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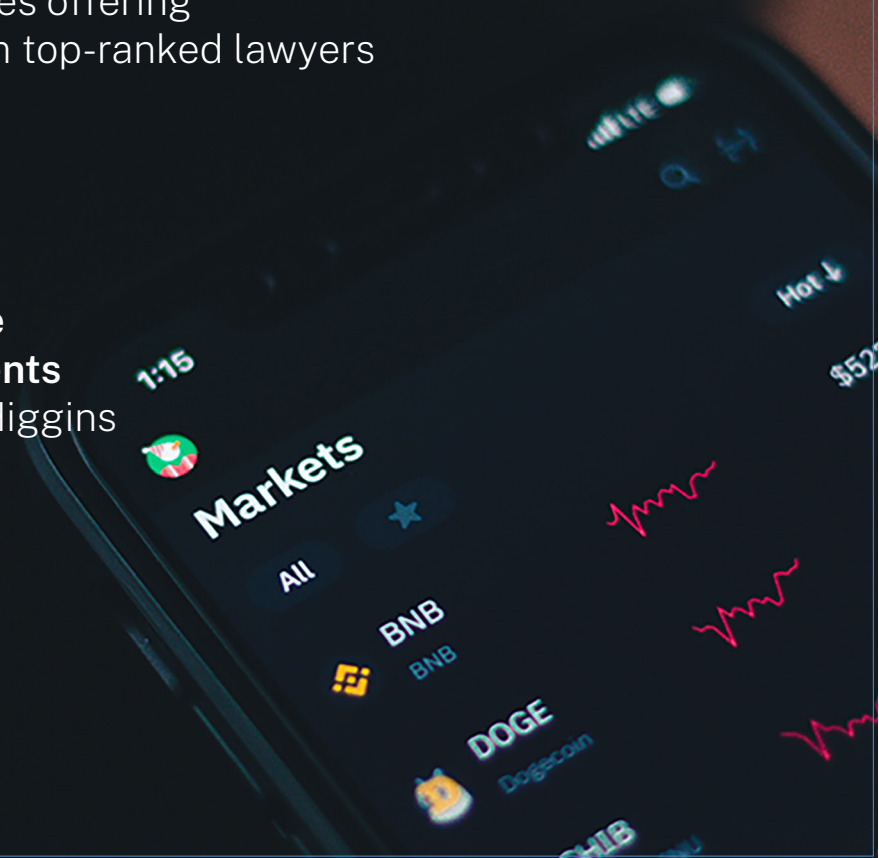
Australia: Law & Practice and Trends & Developments

Steven Pettigrove, Luke Higgins and Luke Misthos
Piper Alderman



AUSTRALIA

Law and Practice

Contributed by:
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Piper Alderman

Contents

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. Its 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 underwent liquidation in a procedure independent from the US Chapter 11 process, in which Australian creditors received 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 in the last 12 months. In particular, there has been increasing interest in the use of stablecoins for payment uses cases and the Reserve Bank of Australia (the *"RBA"*) has committed to further research on a wholesale central bank digital currency (CBDC) to uplift the efficiency, transparency and resilience of wholesale tokenised asset markets through tokenised money and new settlement infrastructure.

Following the successful launch of the Bitcoin and Ether 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. Two local Bitcoin spot funds have launched in the last 12 months and a leading wealth manager has started allocating investor funds to Bitcoin.

In the next 12 months, the Australian government is expected to publish draft legislation for a licensing and custody framework for digital asset platforms. The Australian Securities & 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.

- In 2023, the RBA completed and reported on 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 the Australian Treasury published a joint report in mid-2024 summarising their CBDC research and committing to further work on a wholesale CBDC.
- In 2024, the RBA released a consultation paper outlining a joint research initiative by the RBA and the Digital Finance Cooperative Research Centre (the *"DFCRC"*) to explore how different forms of digital money and associated infrastructure could support the development of wholesale tokenised asset markets in Australia. The ongoing consultation is part of a project dubbed Project Acacia, which builds on the lessons from

the RBA's 2023 CBDC pilot, by focusing on opportunities to uplift the efficiency, transparency and resilience of wholesale markets through tokenised money and new settlement infrastructure. In collaboration with Tennis Australia, AO Metaverse released non-fungible tokens (NFTs) called the AO Art Ball Collection for the Australian Open. These NFTs provided intrinsic value in the form of ground passes to matches and exclusive benefits.

- The largest bank in the country, the Commonwealth Bank of Australia 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 currently unclear 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 currently 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 will be expected to determine when a transaction is final. So far, the determination and timing of ownership has not posed as many judicial questions as the proprietary nature of crypto-assets and whether they can be owned as property.

