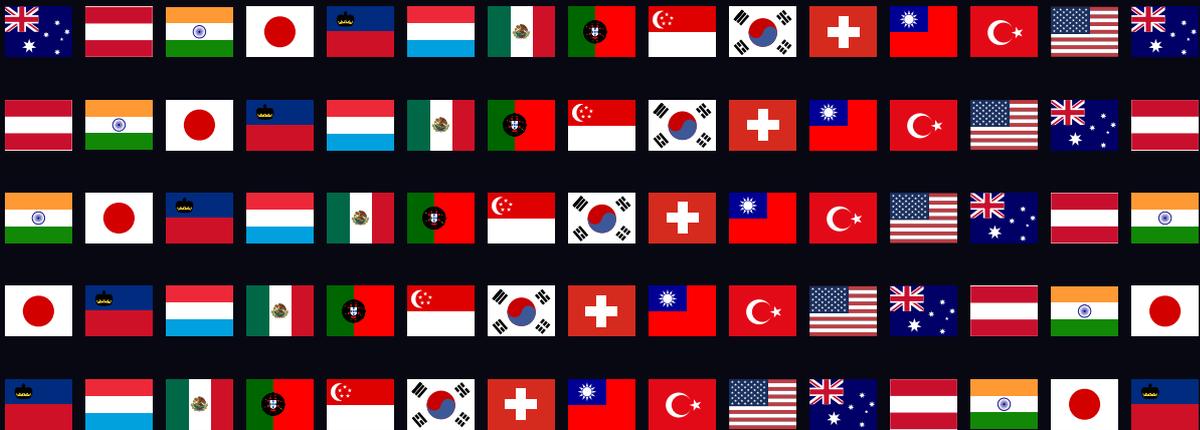


# CRYPTOASSETS & BLOCKCHAIN

## Australia



# Cryptoassets & Blockchain

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Quick reference guide enabling side-by-side comparison of local insights, including into the legal and regulatory framework; use of cryptoassets for investment, financing, trading and payments; cryptocurrency mining; blockchain and other distributed ledger technologies; and recent trends.

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## GENERAL LEGAL AND REGULATORY FRAMEWORK

### Legal framework

What legal framework governs cryptoassets? Is there specific legislation governing cryptoassets and businesses transacting with cryptoassets?

There is no present legal framework governing cryptoassets in Australia. However, following a report delivered by the Senate Select Committee on Australia as a Technology and Financial Centre in October 2021 (the Senate Report), digital asset regulation will be developed in the next 12 months. At present, the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the AML/CTF Act) defines 'digital currency' as:

- a digital representation of value that:
  - functions as a medium of exchange, a store of economic value or a unit of account;
  - is not issued by or under the authority of a government body;
  - is interchangeable with money and may be used as consideration; and
  - is generally available to members of the public; or
- a means of exchange or digital process or crediting declared to be digital currency under the AML/CTF Rules (which are subsidiary legislative instruments made under the AML/CTF Act).

The AML/CTF Rules may be updated by the chief executive officer of the Australian Transaction Reports and Analysis Centre (AUSTRAC) and does not require Parliament to change underlying legislation. Where a business wishes to offer a service of converting fiat currency to cryptocurrency, it is providing a designated service under the AML/CTF Act and must be registered as a digital currency exchange (DCE) with AUSTRAC, unless an exemption applies. This is expected to expand to capture conversion services from crypto to crypto in future. The Senate Report has recommended that a market licence be introduced for digital currency exchange businesses and that recommendation is likely to be accepted and implemented.

Cryptotokens that represent an asset or facilitate a payment can be a financial product under the Corporations Act 2001 (Cth) (the Corporations Act), but bitcoin and ethereum are not recognised as financial products.

The A New Tax System (Goods and Services Tax) Act 1999 (the GST Act) also contains a separate definition of 'digital currency', which, despite being different to the definition in the AML/CTF Act, operates the same in practice. The GST Act defines 'digital currency' as a digital unit of value that:

- is designed to be fungible;
- can be provided as consideration for a supply;
- is generally available to members of the public without any substantial restrictions on their use as consideration;
- is not denominated in any country's currency;
- does not have a value that depends on or is derived from the value of anything else; and
- does not give an entitlement to receive, or to direct the supply of, a particular thing or things, unless the entitlement is incidental to:
  - holding the digital units of value; or
  - using the digital units of value as consideration; but does not include:
    - money; or
    - something that, if supplied, is a financial supply for other reasons than supplying the digital units of value to which the above apply.

