The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Australia: Blockchain

This country-specific Q&A provides an overview of the legal framework and key issues surrounding blockchain law in Australia.

This Q&A is part of the global guide to Blockchain.

For a full list of jurisdictional Q&As visit **http://www.inhouselawyer.co.uk/index.php/practice-areas/blockchain/**

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1. **Please provide a high-level overview of the blockchain market in your jurisdiction. In what business or public sectors are you seeing blockchain or other distributed ledger technologies being adopted? What are the key applications of these technologies in your jurisdiction, and what is the state of development of the market?**

   The Commonwealth Government of Australia (Government) has generally been supportive of driving innovation in the technology sector and as part of this, there has been sustained attention on blockchain in Australia with a number of leading blockchain initiatives, including industry-specific trials in financial services, energy, agriculture and the public sector.

   In the public sector, the Government has considered blockchain application with the Australian Taxation Office (ATO) using blockchain to validate the dealer history of cars

in a hackathon around Luxury Car Tax compliance. The Government's National Disability Insurance Scheme has also experimented with blockchain and the New Payments Platform to create 'smart money' that has the capability of managing insurance payouts, budgeting and trust management.

Fintech businesses have also begun formalising use cases for blockchain such as managing supply chains, making cross-border payments, trading derivatives, managing assets and managing digital currency exchanges. Initial coin offerings (ICOs) have become an alternative method of funding for blockchain or cryptocurrency-related projects.

With respect to platform operation, Australia's primary securities exchange, the Australian Securities Exchange (ASX), has also proposed a new blockchain-based system covering clearing, settlement, asset registration, and other post trade services. This replacement system represents the first mainstream, scaled use of blockchain by any securities exchange globally and is likely to yield valuable insight as policymakers and regulators consider their approach to blockchain in future.

2. **Have there been any notable success stories or failures of applications of these technologies in your jurisdiction?**

There has been general acknowledgement in the Australian blockchain industry that there is significant potential opportunity for the use of blockchain however part of the associated risk has been the high start-up failure rate with reports noting that only 44% of blockchain start-ups survive 120 days beyond funding via an ICO. However, there have many notable applications of blockchain in Australia, generally being pilots and not yet commercialised for mainstream use. Such blockchain implementations are likely to influence the growth and adoption of blockchain in Australia.

- *Clearing and settling:* One of the most prominent is the highly anticipated replacement of the ASX's clearing and settlement process with a blockchain-based system. The ASX is currently in a consultation and development phase and is targeting a March-April 2021 go-live window.
- *Bond issuance:* On 24 August 2018, the International Bank for Reconstruction and

Development (an arm of the World Bank) selected the Commonwealth Bank of Australia (CBA) to arrange for the issue of A$110 million worth of bonds on blockchain, with each bond coined a blockchain operated new debt instrument (BOND-i). The bonds are governed by New South Wales law and are the first bonds to be created, allocated, transferred and managed using blockchain.

- *Private sector projects*: There have been a number of private sector projects that have used blockchain to deliver services to consumers.
    - Three of Australia's four major banks have partnered with IBM and Scentre Group to run an eight week trial managing bank guarantees for retail property leases on blockchain, reducing the issuance period for a bank guarantee from up to a month to approximately the same day.
    - The Tide Foundation launched a blockchain-based protocol that will facilitate the personal data economy by enabling organisations to monetise information stored in their databases while also addressing compliance with current and expected privacy regulation.

AgriDigital, a cloud-based commodity management platform, has been building a digital asset protocol for global agri-commodity supply chains following successful sales of wheat on a blockchain and a pilot in food traceability and supply chain provenance, real-time payments, digital escrows and supply chain finance.