The question of whether crypto-assets are property in Australia has been addressed in the recent judgment of Re Blockchain Tech Pty Ltd [2024] VSC 690, in which the Supreme Court of Victoria ruled that bitcoin possesses all the attributes of property under common law. Several criminal and insolvency cases have also 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, the Australian 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 distinc-

tion is one of the drivers of the Australian 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 a classification system for different types of crypto-assets. The core question remains whether the crypto-asset in question falls within the existing definition of *"financial product"* under the Corporations Act or is otherwise a form of *"goods"*. Determining this requires analysis on a case-by-case basis. The general definition of *"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 *"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 within the definition of *"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 *"financial product"* and suggests that many activities involving crypto-assets will be *"financial product"*.

Even if a crypto-asset is not *"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 Australian 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 Digital Asset Platform 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 *"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 characteris-

tics are considered when making a determination as to whether the crypto-asset is *"financial product"*.

In 2024, the Australian Treasury consulted 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 consultation was concluded in February 2024 but the timeline for the draft legislation is not yet clear.

2.5 Other Digital Assets

Australia does not have specific arrangements for the regulation of NFTs. The law generally treats NFTs like other non-tangible assets and will permit them to be bought, sold and owned. It will intervene to uphold property rights (including intellectual property rights) and contractual obligations, including those created by smart contracts. In specific 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 misleading and deceptive conduct and unfair contract terms.

The Australian Tax Office (the *"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 and special rules for CGT and exemptions may become relevant in these circumstances.

2.6 Use of Digital Assets in Payment

The Australian government has only recognised digital currencies as a lawful form of payment 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 Australian 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. In prior versions of INFO 225, ASIC took the view that peer-to-peer digital currency transfers do not involve a regulated non-cash payment facility due to a lack of third-party intermediation.

It is unclear whether they maintain this view. Furthermore, if a business is facilitating payments in digital currencies between parties, it may be providing a non-cash payment facility and so it will 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;
- the potential taxation implications of using crypto-assets as collateral; and
- whether the Personal Property Securities Act 2009 extends to security arrangements involving crypto-assets.

To date, there is limited case law or regulatory guidance in Australia specifically addressing these issues, although a superior court has recognised bitcoin as property for the first time. It should therefore be 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. A legally enforceable smart contract must meet all of the traditional elements of a binding contract, including the intention 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 only exist 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.

It also remains to be seen whether an Australian court will follow the United States Court of Appeal decision in Van Loon v OFAC that a smart contract is ownerless, may be entered into unilaterally and is operator-less.

4. Blockchain Regulation

4.1 Regulatory Regime

4.1.1 Regulatory Overview

There are no specific 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. There is therefore 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 *"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 *"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 *"financial product"*, the business will still be providing *"non-cash payment facility"* and will be required to

hold an AFSL unless it can fall within an exemption. In a recent case, a digital wallet was found to be *"non-cash payment facility"* although there may be grounds to distinguish between the regulatory treatment of custodial and non-custodial wallets.

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 Australian government is currently pursuing various reforms intended to modernise the country's financial system and payment system, including introducing a licensing and custody framework for digital assets and broader payment licensing reform aimed at regulating stablecoins as stored value facilities and pass through wallets. It is therefore anticipated 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 *"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 therefore required to hold an AFSL. The same applies to a person *"arranging"* for another to deal in or issue *"financial product"*.

ASIC's current version of INFO 225 sets out factors to help persons dealing in crypto-assets determine whether the crypto-asset is *"financial product"* and encourages persons to *"seek professional advice"* on the 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.

In December 2024, ASIC released a draft update to INFO 225 alongside Consultation Paper 381 (CP 381) to provide insight into ASIC's interpretation of how existing laws apply to crypto-assets and related businesses. The proposed changes to INFO 225 include:

- introducing 13 worked examples explaining existing laws and their application to hypothetical scenarios;
- providing guidance with respect to exchange tokens, asset referenced tokens, staking services, NFTs, memecoins, digital wallets and yield-bearing stablecoins;
- adding consideration of the design and distribution obligations;
- considering whether a cryptocurrency exchange may be providing financial market infrastructure;

- expanding on good practice guidance to fund operators providing exposure to digital assets; and
- addressing applications for relief and the issuance of no-action letters.

The final version of the updated INFO 225 is expected to be published by mid-2025.

Separately, 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 decentralised finance (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 legal recognition of DAOs, the proposal has not been taken up by the Australian government to date and there is no case law to date dealing with legal capacity or liability of DAOs.