*Law stated - 26 October 2021*

## Government policy

How would you describe the government's general approach to the regulation of cryptoassets in your jurisdiction?

Generally, the Australian government has a broad, technology-neutral approach to regulating cryptoassets and the recent Senate Report shows considerable support for cryptoassets. In the absence of specific legislation affecting cryptoassets, the key regulatory bodies are:

- the Australian Securities and Investments Commission (ASIC);
- the Australian Tax Office (ATO); and
- AUSTRAC.

These bodies regulate the activities of the cryptoasset industry by providing general guidance, such as ASIC's 'Initial coin offerings and cryptoassets' (INFO 225) and its Consultation Paper 343 into cryptoassets as underlying assets for exchange-traded products and other investment products; the ATO's 'tax treatment of cryptocurrencies' page ; and via the AML/CTF Act and the AML/CTF Rules in the case of AUSTRAC. The Senate Report recommends that:

- licensing should be introduced for digital currency exchange operators and custody providers;
- changes should be made to the capital gains tax treatment of some digital asset transactions; and
- a new company structure should be considered to permit decentralised autonomous organisations to be recognised in Australia.

*Law stated - 26 October 2021*

## Regulatory authorities

Which government authorities regulate cryptoassets and businesses transacting with cryptoassets?

ASIC regulates activities involving cryptoassets to the extent that such activities meet the definition of a 'financial product' under the Corporations Act. ASIC has received delegated powers from the Australian Competition and Consumer Commission that enable it to take action under the Australian Consumer Law (contained in Schedule 2 of the Competition and Consumer Act 2010) for misleading or deceptive conduct in the marketing or selling of cryptoassets.

*Law stated - 26 October 2021*

## Regulatory penalties

What penalties can regulators impose for violations relating to cryptoassets?

No penalties apply specifically to cryptoassets. Specific violations are dealt with under the respective legislation, for example:

- violations relating to tax offences are set out in the Tax Administration Act 1953 administered by the ATO;
- the dealing of unlicensed financial products is a breach of the Corporations Act; and

- crimes involving the use of a cryptoasset (other than money laundering or drug-related crimes, which fall under federal law) are dealt with under state-based criminal legislation.

*Law stated - 26 October 2021*

## Court jurisdiction

### Which courts have jurisdiction over disputes involving cryptoassets?

No particular court has exclusive jurisdiction over disputes involving cryptoassets. Different state courts have jurisdiction depending on the amount in dispute.

*Law stated - 26 October 2021*

## Legal status of cryptocurrency

### Is it legal to own or possess cryptocurrency, use cryptocurrency in commercial transactions and exchange cryptocurrency for local fiat currency in your jurisdiction?

Yes. However, businesses providing fiat-to-crypto exchange services must be registered with AUSTRAC as a DCE under the AML/CTF Act. There is no explicit restriction on consumers to use exchanges registered or not registered with AUSTRAC. If the Senate Report recommendation into digital currency exchange licensing is accepted and implemented, digital currency exchanges will require licensing to operate.

*Law stated - 26 October 2021*

## Fiat currencies

### What fiat currencies are commonly used in your jurisdiction?

The Australian dollar is the most commonly used fiat currency in Australia. Australian banknotes are legal tender throughout Australia via the Reserve Bank Act 1959 (Cth) and the Currency Act 1965 (Cth). While other fiat currencies such as the US dollar, British pound sterling, the New Zealand dollar and the Japanese yen are all commonly used, they are not legal tender in Australia.

*Law stated - 26 October 2021*

## Industry associations

### What are the leading industry associations addressing legal and policy issues relating to cryptoassets?

The leading industry associations in Australia are Blockchain Australia and Fintech Australia . The Australian government also formed a National Blockchain Roadmap group in February 2020.

*Law stated - 26 October 2021*

## CRYPTOASSETS FOR INVESTMENT AND FINANCING

## Regulatory threshold

What attributes do the regulators consider in determining whether a cryptoasset is subject to regulation under the laws in your jurisdiction?

The starting point for a business is to determine whether the cryptoasset is a financial product under the Corporations Act 2001 (Cth) (the Corporations Act), and whether issuing cryptoassets will require the business to hold an Australian financial services licence (AFSL). 'Financial products' are defined under the Corporations Act as a facility through which, or through the acquisition of which, a person does one or more of the following:

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

The Corporations Act also deems specific things to be financial products, including:

- securities;
- derivatives; and
- interests in a managed investment scheme (MIS).

