia as to whether any ICO or token feature would act as a "bright line" to render an offering to be the offer of an interest in an MIS. The nearest analogy is the "investment contract" concept in the USA which considers similar matters but which takes a subjective analysis of whether backers are seeking to profit from the activities of others as a touchstone.

Mr Jay Clayton of the SEC has recently made very clear that in the USA, all ICOs are considered by the regulators to be the offer of a security, whereas in Australia ASIC has been taken a more open approach, making room for the offer of tokens which are not financial products or securities.

The rights and obligations which attach to a token will be important in deciding if the offer of a cryptographic token is the offer of an interest in an MIS based on the design of the tokens themselves as will the manner in which the tokens have

been advertised or offered.

2. ASIC now has delegated powers from the ACCC for misleading and deceptive conduct

Historically ASIC has only had jurisdiction over misleading and deceptive conduct issues in relation to the offer of securities under the *Corporations Act* and the Australian Competition and Consumer Commission (**ACCC**) had jurisdiction over all other jurisdiction under the *Australian Consumer Law* (**ACL**).

The ACCC's powers under the ACL have recently been delegated, in relation to ICO/token sales only, to ASIC.

What this means is that ASIC now has jurisdiction to raise issues of misleading and deceptive conduct in relation to ICOs without needing to establish that an ICO is the offer of a security.

ASIC has confirmed they are actively reviewing ICOs and approaching projects that they are concerned about. The following are examples of conduct that may be considered to be misleading or deceptive:

1. The use of social media to generate the appearance of a greater level of public interest in an ICO than actually exists;
2. Undertaking or arranging for a group to engage in trading strategies to generate the appearance of a greater level of buying and selling activity for an ICO or a crypto-asset;
3. Failing to disclose adequate information about the ICO, including all the risks facing a project; and
4. Suggesting that the ICO is a regulated product or the regulator has approved the ICO if that is not the case.

ASIC is becoming more pro-active in the ICO. Rumour has it that around a dozen ICOs have been shut down by ASIC. In early May the Australian newspaper reported that betting platform Neds discontinued their ICO after being contacted by ASIC. It is worth noting the tokens in that offering carried the right to receive revenue sharing for holders, and so were plainly the offer of a security.

3. AUSTRAC and ICOs

AUSTRAC director, Mr Tony Prior, stated at a recent Sydney Fintech event that the new anti-money laundering and counter-terrorism financing (AML/CTF) laws regulating Digital Currency Exchanges **would** apply to ICOs where fiat currency was received and cryptographic tokens were issued.

We have since clarified this position with AUSTRAC and understand that at this stage AUSTRAC does not consider ICOs to be Digital Currency Exchanges.

However, AUSTRAC's view remains that any conversions of fiat currency to crypto will place a business at risk of being a Digital Currency Exchange. As many ICO projects offer this as a feature, it is likely they will need early engagement with AUSTRAC to determine whether they will fall within the definition of Digital Currency Exchange.

Irrespective of whether an ICO is considered a Digital Currency Exchange or not, it would be foolish in our view not to put in place AML/KYC compliance for any backers so that an issuer of tokens knows who holds their tokens (even if only initially) and to ensure that they are not taking funds from countries which would require additional compliance or which forbid the offering of cryptographic tokens (most notably, the USA, China and India).

In addition, a number of projects have been including AUSTRAC's logo on their website or as part of marketing after having registered as a Digital Currency Exchange with AUSTRAC. This risks being considered to be misleading or deceptive conduct.

On 11 April 2018, AUSTRAC issued a media release reminding Digital Currency Exchanges of their obligations and that AUSTRAC will be data sharing with other government agencies to ensure compliance with the AML/CTF laws.

4. Cryptocurrency exchange platforms may require a licence to operate

ASIC Commissioner, Mr John Price, at a recent Sydney Fintech event has warned that digital currency exchanges may be creating a financial market and require an Australian market licence.

For example, a cryptocurrency business may be regularly quoting prices at which people can buy or sell financial products or operating a facility through which offers to acquire or dispose of financial products are regularly made.

The updated INFO225 provides guidance about platforms that enable trading of ICO tokens and other cryptocurrencies. ASIC has indicated that platforms may be operating a financial market when they enable consumers to buy or sell tokens

where that token is a financial product. This means these platforms will require an Australian market licence, unless an exemption applies.

5. AFSL holders may require variation or reapplication for cryptocurrency related financial products

Financial products such as managed funds that seek to invest in cryptocurrency or otherwise expose consumers to cryptocurrency may require a new Australian Financial Services Licence or licence variation (such as a new product authorisation) to provide financial services involving the proposed product.

In the updated INFO225, ASIC has stated that they consider applications relating to crypto-asset related financial products to be more likely to be novel applications and assessments of the application to vary an AFSL are expected to take more time.

What's next?

ASIC and other Australian regulators are regularly updating their guidance on the treatment of ICOs and cryptocurrency.

Businesses that are looking into issuing tokens should ensure that they start early, have plenty of time set aside, obtain considered advice considering the regulatory framework of their offering (and tax!) and keep up to date with ongoing legal developments to give their offering the best changes of success.

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