The Australian 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 will 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 will be regulated as a new class of *"financial product"* and will be called *"digital asset facility"*. Issuers and those arranging or dealing in *"digital asset facilities"*, such as brokers, arrangers, agents, market makers and advisers, will all be required to hold an AFSL and comply with financial services laws.

4.1.3 Marketing

If a crypto-asset is *"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 *"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 has 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 exchanges (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 (the *"FATF"*) in relation to virtual assets. The AML/CTF Act currently 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) (the *"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 Australian government has implemented reforms to the AML/CTF regime (slated to commence on 31 March 2026), which expand the scope of AML/CTF regulation in relation to digital currencies to cover virtual assets more broadly, including:

- exchanges between one or more virtual assets;
- the transfer of virtual assets on behalf of a customer;
- the safekeeping of virtual assets; and
- the provision of designated services in relation to the sale of virtual assets (eg, initial coin offerings (ICOs)).

4.1.5 Change in Control

Digital asset 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. From 31 March 2026, a firm's money laundering reporting officer must be a resident of Australia.

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.

4.1.7 Other Regulatory Requirements

In April 2022, the Australian 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 is expected to consult on the prudential treatment of crypto-assets in the near future.

4.2 Regulated Firms/Funds With Exposure to Digital Assets

There are three legislative guidance instruments from ASIC that specifically apply to the custody of crypto-assets: INFO 225, *"Response to submissions on CP 343 Crypto-assets as underlying assets for ETPs and other investment products"* (REP 705) and *"Regulatory Guide: Funds management and custodial services: Holding assets"* (RG 133).

Part E of the current version of INFO 225 sets out ASIC's expectations of responsible entities of registered funds when investing in 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 RG 133. For example, REP 705 clarifies that the good practice guidelines set out in the current version of INFO 225 are not legal requirements and that responsible entities of registered schemes will not be required to engage an Australian domiciled custodian.

RG 133 was updated in December 2024 to formally extend the regulator's minimum standards for asset holders to the custody of financial product crypto-assets and asset holders for managed funds. RG 133 explains how AFSL obligations apply to regulated entities in relation to the holding of assets in general and sets out minimum custody standards. The applies to licence holders and sets minimum standards which they are expected to apply to sub-custodians of crypto-assets.

4.3 Regulatory Sandbox

There is no specific regulatory sandbox geared towards blockchain-based projects in Australia although the Australian government has announced plans to review the scope of the Enhanced Regulatory Sandbox to support fintech and digital asset innovation better.

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

The ASIC Innovation Hub assesses applications to use the ASIC 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 currently unlikely to satisfy the criteria to utilise the ASIC Sandbox.

The RBA and the DFCRC's Project Acacia will collaborate with selected industry participants to run practical experiments and develop and test prototypes for settlement of wholesale tokenised asset markets using a wholesale CBDC.

4.4 International Standards

In line with the FATF recommendations, the Australian government has expanded the AML/CTF regime to cover a wider range of virtual asset-related activities. The regime now includes conversion between different virtual assets, transfer, safekeeping services in relation to virtual assets and the provision of designated services related to the sale of virtual assets (eg, ICOs).

A critical aspect of the reform is the shift from regulating *"digital currencies"* to *"virtual assets"*, including broader coverage of stablecoins and NFTs. The reforms also include the introduction of the travel rule for *"virtual asset"* transfers and the extension of international funds transfer reporting requirements to *"virtual assets"*.

4.5 Regulatory Bodies

The regulatory bodies that are most relevant for blockchain and crypto-asset businesses in Australia 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 *"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 (the *"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 position 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 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 of Taxation submitted its report to the Australian government on 23 February 2024. The Australian government published the report in March 2025 but adopted a cautious approach and proposed further guidance for taxpayers but not legislation or broader reforms directed at fostering the digital asset sector. The Australian government accepted and endorsed these recommendations.

4.6 Self-Regulatory Organisations

The Digital Economy Council of Australia is a representative organisation for the blockchain and cryptocurrency industry. It represents blockchain businesses and market participants and 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.

4.7 Other Government Initiatives

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

The National Blockchain 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 Australian government did not continue the National Blockchain Roadmap, although it has recently reiterated its intention to develop an innovative digital asset industry in Australia.

The previous Australian government also ran a Senate Inquiry into Digital Currency in 2015 and established 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 (the *"Committee"*) 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 Australian government in legislative proposals and consultations.