A business offering to deal in cryptoassets, such as by operating a financial market or providing custodial services, must obtain an AFSL if it deals with, give advice in relation to or provide intermediary services for cryptoassets that constitute financial products.

If a business offers payment services, such as accepting cryptoassets and making payments, assuming the cryptoasset is not a financial product, the business will still likely be providing a 'non-cash payment facility' under section 763D of the Corporations Act and must hold an AFSL with a non-cash payment facility authorisation unless an exemption applies. Digital wallets in Australia that are under the control of a third party (ie, custodial wallets) will most likely constitute non-cash payment facilities. The non-cash payment facility concept in Australia is broadly analogous to the e-money licence system in the European Union.

*Law stated - 26 October 2021*

## Investor classification

How are investors in cryptoassets classified and treated differently?

There are no prescribed classes of investors specific to cryptoassets.

Where a cryptoasset is a financial product, Corporations Act disclosure exemptions apply to limit the disclosure to investors that meet the definitions of a professional investor, sophisticated investor or wholesale investor. A sophisticated investor is one that controls A\$2.5 million in assets or who has two consecutive years of over A\$250,000 of income. A retail investor is anyone below this threshold.

*Law stated - 26 October 2021*

## Initial coin offerings

What rules and restrictions govern the conduct of, and investment in, initial coin offerings (ICOs)?

In May 2019, the Australian Securities and Investments Commission (ASIC) updated its INFO 225 guidance relating to ICOs. ASIC considers that there is a high risk that most ICOs or token generation events will be considered an MIS, requiring the token-issuing entity to hold an AFSL to conduct the token sale. ASIC expects entities that do not have an AFSL to justify that their token or ICO does not involve a regulated financial product.

Unfortunately, ASIC's updated INFO 225 still does not provide clear guidance on how entities could undertake a token offering that is compliant with the obligations of an MIS operated by an AFSL holder relating to matters such as custody or secondary trading of cryptoassets or provide any categories of cryptotokens that are not considered to be financial products. There have been no reported decisions on whether this reversal of the onus of proof is valid, but cooperation with regulators is highly recommended. ASIC's Consultation Paper 343 (CP343) considers cryptoassets as underlying assets for exchange-traded products and other investment products. CP343 indicates an awareness of the shortcomings of INFO 225 and discusses obligations for responsible entities on matters such as custody, risk management and disclosure. The results of the consultation are expected to provide further guidance in this area.

*Law stated - 26 October 2021*

## Security token offerings

What rules and restrictions govern the conduct of, and investment in, security token offerings (STOs)?

An STO would typically involve the offer of a token that is considered a financial product under the Corporations Act. On that basis, the issuer must hold an AFSL with suitable authorisation to make the offer and comply with the disclosure requirements under the Corporations Act, including the requirement that any retail investor must be given a regulated disclosure document, such as a prospectus or product disclosure statement (PDS). Further requirements may apply depending on the nature of the financial product being offered.

*Law stated - 26 October 2021*

## Stablecoins

What rules and restrictions govern the issue of, and investment in, stablecoins?

A stablecoin may be regulated under ASIC's guidelines set out in INFO 225 if it satisfies the definition of a financial product. If it does, the issuer must obtain an AFSL and the Corporations Act provisions relating to financial products will apply.

Most stablecoins, by their design, derive their value from being backed by a different, more stable asset. This may result in the stablecoin being classified as a derivative under the Corporations Act, which is a financial product.

In March 2021, the Council of Financial Regulators (CFR) established the CFR Stablecoin Working Group. The objectives and powers of the CFR Stablecoin Working Group are to:

- identify key stablecoin arrangements that could affect Australian consumers;
- assess how these arrangements would be treated under existing regulations;
- propose recommendations to address emerging regulatory gaps for consideration by the CFR and the

government; and

- provide a forum to share information and coordinate Australian contributions on international work related to stablecoins.

*Law stated - 26 October 2021*

## **Airdrops**

### **Are cryptoassets distributed by airdrop treated differently than other types of offering mechanisms?**

Cryptoassets distributed by airdrop are generally not treated differently than other types of offering mechanisms. Issuers planning to distribute a cryptoasset via an airdrop must consider the same Corporations Act requirements as any other issuer.

From a recipient's tax perspective, the Australian Tax Office is yet to publish binding guidance on cryptoasset airdrops, although website guidance is available. According to the Australian Tax Office website, the money value of an established token received through an airdrop is the ordinary income of the recipient at the time it is derived. In the authors' view, airdrops received through an ICO are acquired for valuable consideration and, therefore, the airdrop is not, of itself, a taxable event.

