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

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

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".

In the Federal Court proceeding, 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?