5. Disputes

5.1 Judicial Decisions and Litigation

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

- In ASIC v Web3 Ventures Pty Ltd [2025] FCAFC 58, the Full Federal Court allowed a cross-appeal brought by Web3 Ventures Pty Ltd, trading as Block Earner, holding that its fixed-yield *"Earner"* product did not constitute *"financial product"* under the Corporations Act. As a result, Block Earner was not

required to hold an AFSL to offer the product to consumers and did not contravene the Corporations Act. The decision marked a significant shift from the Federal Court's earlier ruling, which had found that the *"Earner"* product required licensing as a managed investment scheme and financial investment product. The decision provides important clarity on a number of key legal principles relevant to the financial services licensing regime in Australia and could influence developments in this area in other common law countries. ASIC has made an application seeking leave to appeal the Full Court decision to the High Court of Australia.

- 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 was scheduled for appeal hearing in August 2024. As of May 2025, the Federal Court has not yet decided the appeal.
- 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"*. ASIC's allegation that the wallet and the underlying blockchain ought to be grouped together was rejected by the court although it was accepted by ASIC and BPS that the product involved a non-cash payment facility. ASIC prevailed at first instance except in respect of a limited period in which BPS was appointed as a corporate authorised representative of a licence holder. ASIC successfully appealed the judgment on the grounds that BPS could not rely on the corporate authorised representative defence as it did not act as a representative of the licensee as a matter of fact. The Full Federal Court found that BPS had little to do with the issuing of the product.
- In ASIC v Bit Trade Pty Ltd [2024] FCA 953, the Federal Court found that Bit Trade, the Australian arm of global crypto exchange Kraken, breached design and distribution obligations under the Corporations Act by offering a margin extension product to retail customers without preparing a target market determination first. The Federal Court ordered Kraken to pay a penalty of AUD8 million.

There are also several cases considering the nature of crypto-assets, including the following.

- Re Blockchain Tech Pty Ltd [2024] VSC 690 is the first superior decision by an Australian court holding that crypto-assets possess all the characteristics of property. Attiwill J also referenced Federal Court Justice Ian Jackman's speech *"Is Cryptocurrency Property?"*, in which his honour argued that cryptocurrency can be recognised as property in the form of a chose in action.
- 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 INFO 225. However, ASIC has not yet provided any definitive guidance on whether it considers one or more cryptocurrencies to be *"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 distributed ledger technology (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 increased scrutiny of crypto-asset offerings that mimic *"financial products"* and services. Its 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 defined the target market for the products too widely. The stop orders issued against single crypto-asset funds suggest that ASIC may take the view that cryptocurrency investments are only potentially suitable for retail investors with a very high-risk tolerance.

AUSTRAC has previously taken action to refuse, cancel or suspend a DCE registration in a limited number of cases, which it published on its website. AUSTRAC has not publicly specified the reasons for these actions but they have correlated with the insolvency of these exchanges. In more recent times, AUSTRAC has imposed stricter compliance requirements on cryptocurrency ATMs and taken steps to cancel the DCE registration of at least one operator.

6. Tax

6.1 Tax Regime

The ATO has released non-binding web-based guidance on how the existing tax regime applies to certain crypto-asset dealings as well as cryp-

to-asset specific taxation rulings. There is a dearth of case law concerning the taxation of crypto-assets in Australia.

However, 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;
- what crypto-asset dealings may or may not constitute a CGT disposal or event;
- the application of potential CGT exemptions, including the personal use asset exemption;
- the calculation of CGT asset cost bases;
- the taxation implications of crypto-asset exchange failures and creditor claims denominated in crypto-assets; 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 has been asked to consider what legislative changes are necessary to Australia's taxation regime to accommodate digital assets. Following a broad-based public consultation, the Board of Taxation submitted its report to the Australian government on 23 February 2024. It advocated a cautious approach as blockchain technology is still in its *"infancy"*. On 21 March 2025, the Australian government issued its response to the Board of Taxation, acknowledging its report and endorsing its recommendation to issue further guidance to taxpayers. However, it added that it considered bespoke legislation was not required for the time being.

7. Sustainability

7.1 ESG/Sustainable Finance Requirements

The Australian government has not issued any specific laws or regulations in relation to the environmental implications of blockchain technology, including proof of work blockchains. However, a number of companies continue to experiment with the use of blockchain technology, such as biodiversity credits, for the purpose of securing environmental goals.

8. Data Privacy and Protection

8.1 Data Privacy

Australia's legal regime for the protection of data privacy is covered by the federal Privacy Act 1988 (Cth) (the *"Privacy Act"*). Some states in Australia have their own privacy laws. Recent changes to the Privacy Act seek to emulate aspects of the EU's General Data Protection Regulation (the *"GDPR"*) and align Australia with international standards.