*Law stated - 26 October 2021*

## **Advertising and marketing**

### **What laws and regulations govern the advertising and marketing of cryptoassets used for investment and financing?**

Whenever a person publishes advertisements in Australia that are reasonably likely to induce Australians to acquire a financial service or product, that person is conducting financial and related activities. Marketing a product itself may constitute a regulated activity, which requires the person to hold an AFSL, unless an exemption applies.

The Australian Securities and Investment Commission Act 2001 (Cth) provides for consumer protection surrounding the advertising and marketing of financial services, including prohibitions on misleading or deceptive conduct.

Advertisements and promotional material in respect of credit products must comply with the National Consumer Credit Protection Act 2009, including displaying a credit licensee's Australian credit licence number on all printed advertisements.

Advertisements and promotional material in respect of financial products must comply with the Corporations Act, which means the following must be included:

- the identity of the issuer or seller;
- confirmation that a PDS is available; and
- a statement that a person should consider the PDS in deciding whether to acquire or to continue to hold a product.

Whether or not a financial product is involved, promoters must always ensure that the marketing of a cryptoasset does not involve misleading or deceptive conduct or statements that contravene the Australian Consumer Law.

*Law stated - 26 October 2021*

## Trading restrictions

Are investors in an ICO/STO/stablecoin subject to any restrictions on their trading after the initial offering?

While contractual restrictions between investors and issuers regarding trading after a token issue are common, there are no specific legislative or regulatory restrictions that apply to investors trading such assets at present.

*Law stated - 26 October 2021*

## Crowdfunding

How are crowdfunding and cryptoasset offerings treated differently under the law?

Equity crowdfunding and cryptoasset offerings are treated very differently in Australia. The regulatory framework for equity-based crowd-sourced funding (CSF) was expanded by the Corporations Amendment (Crowd-Sourced Funding for Proprietary Companies) Act 2018 (Cth), allowing eligible proprietary companies to raise up to A\$5 million using CSF.

CSF offers can be made only by 'eligible' CSF companies, including:

- unlisted public companies with less than:
- proprietary companies that:

Other obligations applicable to CSF offers include:

- an investor cap of A\$10,000 per year per company for retail investors;
- a CSF offer document containing minimum information; and
- a five-day cooling-off period for investors.

In addition, CSF offers must be made by the holder of an AFSL or on a platform operated by a CSF intermediary holding an AFSL. The latter is the more common approach.

Cryptoasset offers that are the offer of a financial product are regulated in accordance with the Corporations Act and not the CSF provisions, and issues of cryptoassets that are not financial products are not presently regulated, other than in relation to misleading and deceptive conduct.

*Law stated - 26 October 2021*

## Transfer agents and share registrars

What laws and regulations govern cryptoasset transfer agents and share registrars?

There is no specific legislation or set of regulations relating to cryptoassets, beyond that applying to the operators of non-cash payment facilities or remittance providers under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the AML/CTF Act). There is also no specific recognition or prohibition of any blockchain-based share registries.

*Law stated - 26 October 2021*

## Anti-money laundering and know-your-customer compliance

What anti-money laundering (AML) and know-your-customer (KYC) requirements and guidelines apply to the offering of cryptoassets?

The AML/CTF Act imposes obligations regarding the prevention of money laundering and terrorism financing on entities providing 'designated services'. Entities that operate a crypto-to-fiat digital currency exchange business are deemed to be providing a designated service and must:

- be registered as a digital currency exchange with the Australian Transaction Reports and Analysis Centre (AUSTRAC);
- conduct KYC identification;
- monitor and report, including reporting transfers of physical currency of A\$10,000 or more and international funds transfer instructions;
- provide suspicious matter reporting;
- have a compliant AML/CTF programme in place; and
- submit annual compliance certificates to AUSTRAC.

A report delivered by the Senate Select Committee on Australia as a Technology and Financial Centre in October 2021 recommended that the government clarify that the regulations are fit for purpose, but not so stringent as to stifle innovation. This recommendation has not yet been adopted.

*Law stated - 26 October 2021*

## Sanctions and Financial Action Task Force compliance

What laws and regulations apply in the context of cryptoassets to enforce government sanctions, anti-terrorism financing principles, and Financial Action Task Force (FATF) standards?

Australia has adopted the FATF Asia-Pacific Group mutual evaluation process, which analyses the effectiveness of AML/CTF measures. The AML/CTF Act is the relevant legislation that governs any contraventions of AML/CTF regulations.