3. **Please outline the principal legislation and the regulators most relevant to the use of blockchain technologies in your jurisdiction. In particular, is there any blockchain-specific legislation or are there any blockchain-specific regulatory frameworks in your jurisdiction, either now or envisaged in the short or mid-term?**

There are currently no specific regulations or legislation dealing with blockchain in Australia. The Australian Securities and Investments Commission (ASIC), Australia's primary corporate, markets, financial services and consumer credit regulator, has reaffirmed the view that Australian legislative obligations and regulatory requirements are technology-neutral and apply irrespective of the mode of technology that is being used to provide a regulated service.

4. **What is the current attitude of the government and of regulators to the use of blockchain technology in your jurisdiction?**

Both the Government and regulators have generally been receptive to fintech and innovation and have sought to improve their understanding of, and engagement with businesses by regularly consulting with industry on proposed regulatory changes. There has been considerable discussion around the opportunities, risks and challenges that have arisen for market participants, customers and regulators. The Government's broader commitment to facilitating growth and innovation within the technology sector has been underpinned by its relatively non-interventionist approach to the regulation of blockchain technology and regulatory and legislative developments have been made to ensure the scope of emerging services is adequately captured within the existing framework. This has included increased fintech specific regulatory guidance to assist businesses in understanding their obligations, amended legislation to bring fintech services providers within the remit of existing regimes, and the introduction of new legislation to provide greater consumer protection (discussed below).

The Government has announced plans to develop a national blockchain roadmap that will focus on a number of policy areas such as regulation, skill building, investment, and international competitiveness and collaboration. As well as this, the Government has invested in positioning Australia at the forefront of the blockchain sector, promising A$100,000 in funding for Australian companies to join Austrade's Mission to New York's premiere blockchain event, Consensus. The Government has previously invested A$700,000 in Australia's Digital Transformation Agency to investigate the use of blockchain for delivering public services like government payments and $350,000 to Standards Australia to lead the development of international blockchain standards through the International Organization for Standardization.

5. **Are there any governmental or regulatory initiatives designed to**

facilitate or encourage the development and use of blockchain technology (for example, a regulatory sandbox)?

While there are no specific initiatives designed to facilitate or encourage the development and use of blockchain, both ASIC and the Australian Transaction Reports and Analysis Centre (AUSTRAC) have established Innovation Hubs designed to assist fintech businesses more broadly in understanding their obligations under Australian law.

The ASIC Innovation Hub is designed to foster innovation that could benefit consumers by helping Australian fintech start-ups navigate the Australian regulatory system. The Innovation Hub provides tailored information and access to informal assistance intended to streamline the AFSL process for innovative fintech start-ups, which could include blockchain-related businesses.

In December 2016, ASIC made certain class orders establishing a fintech licensing exemption and released Regulatory Guide 257, which details ASIC's framework for fintech businesses to test certain financial services, financial products and credit activities without holding an Australian financial services licence (AFSL) or Australian credit licence by relying on the class orders (referred to as the regulatory sandbox). There are strict eligibility requirements for both the type of businesses that can enter the regulatory sandbox and the products and services that qualify for the licensing exemption. There are restrictions on how many persons can be provided with a financial product or service, and caps on the value of the financial products or services which can be provided. Businesses may only rely conditionally on the relief for 12 months.

The framework relating to ASIC's regulatory sandbox has been subject to review. The Government has consulted on draft legislation and regulations outlining an enhanced framework that allows businesses to test a wider range of products and services for a longer period of time. ASIC has also released a consultation paper suggesting that no changes to its existing fintech licensing exemption will be made.

6. Have there been any recent governmental or regulatory reviews or consultations concerning blockchain technology in your jurisdiction and, if so, what are the key takeaways from these?

Data61, the digital research network of Australia's national science agency (CSIRO), partnered with the Australian Computer Society to release a report titled Blockchain 2030: A look at the future of blockchain in Australia (Report). The Report notes that blockchain has grown in popularity and use over the last decade and has been used to create vast opportunity in many sectors across the economy but there are key trends that will impact whether there is mainstream adoption of blockchain.