The Privacy Act currently 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 Privacy Act also applies to reporting entities (including DCEs) under AML/CTF laws, regardless of the turnover threshold. Reforms to the Privacy Act aim 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 (the *"APPs"*) also form part of the Privacy Act. The APPs impose obligations on the collection, use, disclosure, retention and destruction of personal information, which entities caught under the Privacy Act need to comply with.

The Privacy and Other Legislation Amendment Act 2024 (Cth) implements the first tranche of reforms to the Privacy Act. Most provisions took effect in December 2024, except for the tort of serious invasions of privacy and certain provisions on automated decision-making. The key reforms include:

- a new tort for serious invasions of privacy;
- expanded enforcement powers for the Office of the Australian Information Commissioner (the *"OAIC"*)
- mandatory updates to privacy policies to address the use of automated decision-making;
- *"whitelist"* approach for overseas disclosures to *"safe jurisdictions"*;
- mandatory technical and organisational security measures to protect information from misuse, interference and loss;
- a new criminal offence of doxxing; and
- enhanced data breach declarations requiring organisations to provide detailed information on breaches, including affected data and mitigation steps to improve transparency and response efforts.

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. This poses challenges where on-chain information, such as transaction records linked to a wallet address, can be linked to an identifiable person.

Entities that use or provide blockchain-based products or services therefore need to craft their privacy policies carefully and ensure robust data security procedures. 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.

Trends and Developments

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Piper Alderman

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. Its 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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Introduction

Australia has a vibrant crypto and blockchain ecosystem. A number of home-grown cryptocurrency exchanges, start-ups and Web3 companies are leading the way in their respective fields. There is also growing interest in the use of stablecoins for payments and the tokenisation of financial and real-world assets.

There are currently no tailored laws or regulations governing the use of blockchain and crypto-asset-related services in Australia, except for obligations in relation to anti-money laundering and counter-terrorism financing (AML/CTF). The Australian government is taking steps to regulate the sector, by preparing new legislation and increasing the enforcement of existing laws, particularly in relation to crypto products that exhibit similar features to traditional financial products. The Australian government has notably committed to introducing a licensing framework for crypto-asset custodians as part of broader reforms aimed at modernising Australia's financial system.

Current regulatory environment

While there are not yet any specific laws regulating the blockchain and crypto industries in Australia, the following laws may apply to blockchain and crypto-assets:

- the Corporations Act 2001 (Cth), including a requirement to hold an Australian Financial Services Licence (AFSL) where a crypto-asset is a financial product;
- the Anti-Money Laundering and Counter-Terrorism Finance Act 2006 (Cth) (the *"AML/CTF Act"*)
- the National Consumer Credit Protection Act 2009 (Cth);
- the Australian Securities and Investments Commission Act 2001 (Cth);
- the Payment Systems (Regulation) Act 1998 (Cth) (the *"PSRA"*) and
- the Australian Consumer Law.

The existing regimes have limitations. For example, there is currently substantial uncertainty as to whether some crypto-assets are financial products. The AML/CTF Act currently only applies to crypto on/off ramps (so-called digital currency exchanges or DCEs). However, the scope of the AML/CTF Act has been expanded following amendments passed in November 2024.

Current taxation regime

While the existing taxation laws in Australia do not specifically cater to blockchain and digital assets, the following laws may impose tax obligations on cryptocurrency dealings:

- the Income Tax Assessment Act 1997 (Cth) and the Income Tax Assessment Act 1936 (Cth);
- the A New Tax System (Goods and Services Tax) Act 1999 (Cth);
- the Fringe Benefits Tax Assessment Act 1986 (Cth); and
- the State-based payroll tax, stamp duty and land tax regimes.

Given the lack of bespoke laws for blockchain and digital assets, the Australian Taxation Office (the *"ATO"*) has released tax rulings and non-binding public guidance, including:

- Taxation Determination TD 2014/25 *"Income tax: is bitcoin a 'foreign currency' for the purposes of Division 775 of the Income Tax Assessment Act 1997?"*;
- Taxation Determination TD 2014/26 *"Income tax: is bitcoin a 'CGT asset' for the purposes*

of subsection 108-5 (1) of the Income Tax Assessment Act 1997?";
- Taxation Determination TD 2014/27 *"Income tax: is bitcoin trading stock for the purposes of subsection 70-10 (1) of the Income Tax Assessment Act 1997?"*;
- Taxation Determination TD 2014/28 *"Fringe benefits tax: is the provision of bitcoin by an employer to an employee in respect of their employment a property fringe benefit for the purposes of subsection 136 (1) of the Fringe Benefits Tax Assessment Act 1986?"*;
- non-binding web guidance for Australian small businesses on how to deal with crypto-assets;
- non-binding web guidance for individuals engaging in a broad range of crypto-asset activities, including specific guidance involving gift cards and gambling;
- non-binding web guidance on goods and services tax (GST) on certain digital currency interactions; and
- various edited versions of private advices by the ATO regarding the treatment of taxpayer-specific digital asset interactions.

