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Australia: Law & Practice
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Michael Bacina, Steven Pettigrove,
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Piper Alderman

AUSTRALIA

Law and Practice

Contributed by:
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Piper Alderman

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Piper Alderman is a commercial law firm with offices in Sydney, Melbourne, Adelaide, Brisbane and Perth. Its legal expertise has been built on nearly two centuries of industry experience as a leading adviser to Australian commercial clients. The firm prides itself on bringing tradition and innovation together to benefit clients. The blockchain group has been assisting clients on matters including fund structuring and fundraising, DAO and token structuring, licensing, taxation and other regulatory matters since 2016. It brings together lawyers with experience in early-stage companies, software development, financial services, corporate and commercial, IP/privacy, tax, insolvency and restructuring, and disputes. Clients include financial institutions, fintechs, cryptocurrency exchanges, venture capital firms and funds, and start-ups. The team regularly publishes articles and presents on blockchain-related legal issues.

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1. Blockchain Market

1.1 Evolution of the Blockchain Market

Australia has a vibrant crypto and blockchain ecosystem. Notwithstanding the market turbulence following major collapses in 2022-2023, including FTX whose Australian arm is undergoing liquidation (a procedure independent from the US Chapter 11 process), in which Australian creditors are expected to receive a full recovery, many Australian-grown cryptocurrency exchanges, start-ups and "Web3" companies are continuing to lead the way in their respective fields.

Institutional interest in the adoption of blockchain technology has also continued to grow over the past 12 months. In particular, there has been increasing interest in the use of stablecoins for payments and the tokenisation of traditional financial and real-world assets, as demonstrated by the Reserve Bank of Australia's (RBA) retail central bank digital currency (CBDC) pilot project.

Following the successful launch of the first Bitcoin spot exchange traded funds in the United States, Australian fund managers have also demonstrated increasing interest in incorporating crypto-assets into their investment portfolios, providing direct or indirect exposure to the asset class.

In the next 12 months, the government is expected to publish draft legislation for a licensing and custody framework for digital assets platforms. The Australian Securities and Investments Commission (ASIC) is likely to continue to pursue high-profile enforcement actions in relation to crypto-offerings that it alleges fall foul of existing financial services law, and to apply enhanced scrutiny to regulated offerings that reference crypto-assets. Financial institutions and asset managers are expected to continue to explore crypto-asset-related offerings, with a focus on payments applications, crypto-asset investment funds and finding solutions where current laws are not working.

1.2 Business Models

Australian businesses have adopted blockchain technology for a wide variety of applications. While blockchain technology has been widely adopted for financial applications, it is also being deployed in a number of other industries, such as supply chain, healthcare, gaming, ticketing, real estate and the arts, with the following examples.

- The RBA has completed a successful pilot project to explore use cases and the economic benefits of a retail CBDC in Australia. The project involved a wide range of use cases involving carbon trading, livestock auctions, tax automation and tokenised invoicing, among others. The RBA and Treasury are expected to publish a joint report in mid-2024 that will provide a stocktake on the CBDC pilot and set out a roadmap for future work.
- In collaboration with Tennis Australia, AO Metaverse released non-fungible tokens (NFTs) called the AO Art Ball Collection for the Australian Open. These NFTs provide intrinsic value in the form of Ground Passes to matches and exclusive benefits.
- The Commonwealth Bank of Australia (the largest bank in the country) has explored multiple use cases for blockchain, including:
  (a) successfully issuing a bond on a blockchain in 2017;
  (b) developing a blockchain-based platform for the management of sustainable investment products in 2018;
  (c) completing a global trade pilot to trace

provenance of a shipment in 2019; and
(d) conducting a proof of concept for a digital marketplace for trading tokenised biodiversity credits in 2019.

- In 2022, the Australian and New Zealand Banking Group issued its own stablecoin, the A$DC, and has completed a number of pilot transactions, testing a variety of use cases.
- Immutable, an Australian-grown, blockchain-based video gaming platform, has continued to pioneer the use of NFTs in video games. Immutable is the developer of the Immutable zkEVM layer-2 blockchain, the Passport digital wallet solution, and the Gods Unchained and Guild of Guardians NFT-based video games.
- Cryptocurrency exchanges such as CoinSpot and Stables have rolled out innovative card products to enable users to spend cryptocurrency and stablecoins on daily expenses.