*Law stated - 26 October 2021*

## CRYPTOASSET TRADING

### Fiat currency transactions

What rules and restrictions govern the exchange of fiat currency and cryptoassets?

Other than customary tax obligations and criminal law prohibitions, no specific restrictions govern the exchange of fiat currency and cryptoassets for users. However, businesses providing the service of exchanging fiat currency for cryptoassets and vice versa must comply with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the AML/CTF Act) and be registered as a digital currency exchange (DCE). A report delivered by the Senate Select Committee on Australia as a Technology and Financial Centre in October 2021 (the Senate Report) recommended that a licensing regime be introduced to apply to DCEs, which is likely to be approved.

*Law stated - 26 October 2021*

## Exchanges and secondary markets

Where are investors allowed to trade cryptoassets? How are exchanges, alternative trading systems and secondary markets for cryptoassets regulated?

There are no regulatory restrictions on where investors can trade cryptoassets. Exchanges, alternative trading systems and secondary markets for cryptoassets are regulated under the AML/CTF Act. If a cryptoasset is a financial product, an exchange or market operator will require an Australian financial services licence (AFSL) with suitable authorisation. The Senate Report recommended that a market licensing regime for DCEs be introduced with key requirements relating to capital adequacy, auditing size and responsible person tests.

*Law stated - 26 October 2021*

## Custody

How are cryptoasset custodians regulated?

Cryptoasset custodians are regulated only if the cryptoassets stored by the custodian are financial products, in which case the custodian must obtain an AFSL with appropriate custodial and depository authorisation in accordance with the Australian Securities and Investments Commission's (ASIC) Regulatory Guide 1 and Regulatory Guide 133. The Senate Report recommends that a custody or depository regime for digital assets be introduced.

*Law stated - 26 October 2021*

## Broker-dealers

How are cryptoasset broker-dealers regulated?

Businesses that give advice, deal or provide other intermediary services for cryptoassets that are financial products must hold an AFSL. ASIC requires that broker-dealers interacting with these types of cryptoassets must comply with Regulatory Guide 36 (Licensing: Financial product advice and dealing).

Where the broker-dealer is exchanging cryptoassets for fiat currency (whether Australian or not) or vice versa in the course of carrying on a DCE business, the broker-dealer must also apply for registration as a DCE with Australian Transaction Reports and Analysis Centre (AUSTRAC) and prepare a compliant AML/CTF programme.

*Law stated - 26 October 2021*

## Decentralised exchanges

What is the legal status of decentralised cryptoasset exchanges?

There is no specific legislation or set of regulations that considers the legal status of decentralised exchanges. Depending on the characteristics of the decentralised exchange, it is likely to still be captured under the AML/CTF Act as a DCE that is required to be registered with AUSTRAC. Decentralised exchanges are likely, in the authors' opinion, to be unincorporated associations, as would almost all decentralised autonomous organisations (DAOs). The Senate Report has recommended that a new company structure be introduced for DAOs in Australia.

*Law stated - 26 October 2021*

## Peer-to-peer exchanges

### What is the legal status of peer-to-peer (person-to-person) transfers of cryptoassets?

There is no prohibition on the exchange of cryptoassets on a peer-to-peer basis. The operation of a peer-to-peer DCE will require an AFSL if the tokens on the exchange are financial products. An exchange business must also be registered as a DCE if it facilitates the transfer of cryptoassets for fiat currency.

*Law stated - 26 October 2021*

## Trading with anonymous parties

### Does the law permit trading cryptoassets with anonymous parties?

For individuals, there are no explicit legislative or regulatory restrictions on trading cryptoassets with anonymous parties.

Businesses operating a digital currency exchange or providing another designated service must comply with the AML/CTF Act, which includes not providing a service to anonymous users. The Senate Report cited that 455 DCEs are registered in Australia.

*Law stated - 26 October 2021*

## Foreign exchanges

### Are foreign cryptocurrency exchanges subject to your jurisdiction's laws and regulations governing cryptoasset exchanges?

The AML/CTF Act provisions relating to digital currency exchanges apply to anyone that provides a digital currency exchange service to users in Australia.

*Law stated - 26 October 2021*

### Under what circumstances may a citizen of your jurisdiction lawfully exchange cryptoassets on a foreign exchange?

Subject to criminal laws prohibiting citizens from engaging in money laundering, terrorist financing or other criminal acts, there are no restrictions on a citizen participating in the lawful exchange of cryptoassets on a foreign exchange.