In recent years, the ATO has also been more aggressive in its revenue collection across all sectors, launching comprehensive risk reviews and audits of businesses and individuals operating in the sector. The ATO has also engaged in private rulings or test cases regarding the application of the existing laws to blockchain and digital assets.

Proposed regulatory reforms

Proposed CASSPr licensing regime

In 2022, the Australian government proposed and conducted consultations for a regime to license crypto-asset secondary service providers (CASSPrs). This proposal followed recommendations in a Senate report regarding Australia as a financial and technology centre, with a primary focus on enhancing consumer protection.

Following an election in May 2022, the new Australian government chose not to pursue the CASSPRs proposal, although it remains relevant to the ongoing legislative efforts.

Token mapping consultation in 2023

In February 2023, the Australian Treasury released the Token Mapping Consultation Paper, which aimed to build a shared understanding of crypto-assets in Australia. The Australian government intended this *"token mapping exercise"* to assist regulators and policymakers in formulating appropriate regulations for the crypto-asset industry.

The Consultation Paper set out to define some of the key concepts relating to blockchain and crypto technology and adopted a broad concept called the *"functional perimeter"* as the basis for Australia's financial services regulatory regime. This concept is tied to the general definition of *"financial product"* in the Corporations Act. *"financial product"* is defined as a facility through which a person makes a financial investment, manages financial risk or makes non-cash payments.

The Consultation Paper approached the task of regulating crypto-assets from first principles but with an implicit view of defining many crypto-asset-related services into the existing financial services regime.

Digital Assets (Market Regulation) Bill 2023

In March 2023, Australian Senator Andrew Bragg introduced a private member's bill in the Senate proposing to regulate crypto-asset exchanges, custodians and stablecoin issuers. The Digital

Assets (Market Regulation) Bill 2023 (Cth) (the *"Digital Assets Bill"*) built on an earlier draft published by Senator Bragg for comment by the public in September 2022.

The Digital Assets Bill echoed the earlier CASSPrs consultation while also borrowing certain definitions and concepts from the EU's Markets in Crypto-Asset Regulation. While the Digital Assets Bill was not taken up by the Australian government, it nevertheless represents an evolution in the legislative thought process and discussion.

Digital asset platforms consultation

In October 2023, the Australian Treasury unveiled a comprehensive Proposal Paper on Regulating Digital Asset Platforms by establishing a custody and licensing framework.

The heart of the proposal involves the licensing of *"digital asset platforms"*, being *"multi-function platform that holds assets for customers"*. These platforms will be required to obtain an AFSL and comply with existing financial services laws and specific tailored obligations if they exceed certain asset holding thresholds:

- AUD1,500 for an individual; or
- AUD5 million in aggregate holdings.

Under the proposal, digital asset platforms will be regulated as a new class of financial product called *"digital asset facility"*. Issuers and those arranging or dealing in digital asset facilities, such as brokers, arrangers, agents, market makers and advisers, will all be required to hold an AFSL and comply with financial services laws.

The Australian Treasury says this regulatory approach is well established and reliable in mitigating risks associated with businesses holding and managing client assets. The Australian Treasury believes this approach is much easier to implement than a standalone regulatory regime. The exposure draft legislation based on the proposal is expected to be released in 2025. If the legislation is passed, the Australian Treasury has proposed a 12-month transition period to allow industry participants to obtain a licence.

Broader financial infrastructure and payments reform

In December 2022, the Australian government proposed reforms to strengthen Australia's payments system and the financial market infrastructure, including a custody and licensing framework for crypto service providers. The proposed reforms are in line with the Australian Treasury's objective to *"embrace new economic opportunities"* while responding to *"future challenges"*.

As part of this reform, the Australian Treasury has published a Strategic Plan for Australia's Payment System (the *"Strategic Plan"*), which contemplates that the Australian government will continue to explore the policy rationale for a central bank digital currency (CBDC) in Australia. The Australian government has also consulted on changes to the PSRA, giving the Treasurer and the Reserve Bank of Australia (the *"RBA"*) new powers to regulate new and emerging payment systems.