2. Digital Assets

2.1 Ownership

It is not currently clear how to determine the ownership of a crypto-asset whose transfer is based on an instruction given to a blockchain network using a private cryptographic key in Australia: it depends on the blockchain network being referred to and how many blocks need to be created before a transaction is considered to be irreversible on account of being too deep within the ledger's history to be altered.

On a public blockchain with no central party that determines when a transaction is final, ownership is probabilistic and statistical. On a private blockchain, the operator of the blockchain would be expected to determine when a transaction is final.

To date, there have been no cases or legislation directly addressing the questions of whether crypto-assets are property, how they are owned and at what point their ownership or control is transferred. Criminal and insolvency cases have proceeded on an assumption that crypto-assets are property for the purposes of those areas of law.

In its comprehensive Proposal Paper on Regulating Digital Asset Platforms (the Digital Asset Platform Proposal), issued in October 2023, Treasury acknowledged the legal complexities with regards to digital assets ownership and possession (ie, factual control). A person is not the legal owner of a digital asset simply because they have possession of it and can benefit from its entitlements. This distinction is one of the drivers of the government's efforts to establish a fit-for-purpose licensing regime for digital asset custody.

2.2 Categorisation

To date, the Australian government has not adopted any classification system for different types of crypto-assets. The core question remains whether the crypto-asset in question falls within the existing definition of a "financial product" under the Corporations Act or is otherwise a form of "goods"; this requires analysis on a case-by-case basis. The general definition of a financial product is a facility through which, or through the acquisition of which, a person:

- makes a financial investment;
- manages financial risk; or
- makes non-cash payments.

In addition, specific things are deemed to be financial products, including securities, derivatives and interests in a managed investment scheme.

The assessment of whether a particular crypto-asset is a financial product involves considerable uncertainty in the absence of clear guidance or case law. ASIC's evidence to the 2015 Digital Currency Inquiry was that digital currencies do not fall into the definition of a financial product. However, ASIC's Information Sheet 225 (INFO 225) encourages persons dealing in crypto-assets to "seek professional advice" on whether the asset is a financial product, and suggests that many activities involving crypto-assets will be a financial product.

Even if a crypto-asset is not a financial product, the sale of crypto-assets remains subject to Australia's general consumer protection laws, including the prohibition on misleading and deceptive conduct under the Australian Consumer Law.

2.3 Tokenised Securities

While the tokenisation of traditional financial assets, including securities, has been a topic of considerable interest in Australia, the government has been slow in following peer jurisdictions in exploring the legal and regulatory treatments of tokenised financial assets. In principle, the financial product definitions under the Corporations Act are technology neutral. However, there has not yet been any proposed legislation or regulatory guidance addressing the legal considerations involved in issuing tokenised financial assets.

The Digital Asset Platform Proposal contemplates the regulation of asset tokenisation where the underlying asset is a non-financial product. If enacted, the Proposal is likely to encourage the growth of tokenised markets in non-financial assets. However, these reforms do not address the issuance of tokenised securities, which is currently dealt with under existing laws.

2.4 Stablecoins

Australia does not yet maintain laws that specifically address stablecoins. Depending on its specific features, a stablecoin may meet the definition of a financial product (eg, a derivative, an interest in a managed investment scheme or a non-cash payment facility), in which case the issuer and persons dealing in the stablecoin must hold an Australian Financial Services Licence (AFSL).

While there is no regulation that specifically addresses the distinction between asset-backed and algorithmic stablecoins, these characteristics are considered when making a determination as to whether the crypto-asset is a financial product.

Treasury is consulting on a new payments licensing framework aimed at regulating a wider range of payment functions, including the issuance of payment stablecoins as a type of stored-value facility. At this time, only fiat-backed stablecoins are within scope. The timeline for the draft legislation is not yet clear. It is highly likely that stablecoins will ultimately face similar regulation to banks.