*Law stated - 26 October 2021*

## Taxes

### Do any tax liabilities arise in the exchange of cryptoassets (for both other cryptoassets and fiat currencies)?

Yes. The Australian Tax Office's current views on the taxation treatment of cryptocurrencies are contained in four 2014 taxation determinations.

In Taxation Determination 2014/25, the Commissioner expressed the view that bitcoin is not foreign currency for

Division 775 of the Income Tax Assessment Act 1997 (ITAA).

In Taxation Determination 2014/26, the Commissioner expressed the view that bitcoin is a capital gains tax (CGT) asset for subsection 108-5(1) of the ITAA. This determination also sets out the following.

- The disposal of bitcoin may give rise to a CGT if the capital proceeds exceed the cost base of the tokens. Capital proceeds can include the market value of other property given for disposal. There appears to be a widespread misapprehension in the marketplace that disposals of various cryptocurrencies do not give rise to gains and that only conversion to fiat currency crystallises a gain.
- If the first element of the cost base of a token is A\$10,000 or less and the token qualifies as a personal use asset, the gain may be disregarded under the 'personal use exemption'.
- In some cases, a gain on the disposal of cryptocurrency may be on income account (in which case the capital gain is disregarded). Taxpayers should refer to Taxation Ruling TR 92/3 for guidance on these points.

In Taxation Determination 2014/27, the Commissioner expresses the view that bitcoin held for sale or exchange in the ordinary course of a business is trading stock for the purposes of Division 70. This determination also sets out that:

- bitcoin held by a taxpayer carrying on a business of mining and selling bitcoin or a taxpayer carrying on a bitcoin exchange business will be considered trading stock; and
- bitcoin received as a method of payment by any business that sells goods will also be considered to be trading stock of that business where the bitcoin is held for sale or exchange in the ordinary course of business.

In Taxation Determination 2014/28, the Commissioner expressed the view that the provision of bitcoin by an employer to an employee in respect of his or her employment is a property fringe benefit for the Fringe Benefits Tax Assessment Act 1986 (the FBT Act). The determination also sets out that:

- bitcoin is 'any kind of property other than tangible property' for FBT Act purposes and the provision of it to an employee is, therefore, a property fringe benefit; and
- bitcoin will not be a property fringe benefit if it is salary or wages.

Fringe benefits are taxed differently than salary or wages.

The Senate Report has recommended that a CGT event relating to cryptoassets should only occur where there is 'a clearly definable capital gain or loss'.

*Law stated - 26 October 2021*

## **CRYPTOASSETS USED FOR PAYMENTS**

### **Government-recognised assets**

Has the government recognised any cryptoassets as a lawful form of payment or issued its own cryptoassets?

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

The Reserve Bank of Australia (RBA) is interested in whether there is a case for a central bank digital currency (CBDC) in Australia and has partnered with the Commonwealth Bank, the National Australia Bank, the investment group Perpetual and the US software company ConsenSys to issue a proof-of-concept CBDC for wholesale settlement on an ethereum-based distributed ledger technology platform. The final report on the project is expected to be released in late 2021. IP Australia is also piloting the use of cryptoassets to represent ownership of trademarks for proof of provenance. A report delivered by the Senate Select Committee on Australia as a Technology and Financial Centre in October 2021 has recommended that the Treasury lead a policy review into the viability of an Australian CBDC.

*Law stated - 26 October 2021*

## Bitcoin

### Does Bitcoin have any special status among cryptoassets?

The first version of INFO 225 included an express statement that the Australian Securities and Investments Commission (ASIC) did not consider bitcoin to be a financial product. This statement was subsequently removed in later updates to INFO 225 without explanation.

In December 2014, ASIC provided its submission to a Senate inquiry into digital currency, stating that, after analysing how a transfer of bitcoin is made using standard bitcoin wallets, a bitcoin wallet is not a non-cash payment facility merely because it facilitates the direct movement of digital currencies from one person's wallet to another, with the person initiating the payment retaining ultimate control of the funds (presumably the lack of a third party or intermediary having any control over or role to play in relation to the funds being transferred from one wallet to another was implicit in this submission).

Bitcoin is the only cryptoasset to have been recognised in this way as not being a financial product. In Consultation Paper 343, ASIC suggests that in relation to exchange-traded products, a new asset kind should be considered to classify cryptoassets such as bitcoin and ether, given their features and characteristics.