Furthermore, it has proposed a new payments licensing framework aimed at regulating a wider range of payment functions, which includes the issuance of payment stablecoins as a type of stored value facility.

The Australian government has also expressed concern regarding deficiencies in clearing and settlement infrastructure and indicated an inten-

tion to expand its powers to facilitate competition. These concerns stem from reviews previously undertaken by the Council of Financial Regulators, infrastructure outages affecting the Australia Securities Exchange and the failure of its high-profile project to replace its existing clearing and settlement infrastructure with a distributed ledger technology-based solution.

CBDCs and stablecoin legislation

In August 2023, the RBA and the Digital Finance Cooperative Research Centre released their final report on a pilot project to test potential use cases for a retail CBDC (the *"eAUD"*). The pilot project received a bumper response, with over 140 use case proposals submitted and 15 use cases ultimately selected. The selected use cases deployed a CBDC in a range of scenarios, including carbon trading, bond and FX settlement, livestock auctions, Web3 commerce, construction payments and invoice factoring. In addition to piloting a CBDC, the project also offered an opportunity to trial a range of innovative use cases for blockchain technology.

The final report identified several ways in which the Australian payments system could benefit from a CBDC, including enhanced automation through smart contracts and interoperability. The report also identified legal and regulatory obstacles to implementing a CBDC, primarily related to the legal treatment of digital assets. Participants also raised concerns regarding taxation issues and the applicability of the AML/CTF Act.

In September 2024, the RBA announced a commitment to prioritising research and development on wholesale digital money and infrastructure, with a focus on a wholesale CBDC. The RBA and the Australian Treasury published a joint report reviewing their CBDC research and outlining a three-year plan for digital money development.

The Australian government is continuing consultations on proposed stablecoin legislation at the time of writing. The RBA has identified the potential of stablecoins to contribute to providing better services for Australian households and businesses. Two of Australia's four major banks have minted their own stablecoins (the AUDN in the case of NAB and the A$DC in the case of ANZ) and conducted pilot transactions. A number of other fintechs and start-ups have launched stablecoin products, with a number focusing on their usage for cross-border payments.

Expansion of the AML/CTF regime

In November 2024, the Australian Parliament passed the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024. The Bill introduced significant reforms to tackle financial crime and has three primary objectives:

- to expand the AML/CTF regime to additional high-risk services (known as *"tranche 2"* entities) including real estate professionals, lawyers, dealers in precious stones, metals and products, conveyancers, accountants and trust and company service providers;
- to modernise regulation of digital currency, virtual assets and payment technologies; and
- to simplify and clarify the AML/CTF regime to enhance flexibility, reduce regulatory impacts and support businesses in detecting and preventing financial crime.

The reforms align with the requirements of the Financial Action Task Force by expanding the AML/CTF regime to cover a wider range of virtual asset-related activities, including conversion between different virtual assets, transfer, safekeeping services in relation to virtual assets and the provision of financial services related to the offer and/or sale of a virtual asset (eg, initial coin

offerings or ICOs). A critical aspect of the reform is a shift from regulating *"digital currencies"* to *"virtual assets"*, including broader coverage of stablecoins and non-fungible tokens (NFTs). The reforms introduce a travel rule for *"virtual asset"* transfers and extend international funds transfer reporting requirements to *"virtual assets"*.

Taxation reform

In early 2022, the previous Australian government established a framework for a review to be undertaken by the Board of Taxation regarding the taxation of digital asset dealings in Australia. An extensive consultation process was commenced by the Board of Taxation, which delivered its report to the Australian government in February 2024.

The Australian government published the report in March 2025 but adopted a cautious approach and proposed further guidance for taxpayers but not legislation or broader reforms directed at fostering the digital asset sector. The Australian government accepted and endorsed these recommendations.

In 2023, the Australian government passed legislation to clarify the tax treatment of Bitcoin following El Salvador's decision to recognise it as legal tender (which has since been rescinded). Under the legislation, Bitcoin will continue to be treated as digital currency and taxpayers will not be able to benefit from any preferential tax elections for foreign currency in relation to Bitcoin. The legislation also excludes CBDCs from the definition of *"digital currency"* so that they benefit from the same tax treatment as foreign currency.