2.5 Other Digital Assets

Australia does not have specific arrangements for the regulation of NFTs. Generally, the law treats NFTs like other non-tangible assets, and will permit them to be bought, sold and owned, intervening to uphold property rights (including intellectual property rights) and contractual obligations, including those created by smart contracts. In certain cases, NFTs may be treated as financial products. However, even where they are not, NFTs will be considered goods under the Australian Consumer Law, and the sale of or trading in NFTs is subject to consumer law protections, such as the prohibition on mislead-

ing and deceptive conduct and unfair contract terms.

The Australian Tax Office (ATO) has advised that the tax treatment of an NFT is contingent on the circumstances of the acquisition or sale, the usage of the NFT and the reasons for transacting or holding the NFT. An individual may be required to pay income tax on the NFT as a capital gains tax asset under the CGT regime or as part of a business or profit-making scheme or on revenue account as trading stock. Furthermore, Goods and Services Tax (GST) may apply on NFT sales to Australian consumers if the NFT marketplace is operating as an electronic distribution platform. In rare cases, an NFT may be recognised as a personal use asset, in which case special rules for CGT and exemptions may become relevant.

2.6 Use of Digital Assets in Payment

The government has recognised digital currencies as a lawful form of payment only in the sense that it has acknowledged that digital currencies can be used in the same way as other non-cash consideration in barter transactions. However, no digital currency is recognised as legal tender in Australia, and the government has yet to accept any digital currency as a means of payment.

Some businesses in Australia are accepting digital currencies from customers, and a number of payments businesses have issued card products that allow customers to convert digital currencies and pay merchants in fiat currency. ASIC has acknowledged in prior versions of INFO 225 that peer-to-peer digital currency transfers do not involve a regulated non-cash payment facility due to a lack of third-party intermediation. However, if a business is facilitating payments in digital currencies between parties, it may be providing a non-cash payment facility, in which case it would need an AFSL; it should also consider whether it may be providing a payment system or purchased payment facility, which is regulated by the RBA. In a recent court decision, a digital wallet enabling payments on a blockchain was found to be a non-cash payment facility.

2.7 Use of Digital Assets in Collateral Arrangements

There are several areas of legal uncertainty surrounding the use of digital assets as a form of collateral or security, including whether crypto-assets are property, how to determine ownership and control of crypto-assets, and whether the Personal Property Securities Act 2009 extends to security arrangements involving crypto-assets. To date, there is no case law or regulatory guidance in Australia specifically addressing these issues, although a number of cases have proceeded on the assumption that crypto-assets are in fact property and, accordingly, are capable of being the subject matter of a collateral or security arrangement.

3. Smart Contracts

3.1 Enforceability

Whether smart contracts are legally enforceable depends on the form of the particular smart contract. The term “smart contracts” is used for various contractual relationships, including:

- an unwritten agreement, where inputs and outputs are extremely limited and trust is not required between the parties (eg, a vending machine);
- a standard written agreement (eg, an agreement for the sale of land);
- a written agreement incorporating the parties’ reliance on a software-driven outcome, where

control over the execution of the software process is in the hands of a trusted third party (eg, an escrow service);
- a written agreement, usually in a human language, incorporating the parties' reliance on a software-driven outcome where the software resides on a blockchain and executes without human intervention; and
- an agreement written only in machine-readable computer code, executed entirely without human intervention once entered into, known as "the code is the contract" or even presumptuously as "smart contract law".

A legally enforceable smart contract must meet all of the traditional elements of a binding contract, including intent to create legal relations, consideration, offer and acceptance. Any duress, undue influence or unconscionable dealings could render a smart contract void at law, despite being potentially unstoppable digitally.

The purest "the code is the contract" smart contracts are of particular concern as they lack any notification of their terms, which exist only as machine-readable code. The identity of the other party to the contract, or whether that party has capacity to enter into the contract, is usually unknown. Australian superior courts have yet to address a smart contract dispute of this kind or make rulings regarding smart contracts.

4. Blockchain Regulation

4.1 Regulatory Regime

4.1.1 Regulatory Overview

There are no targeted laws or regulations governing market participants who use blockchain technology or businesses that provide services in relation to crypto-assets, except in relation to AML/CTF laws. Accordingly, there remains significant uncertainty regarding the application of existing regulatory regimes to blockchain and digital assets.