*Law stated - 26 October 2021*

## Banks and other financial institutions

### Do any banks or other financial institutions allow cryptocurrency accounts?

No Australian banks offer accounts denominated in cryptocurrency. However, financial institutions such as Visa and Mastercard have taken steps to introduce crypto-linked cards in Australia to encourage more convenient spending of cryptoassets. The RBA is currently trialling the implementation of a domestic wholesale CBDC.

*Law stated - 26 October 2021*

## CRYPTOCURRENCY MINING

### Legal status

#### What is the legal status of cryptocurrency mining activities?

Cryptocurrency mining is not a regulated activity unless it facilitates a clearing and settlement process for cryptoassets that are financial products in accordance with the Corporations Act 2001 (Cth) (the Corporations Act). While the Australian Securities and Investments Commission (ASIC) refers to this potential in INFO 225, there have been no real-world examples of this provided.

*Law stated - 26 October 2021*

## **Government views**

### **What views have been expressed by government officials regarding cryptocurrency mining?**

The government has shown concern about the carbon emissions associated with cryptocurrency mining, particularly due to the intense electrical power required for it. As a response, a report delivered by the Senate Select Committee on Australia as a Technology and Financial Centre in October 2021 recommended a 10 per cent company tax discount if a cryptocurrency mining company sources its own renewable energy for mining activities.

*Law stated - 26 October 2021*

## **Cryptocurrency mining licences**

### **Are any licences required to engage in cryptocurrency mining?**

Licences are required only if the mining facilitates a clearing and settlement process for cryptoassets that are financial products under the Corporations Act. ASIC refers miners to Regulatory Guide 211 (clearing and settlement facilities: Australian and overseas operators). At present, Regulatory Guide 211 provides no specific guidance for cryptoasset mining. It is unclear how mining activity in a proof-of-work system can be understood in the context of clearing and settlement under the Corporations Act.

*Law stated - 26 October 2021*

## **Taxes**

### **How is the acquisition of cryptocurrency by cryptocurrency mining taxed?**

Determining tax for cryptocurrency mining is dependent on whether the mining is undertaken as a hobby, for speculative purposes or as part of carrying on a business.

Hobby miners typically participate in mining to encourage the growth of a blockchain non-commercially. However, the tax implications will turn on whether the taxpayer was acquiring cryptocurrency for the sake of having it or to experience the process and participate in the community, possibly with an incidental thought that the cryptoasset may become more valuable in future. This contrasts with an intent to make profit, such as speculating on the value of the cryptocurrency or using the cryptocurrency as a long-term store of value, such as personal savings that are intended to be protected from inflation.

While true hobby mining is difficult to establish, doing so will result in the cryptoassets obtained by mining being considered as personal use assets, which are not taxable. Cryptoassets obtained by an individual undertaking mining for speculative gain, but not in accordance with a business, will generally be assessed as a capital gain or loss.

Where cryptoassets are obtained through mining in the course of carrying on a business, those assets will be treated as trading stock of a business and assessed as taxable income when sold.

*Law stated - 26 October 2021*

## **BLOCKCHAIN AND OTHER DISTRIBUTED LEDGER TECHNOLOGIES**

## Node licensing

### Are any licences required to operate a blockchain/DLT node?

There are no specific licences required to operate or use a DLT or blockchain node at this time.

The Australian Securities and Investments Commission's (ASIC) INFO 219 sets out a general guidance assessment tool for businesses to identify whether an Australian financial services licence (AFSL) may be required for DLT-based services. This tool includes a set of factors to be considered by the business, such as which DLT platform is being used and how the DLT will be run, how it works, how it uses data and how it affects others.

INFO 219 does not provide any definitive guidance.

*Law stated - 26 October 2021*

## Restrictions on node operations

### Is the operation of a blockchain/DLT node subject to any restrictions?

There are no specific restrictions, but where operating a node facilitates a clearing and settlement process for cryptoassets that are financial products under the Corporations Act 2001 (Cth), the operator must obtain an AFSL and comply with ASIC Regulatory Guide 211.

*Law stated - 26 October 2021*

## DAO liabilities

### What legal liabilities do the participants in a decentralised autonomous organisation (DAO) have?

This depends on the nature of the DAO, but generally, the relationship between participants of a DAO can be described as analogous to a 'general partnership', putting all stakeholders at risk of being liable for any debts or legal actions that the DAO may face. This is subject to the implementation of a recommendation made by the Senate Select Committee on Australia as a Technology and Financial Centre in its report delivered in October 2021 (the Senate Report) for a DAO-based company structure to be introduced.