The Australian Securities & Investments Commission's enforcement focus and actions

Australian Securities & Investments Commission Corporate Plan 2023-2027

In August 2023, the Australian Securities & Investments Commission (ASIC) published its annual Corporate Plan, a four-year strategic plan outlining ASIC's priorities. In recognising that emerging technology and products are quickly transforming the financial landscape, ASIC included crypto-assets as one of its core strategic projects. Their actions will include:

- supporting the development of an effective regulatory framework focused on consumer protection and market integrity following the consultation by the Australian Treasury;
- supervising and assessing product disclosure statements, target market determinations and outcomes for retail investors of major crypto offerings within its jurisdiction;
- taking stronger enforcement action to protect consumers from harms associated with crypto-assets, including those that mimic traditional financial products but seek to circumvent regulation and offerings within its jurisdiction that involve misleading promotion of high-risk investments or inadequate risk disclosures;
- monitoring the regulatory model for exchange-traded products with underlying crypto investments;
- raising public awareness of the risks inherent in crypto-assets and decentralised finance (DeFi); and
- working with domestic and international peers to monitor risks, develop co-ordinated responses to issues and develop international policy regarding crypto-assets and DeFi.

While ASIC has removed *"misconduct involving high-risk products including crypto-assets"*

from its list of enforcement priorities in recent years, crypto-assets remain an area of focus for ASIC, which has continued to reiterate its willingness to *"test the regulatory perimeter"* by taking enforcement action against crypto-asset-related offerings.

Enhanced enforcement against crypto-asset offerings

ASIC's recent enforcement activity reflects its increased scrutiny of crypto-asset offerings that allegedly mimic financial products and services. The deputy chair of ASIC has repeatedly warned that *"simply because a product hinges on a crypto-asset does not mean it falls outside financial services law"*. This stance was reinforced by enforcement proceedings initiated by ASIC in 2022 and 2023 against Qoin, Block Earner, Kraken and Finder Wallet. In each case, ASIC alleged that the crypto company provided unlicensed financial services.

Similar to the United States' Securities and Exchange Commission, ASIC's enforcement actions against crypto-asset-related offerings have had mixed results in court.

- The Federal Court held in favour of ASIC in the Qoin proceeding, with Qoin conceding that the Qoin wallet constituted a non-cash payment facility. However, importantly, ASIC's argument that the underlying blockchain was a financial product was rejected. ASIC successfully appealed the decision on an unrelated point of law.
- In the Finder case, ASIC failed to prove that Finder's yield product was a debenture. ASIC has appealed the case and it remains under appeal at the time of writing.
- In the Kraken case, ASIC was successful in establishing that the exchange had failed to issue a target market determination in respect of its margin extension product which the Court held was a credit facility for the purposes of *"design and distribution obligations"*.
- After a partial win at first instance by ASIC, the Full Federal Court overturned a Federal Court decision, finding that Block Earner's fixed yield *"Earner"* product was not a managed investment scheme or financial investment product under Part 7.1 of the Corporations Act. As a result, Block Earner was not required to hold an AFSL to offer the product to consumers and did not contravene the Corporations Act. The Full Federal Court found the Earner product was an investment loan product. It focused on the key product terms and disclosure and found that users did not acquire a right to returns generated by Block Earner using their funds. The decision provides important clarity on a number of key legal principles relevant to the financial services licensing regime in Australia and could influence other common law countries. ASIC has sought leave to appeal the decision to the High Court of Australia.

In April 2023, ASIC cancelled the derivatives licence held by Binance's Australian business. Binance decided to surrender the licence following a review by ASIC of its financial services business, including its classification of retail and wholesale clients. The cancellation followed charges issued by the US Commodities Futures Trading Commission against Binance and specific senior executives. Most recently, ASIC has issued proceedings in the Federal Court against Binance's Australian derivatives arm, arguing that over 500 retail clients of the business were denied important consumer protections after being misclassified as wholesale clients.

Conclusion

Australia continues to be a vibrant innovation hub for blockchain and digital assets. It is estimated that around a quarter of Australians own digital assets and Australians are typically quick to adopt new forms of technology and innovation. Meanwhile, Australia has many homegrown start-ups and a strong investment appetite in the blockchain and Web3 industry.

The Australian government has committed to reforms intended to modernise Australia's financial system, including in relation to payments and the introduction of a licensing and custody regime for digital assets platforms. These reforms are also expected to create a regulatory framework for stablecoins. While the details of these reforms and the timeline for implementation are yet to be defined, blockchain and digital assets appear set to become an established part of the licensing and regulatory regime in the near future. Actions by ASIC are helping to generate a body of domestic case law referring to international case law, with the courts showing a sophisticated understanding of cryptocurrencies.

Given Australia's status as an open economy with a robust regulatory framework and rule of law, these reforms are likely to drive more innovation onshore and encourage Australia's continued growth as a hub for fintech and blockchain technology as we enter the Web3 era.

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