The starting point for businesses is to determine whether a crypto-asset is a financial product under the Corporations Act. Any person issuing or dealing in crypto-assets, such as by making a market or providing custodial services, must obtain an AFSL if the relevant crypto-asset is a financial product. However, crypto-asset offerings are highly scrutinised by ASIC, and few licences have been issued to companies seeking to offer crypto-asset financial products.

If a business is offering payment services, such as accepting crypto-assets and making a payment to another party or bank account, then, assuming the crypto-asset is not a financial product, the business will still be providing a "non-cash payment facility" and will be required to hold an AFSL unless it can fall within an exemption. Digital wallets in Australia will most likely constitute non-cash payment facilities. The non-cash payment facility concept in Australia is broadly analogous to the e-money regulatory system in the EU.

Regardless of whether financial services laws apply, Australia maintains robust consumer protection laws relating to the sale of goods and services, including under the Australian Consumer Law, which restrict misleading and deceptive conduct, unfair contract terms and unconscionable conduct, among others.

For the most part, Australia applies its existing tax laws in relation to crypto-assets, but the ATO has made a number of determinations and issued guidance that sets out how it will apply the law to market participants using blockchain technology or cryptocurrencies. The existing tax

regime and its application to digital assets has been the subject of a broad-based review by the Board of Taxation.

In addition, the government is currently pursuing a number of reforms intended to modernise Australia's financial system and payment system, including the introduction of a licensing and custody framework for digital assets, and broader payment licensing reform aimed at regulating stablecoins as stored-value facilities. Accordingly, it is expected that Australia will see the adoption of specific laws relating to digital assets in the next 12 to 24 months. The reforms are being pursued within the existing legislative framework rather than as bespoke arrangements addressing digital assets.

4.1.2 Licensing

Australian regulation is stated to be technology neutral, and individuals and entities are expected to consider the nature of services being offered to determine which laws and regulations apply. If a crypto-asset is considered to be a financial product (such as a security or a derivative), a person dealing in or issuing the crypto-asset could be carrying on a financial service business, and is required to hold an AFSL. The same applies to a person "arranging" for another to deal in or issue a financial product.

ASIC's INFO 225 sets out factors to help persons dealing in crypto-assets to determine whether the crypto-asset is a financial product, and encourages persons to "seek professional advice" on such determination. Unfortunately, there is no clear pathway to compliance or addressing how the unique technological features of blockchain can sit with existing laws designed for centralised systems.

Similarly, ASIC's Information Sheet 219 sets out an assessment tool to help businesses identify whether an AFSL may be required for blockchain-based services. This tool includes a set of factors to be considered by the business, such as:

- which blockchain platform is being used;
- how it will be run;
- how it works under the law;
- how the blockchain is using the data; and
- how the blockchain affects others.

However, a difficulty arises in relation to DeFi where a protocol operates autonomously and does not fit neatly – or at all – within the existing regulatory framework. It is also unclear how regulators may attempt to impose liability or accountability on decentralised autonomous organisations (DAOs) or their participants. While a Senate Committee has proposed the legal recognition of DAOs, that proposal has not been taken up by government to date.

Treasury has consulted on a new licensing framework for platforms that provide custody arrangements for non-financial product digital assets and "financialised functions" in relation to those assets, including trading, staking, asset tokenisation and funding tokenisation. Under the proposal, digital asset platforms would be required to obtain an AFSL and comply with existing financial services laws and specific tailored obligations if they exceed certain asset holding thresholds. Digital asset platforms would be regulated as a new class of financial product called a "digital asset facility". Issuers and those arranging or dealing in digital asset facilities, such as brokers, arrangers, agents, market makers and advisers, would all be required to hold an AFSL and comply with financial services laws.

4.1.3 Marketing

If a crypto-asset is a financial product, the marketing of the crypto-asset or activities in relation to it is subject to financial product-specific consumer protection laws, including prohibitions on hawking financial products. Even if the crypto-asset is not a financial product, its marketing remains subject to Australia's general consumer protection laws. These protections include but are not limited to prohibitions on misleading and deceptive conduct.

While there are no general or bespoke marketing requirements in relation to digital assets in Australia, it is nevertheless important for persons dealing in digital assets to exercise caution in conducting marketing activities. Australia has some of the world's most robust consumer protection laws. In addition, a number of regulatory actions commenced by ASIC in relation to crypto-asset-related offerings have focused on marketing representations made by the defendant company.