*Law stated - 26 October 2021*

## DAO assets

### Who owns the assets of a DAO?

This depends on the nature and characteristics of the specific DAO. However, because most well-known DAOs are established to be completely self-owned and autonomous, legal ownership of any assets controlled by a DAO is unclear. Currently, there is no specific legal framework dealing with this in Australia. Where a DAO acquires an asset through the operation of a smart contract on the network, a court may consider who enabled the smart contract to self-execute, which entities have a controlling portion of interests in the DAO and who has day-to-day control and possession over the asset. This is subject to the implementation of a recommendation made by the Senate Report for a DAO-based company structure to be introduced.

*Law stated - 26 October 2021*

## Open source

### Is DLT based on open-source protocols or software treated differently under the law than private DLT?

No. The government and regulators take a strict substance-over-form and technology-neutral approach to implementing and applying the law. Regardless of whether the DLT is open-sourced or private and permissioned, the actual use of the application built on that DLT will inform the regulatory response to that DLT.

From an intellectual property perspective, DLT based on open-source protocols will typically include expectations or licence terms requiring that any modifications or additions built into the open-source code be subject to the same open-source licence as the code used.

*Law stated - 26 October 2021*

## Smart contracts

### Are smart contracts legally enforceable?

Whether smart contracts are legally enforceable depends on the form of the particular smart contract. The nomenclature '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 'smart contract law'.

A legally enforceable smart contract must meet all the traditional elements of a binding contract, including intent to create legal relations, consideration and offer, and acceptance. Any duress, undue influence or unconscionable dealings could render a smart contract void at law, despite being potentially unstoppable digitally. Of particular concern are the purest 'the code is the contract' smart contracts, lacking any notification of their terms that exist only as machine-readable code. The identity of the other party to the contract, or whether that party can enter into the contract, is usually unknown. Australian courts have yet to address a smart contract dispute of this kind.

*Law stated - 26 October 2021*

## Patents

### Can blockchain/DLT technology be patented?

Yes, subject to the same requirements as any other patent application.

*Law stated - 26 October 2021*

## UPDATE AND TRENDS

### Recent developments

Are there any emerging trends, notable rulings or hot topics related to cryptoassets or blockchain in your jurisdiction?

The non-fungible token space has seen tremendous growth in Australia in the past year and the government has been very active in signalling support for cryptoassets, with the Senate Select Committee on Financial Technology and Regulatory Technology issuing a final report in October 2021, which recommended that, among other things:

- a new market licensing regime be introduced for digital currency exchanges, including capital adequacy, auditing and responsible person tests;
- a new custody or depository regime be introduced for digital assets with minimum safeguards;
- the government conduct a token-mapping exercise to determine the best way to characterise the various types of digital asset tokens in Australia;
- a new decentralised autonomous organisation company structure be considered;
- AML/CTF regulations be reviewed to ensure they are fit for purpose;
- capital gains tax laws be amended so only a clearly definable capital gains or loss event for cryptocurrency can be caught;
- cryptocurrency miners using renewable energy be given a 10 per cent company tax discount; and
- the Treasury lead a policy review of the viability of a retail central bank digital currency in Australia.

At the time of writing, there are many cryptoasset exchange-traded fund (ETF) applications awaiting consideration for the possible public trading of a bitcoin ETF. The Australian Securities and Investments Commission (ASIC) is continuing its consultation under Consultation Paper 343 in respect of cryptoassets backing exchange-traded products and other investment products.

*Law stated - 26 October 2021*

## Jurisdictions

	<b>Australia</b>	Piper Alderman
	<b>Austria</b>	Schoenherr
	<b>India</b>	AZB & Partners
	<b>Japan</b>	Mori Hamada & Matsumoto
	<b>Liechtenstein</b>	Niedermüller Rechtsanwälte   Attorneys at Law
	<b>Luxembourg</b>	CMS Luxembourg
	<b>Mexico</b>	Ramos, Ripoll & Schuster
	<b>Portugal</b>	Morais Leitão, Galvão Teles, Soares da Silva & Associados
	<b>Singapore</b>	RHTLaw Asia LLP
	<b>South Korea</b>	Bae, Kim & Lee LLC
	<b>Switzerland</b>	MLL Meyerlustenberger Lachenal Froriep Ltd
	<b>Taiwan</b>	Lee and Li Attorneys at Law
	<b>Turkey</b>	SRP Legal
	<b>USA</b>	Nelson Mullins Riley & Scarborough LLP