4.1.4 Anti-money Laundering and Counter-Terrorism Financing (AML/CTF) Requirements

AML/CTF laws apply if a designated service is provided with a geographical link to Australia. In 2018, the AML/CTF Act was updated to specify that the exchange of digital currency for money or vice versa is a designated service and requires digital currency exchange (DCEs) to register with the Australian Transaction Reports and Analysis Centre (AUSTRAC). Depending on the nature of the crypto-asset-related service in which they are engaged, a person may be engaged in one or more designated services, including a DCE business, which requires registration with AUSTRAC.

Australia has not yet fully implemented AML/CTF-related guidance from the Financial Action Task Force (FATF) in relation to virtual assets. Currently, the AML/CTF Act only requires DCEs involved in the conversion of digital currency for money or vice versa to register with AUSTRAC where they have a geographical link to Australia. The AML/CTF Act and the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument (2007) (No. 1) (Cth) (AML/CTF Rules) require regulated entities to conduct know your customer (KYC) checks and take a risk-based approach to complying with AML/CTF obligations.

The government is consulting on reforms to the AML/CTF regime, which would expand the scope of AML/CTF regulation in relation to digital currencies to cover digital assets more broadly, including:

- exchanges between one or more forms of digital asset;
- the transfer of digital assets on behalf of a customer;
- the safekeeping or administration of digital assets; and
- the provision of financial services in relation to an offering or sale of digital assets (eg, ICOs).

4.1.5 Change in Control

Digital assets firms are subject to general law requirements regarding change of control, including the Competition and Consumer Act 2010 (Cth) and the Foreign Acquisitions and Takeovers Act 1975 (Cth). For AFSL licence holders, controllers and officers must be fit and proper persons. A reporting entity under the AML/CTF Act must notify AUSTRAC of any updates to key personnel, which includes beneficial owners and officers.

4.1.6 Resolution or Insolvency Regimes

There are no specific resolution or insolvency requirements for digital asset firms. However,

a number of digital asset firms have been the subject of insolvency proceedings, including the Australian arm of FTX, which entered administration in 2022 and subsequently went into liquidation, with creditors expected to have their claims paid in full. Another cryptocurrency exchange, Digital Surge, which was impacted by the FTX collapse, went into administration in late 2022 and was the subject of a successful Deed of Company Arrangement (DOCA), which saw it exit administration and resume trading (creditors are expected to receive a full payment in time under this DOCA).

4.1.7 Other Regulatory Requirements

In April 2022, the Australia Prudential Regulation Authority (APRA) issued a letter setting out its risk management expectations and policy roadmap for crypto-assets. Regulated entities are expected to:

- conduct appropriate due diligence and risk assessment before engaging in activities relating to crypto-assets;
- consider applicable principles and requirements and the extent to which they rely on third-party outsourcing arrangements; and
- apply robust risk management controls, having regard to the types of crypto-asset-related activities.

APRA will consult on the prudential treatment for crypto-assets in 2024, with new requirements expected to come into effect from 2025.

4.2 Regulated Firms/Funds With Exposure to Digital Assets

There are two legislative guidance instruments from ASIC that specifically apply to the custody of crypto-assets: INFO 225 and "Response to submissions on CP 343 Crypto-assets as underlying assets for ETPs and other investment products" (REP 705).

Part E of INFO 225 sets out ASIC's expectations of Responsible Entities of registered funds when investing into digital assets, including in relation to custody, risk management and risk disclosure. The document also sets out key good practice guidelines for choosing a custody provider.

In REP 705, ASIC clarifies and expands upon several matters in INFO 225 and ASIC's "Regulatory Guide: Funds management and custodial services: Holding assets" (RG 133). For instance, REP 705 clarifies that the good practice guidelines set out in INFO 225 are not legal requirements and that responsible entities of registered schemes will not be required to engage an Australian domiciled custodian.

General legislative requirements and regulatory guidance will also apply to funds that invest in crypto-assets. For example, RG 133 explains how AFSL licensee obligations apply to regulated entities in relation to the holding of assets, and sets out the minimum custody standards for custodianship. The application of this regulatory guidance in relation to digital asset custodians raises a number of novel legal considerations.

4.3 Regulatory Sandbox

There is no specific regulatory sandbox geared towards blockchain-based projects, but Australia does have a regulatory sandbox that "aims to facilitate financial innovation in Australia".

The ASIC sandbox permits a business to provide a limited range of services without first needing to obtain an AFSL or Australian credit licence, or vary its licence to include additional authorisations, for a period of up to two years. However, prior to participating, the business must pass a

public benefit test and an innovation test. While businesses must still report to ASIC on their activities, this licensing leeway is designed to grant innovative businesses the opportunity to test new services. Should they wish to continue their business after these two years, they will need to apply for the appropriate licence well before the end of the sandbox.

The ASIC Innovation Hub assesses applications to use the sandbox and also provides practical support to fintech start-ups and other innovators as they navigate Australia's financial regulatory system. Most blockchain-based start-ups are unlikely to fit within the criteria to utilise the sandbox.

4.4 International Standards

In line with the FATF recommendations, the government is planning to expand the AML/CTF regime to cover a wider range of virtual asset-related activities, including conversion between different digital assets, transfer, safekeeping or administration services in relation to digital assets, and the provision of financial services related to an issuer's offer and/or sale of digital assets (eg, ICOs). A critical aspect of the reform is a proposed shift from regulating "digital currencies" to "digital assets", including broader coverage of stablecoins and, potentially, NFTs. The reforms are expected to include the introduction of the travel rule for digital asset transfers and the extension of international funds transfer reporting requirements to digital assets. The consultation paper states that the proposed reforms are intended to align with broader licensing and custody reforms (discussed elsewhere in this paper to minimise duplication).

4.5 Regulatory Bodies

The regulatory bodies that are most relevant for blockchain and crypto-asset businesses are ASIC, AUSTRAC and the ATO.

- ASIC regulates activities involving blockchain and crypto-asset business if one or more crypto-assets meets the definition of a financial product, or if the business is providing a financial service under the Corporations Act. This includes taking action against misleading and deceptive conduct in the marketing and sale of financial products and services. The Australian Competition and Consumer Commission (ACCC) has also delegated powers to ASIC to take action in respect of misleading and deceptive conduct in the marketing or sale of crypto-assets that are not financial products. Following the growth of the cryptocurrency industry and the market turbulence of 2022, ASIC has adopted a more aggressive enforcement posture in relation to crypto-assets by identifying the industry as an area of focus.
- AUSTRAC regulates businesses providing certain services (designated services) in the financial sector with a geographical link to Australia. AUSTRAC receives reports from reporting entities, which assist it and its partner agencies in Australia and internationally to combat and disrupt financial crime. To the extent that a blockchain or cryptocurrency business is providing a designated service with a geographical link to Australia, it will be regulated by AUSTRAC.
- The ATO collects revenue, administers GST on behalf of states and territories, and administers programmes that provide a means for transfer and community benefits. The ATO has provided some limited guidance on cryptocurrency dealings – eg, relating to the tax treatment of certain crypto-assets and

whether they are taxed as capital gains tax (CGT) assets or trading stock, or are subject to fringe benefits tax (FBT). The Board of Taxation has undertaken a review of the taxation treatment of various crypto-asset interactions and was requested to consider what legislative changes are necessary to Australia's taxation regime to accommodate digital assets. Following a broad-based public consultation, the Board submitted its report to the Australian government on 23 February 2024; at the time of writing, the Australian government has yet to publish or respond to the report.

4.6 Self-Regulatory Organisations

Blockchain Australia is an industry organisation for the blockchain and cryptocurrency industry that represents blockchain businesses and market participants. Its Code of Conduct provides an audited, self-regulatory scheme that allows Australian exchanges, if certified, to demonstrate that they meet certain best practice standards in the operation of their business, including:

- legal compliance;
- the reputation and background of the owners and operators;
- AML/CTF protections and reporting; and
- consumer protection, including transparent pricing, dispute resolution and data security.

The Code also applies to businesses that provide or facilitate the storage of digital currency. However, at the time of writing, no digital currency custody services have yet been certified.

4.7 Other Government Initiatives

In February 2020, the federal government announced its National Blockchain Roadmap, which is a five-year plan that sets out a strategy for the government to look into the benefits of blockchain and address the challenges thereof. To investigate the potential for blockchain technology, particularly in the Roadmap's showcased areas of supply chains, credentialing and KYC, the government formed working groups to explore several use cases in each sector.

The Roadmap also established a National Blockchain Roadmap Steering Committee, with Terms of Reference to oversee the 12-step strategy for the Australian government to best address the challenges and leverage the opportunities that are presented by blockchain technology.

Following an election in May 2022, the new federal government did not continue the National Blockchain Roadmap, and it appears to have shifted its focus to promoting the development of other innovative technologies.

The previous government also ran a Senate Inquiry into Digital Currency in 2015 and formed the Senate Select Committee on Financial Technology and Regulatory Technology (later renamed as the Senate Select Committee on Australia as a Technology and Financial Centre) in 2020 to investigate the policy settings for fintech and regtech in Australia. As part of its goal to develop an internationally competitive edge in fintech, in October 2021 the committee issued a final report with 12 recommendations to the Australian government, including establishing a market licensing regime for DCEs, a custody or depository regime for crypto-assets and conducting a token mapping exercise. A limited number of these recommendations have been adapted by the government in its legislative proposals and consultations.

5. Disputes

5.1 Judicial Decisions and Litigation

In the last year, the Federal Court has issued the following three decisions concerning the application of existing financial services laws to crypto-asset-related offerings.

- In ASIC v Web3 Ventures Pty Ltd (Block Earner) 2024 [FCA] 64, ASIC alleged that Block Earner provided unlicensed financial services by offering a fixed-yield "Earn" product and a variable-yield product that permits users to generate a return via DeFi protocols. The Federal Court held that the fixed-yield "Earn" product was a managed investment scheme and financial product, while finding that the "Access" product was not a financial product owing to the pass-through nature of the service. In a subsequent penalty hearing, Block Earner was relieved entirely of any penalty for reasons including that it had engaged in good faith with compliance and sought legal advice, and that ASIC had issued a misleading press release around the first judgment in the matter.
- In ASIC v Finder Wallet Pty Ltd [2024] FCA 228, ASIC alleged that Finder Wallet engaged in unlicensed financial services by offering a yield-based crypto-asset product. The Federal Court rejected ASIC's contention that the product amounted to a debenture and ordered ASIC to pay costs. ASIC has appealed the case and that matter is still awaiting a hearing as of June 2024.
- In ASIC v BPS Financial Pty Ltd [2024] FCA 457, ASIC asserted that BPS Financial Pty Ltd (BPS) engaged in unlicensed conduct when offering the "Qoin Wallet", a non-cash payment facility that used a crypto-asset token called "Qoin". While the Federal Court held in favour of ASIC, ASIC's allegation that the wallet and the underlying blockchain ought to be grouped together was rejected by the court.

There are also several cases considering crypto-assets that are of an interlocutory or procedural nature, including the following.

- In Noicos v Dawson [2019] FCA 2197, Justice White of the Federal Court made orders extending a freezing injunction in respect of the respondents who had been involved in the establishment of a cryptocurrency hedge fund (Countinghouse Global and/or Countinghouse Fund). The plaintiffs' investments in that case took the form of, and were styled as, Countinghouse Tokens (CHTs).
- In Hague v Cordiner (No. 2) [2020] NSWDC 23, a defamation action in the New South Wales District Court, Judge Gibson made an interim order approving the use of crypto-assets held in a cryptocurrency exchange account as security for costs, considering the assets to be analogous to money or assets.
- In Chen v Blockchain Global Ltd and Another; Abel And Others v Blockchain Global Ltd and Others [2022] VSC 92, an interlocutory proceeding, Attiwill J accepted that bitcoin is property for the purpose of granting a freezing order.

ASIC has issued regulatory guidance regarding the application of financial services laws to blockchain and crypto-assets in Australia in the form of the INFO 225. However, ASIC has not yet provided any definitive guidance on whether it considers one or more cryptocurrencies to be a financial product, and has instructed those dealing in crypto-assets to seek professional advice. ASIC has also provided guidance in Information Sheet 219 in relation to the use of DLT to help both ASIC and interested parties evaluate

whether the use of DLT would allow an entity to meet its regulatory obligations.

5.2 Enforcement Actions

ASIC has stated that it has acted to stop proposed and completed ICOs as well as token generation events that raise capital without appropriate investor protections. According to ASIC, in taking these actions it has identified consistent problems that occur in these areas, including things like the use of misleading and deceptive comments in sales and marketing materials, and the operation of unregistered management investment schemes and businesses not holding an AFSL. There is no clear guidance on how a token sale could occur under the current financial service laws with an AFSL.

ASIC's recent enforcement activity reflects its heightened scrutiny of crypto-asset offerings that mimic financial products and services. The Deputy Chair has repeatedly warned that "simply because a product hinges on a crypto-asset does not mean it falls outside financial services law". This stance became evident in ASIC's proceedings against Qoin, Block Earner and Finder Wallet, which each concerned the alleged offer of unlicensed financial services involving crypto-assets (see **5.1 Judicial Decisions and Litigation**).

In 2022, ASIC also issued stop orders against Holon Investments preventing the distribution of certain crypto-asset funds referencing Bitcoin, Ethereum and Filecoin on the basis that the company had too widely defined the target market for the products. The stop orders issued against single crypto-asset funds suggest that ASIC may take the view that cryptocurrency investments are only suitable for retail investors with a very high risk tolerance, if at all. AUSTRAC has previously taken action to refuse, cancel or suspend a DCE registration in a limited number of cases, which are published on its website. AUSTRAC does not publicly specify the reason for such actions, but they have correlated with the insolvency of these exchanges.

6. Tax

6.1 Tax Regime

The ATO has released limited guidance on how the existing tax regime applies to crypto-asset dealings in the form of taxation rulings and public guidance on its website.

Significant tax uncertainties remain in Australia, including (but not limited to):

- capital versus revenue account characterisations for individual investors/traders;
- the applicability of FBT to projects that allocate tokens to their employees (akin to an employee share scheme);
- the legal and tax implications of a business operating through a DAO;
- whether certain on-chain interactions (eg, staking) constitute taxable events;
- the tax implications of a blockchain hard-fork;
- the applicability of indirect taxes (eg, GST) in the context of decentralised and anonymous transactions;
- the application of potential CGT exemptions, including the personal use asset exemption;
- the calculation of CGT asset cost bases; and
- what constitutes sufficient records in the eyes of the ATO (eg, decentralised ledger records).

The Board of Taxation has undertaken a review of the taxation treatment of various crypto-asset interactions and was requested to consider what legislative changes are necessary to Australia's taxation regime to accommodate digital assets.

Following a broad-based public consultation, the Board submitted its report to the Australian government on 23 February 2024; at the time of writing, the Australian government has yet to publish or respond to the report.

7. Sustainability

7.1 ESG/Sustainable Finance Requirements

This section is not applicable in Australia.

8. Data Privacy and Protection

8.1 Data Privacy

Australia's legal regime for the protection of data privacy is covered under the federal Privacy Act 1988 (Cth) (Privacy Act), which is expected to be amended to bring it in line with international standards and best practices. Some states in Australia have their own privacy laws. Proposed changes to the Privacy Act seek to emulate the EU's General Data Protection Regulation – eg, to include the right to erasure.

Currently, the Privacy Act regulates the handling of personal information by government agencies and private sector entities that have an aggregate group revenue of at least AUD3 million. The Act also applies to reporting entities (including DCEs) under AML/CTF laws, regardless of the turnover threshold. The reforms to the Privacy Act propose to broaden the requirements so that small businesses may be included within the remit of the legislation and to place other additional obligations on entities.

Alongside the main provisions, 13 Australian Privacy Principles (APPs) also form part of the Privacy Act. The APPs impose obligations on the collection, use, disclosure, retention and destruction of personal information, with which entities caught under the Privacy Act need to comply.

One of the main features of blockchain technology is its immutability, which can prove a challenge with regards to the concept of the "right to be forgotten". Amending or deleting personal information that has been entered into a blockchain can be difficult. Therefore, entities that use or provide blockchain-based products or services need to craft their privacy policies clearly, ensuring that any personal information being captured will not ultimately end up on the blockchain where it conflicts with legislation, making it hard to alter or remove it. In addition, given the borderless nature of blockchain technology, entities that have a jurisdictional link to Australia will need to comply with the Privacy Act and the APPs.

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