While blockchain has become more efficient and user-friendly, the Report states that it shows signs of limited scalability. Similarly, while there is great demand for blockchain developers, there is a short supply of talent, which may inhibit blockchain adoption. The Report highlights the opportunities for more transparent and efficient governance methods using blockchain particularly where consumer trust has been eroded in traditional institutions but there are also increased risks associated with scams and illegal activities.

Examining eight scenarios for future adoption of blockchain in Australia, the Report concludes that Australia should leverage its competitive advantage in blockchain with respect to talent and transitioning industry and business. The Report suggests Australia should develop the appropriate skill mix, grow the information technology talent pool, address the blockchain knowledge gap and resolve digital infrastructure bottlenecks. The Report also suggests that the Government should play an active role in regulating the blockchain sector while both the Government and businesses should adopt a rolling strategy approach to implementing blockchain, develop a plan to manage cybersecurity and use research and data to drive decision-making.

The Report's publication follows two earlier reports produced by Data61 for the Government on blockchain use cases for government and industry in Australia. The findings from the three reports will be used to inform the Government's national blockchain strategy (as discussed at section 4 above).

7. Has any official guidance concerning the use of blockchain technology been published in your jurisdiction?

In March 2017, ASIC released an information sheet (INFO 219 Evaluating distributed ledger technology) outlining its approach to the regulatory issues that may arise through the implementation of blockchain technology and solutions. In it, ASIC has reinforced its technology neutral approach to regulation and has re-asserted that businesses considering operating market infrastructure or providing financial or consumer credit services using blockchain will still be subject to the compliance requirements that currently exist under the applicable licensing regimes. This includes the requirement to have the necessary organisational competence, adequate technological resources, and risk-management plans in place. ASIC has provided businesses with the following six questions by which to evaluate whether to use blockchain having regard to those requirements:

1. How will blockchain be used?
2. What blockchain platform is being used?
3. How is blockchain using data?
4. How is blockchain run?
5. How does blockchain work under law?
6. How does blockchain affect others?

While the existing regulatory framework is sufficient to accommodate current implementations of blockchain, as the technology matures, and more case studies emerge in the market, additional regulatory considerations may arise.

8. What is the current approach in your jurisdiction to the treatment of cryptocurrencies for the purposes of financial regulation, anti-money laundering and taxation? In particular, are cryptocurrencies characterised as a currency?

The Government shares a broad commitment to facilitating productivity and economic growth and innovation within the technology and financial services sector and

improving the efficiency and inclusiveness of the financial system over the long term. Though the Government has remained relatively non-interventionist in the cryptocurrency sector, in recent times market regulators have become more engaged with industry developments and have focused on consumer education and issued warnings on the risks of trading and investing in cryptocurrencies. This has happened simultaneously to the sharp rise in the creation and use of cryptocurrencies in Australia in the past few years, with companies such as Synthetix (formerly Havven) and Enosi raising millions through the creation of digital tokens in Australia-based ICOs.

In Australia, cryptocurrencies (also known as virtual assets or digital currencies) refer to digital tokens created from code using blockchain that do not exist physically in the form of notes or coins. The current position in Australian law is that cryptocurrency is to be treated as an asset and not as fiat currency or money. Amendments to existing legislation over the last few years to accommodate increasing use of cryptocurrencies have generally been focused on transactional relationships (ie, issuing and exchanging) rather than on cryptocurrencies themselves. As a result, while cryptocurrencies themselves are not restricted under Australian law, dealings in relation to, or services involving, cryptocurrencies are likely to be captured within existing regulatory regimes.

Financial regulation

A person who carries on a financial services business in Australia must hold an Australian financial services licence (**AFSL**) or be exempt from the requirement to be licensed. Persons or entities dealing with, or providing services involving, cryptocurrencies should consider whether the cryptocurrency constitutes a financial product, which may trigger the licensing requirement as well as other obligations in relation to disclosure, registration and conduct. The definitions of 'financial product' and 'financial service' under the *Corporations Act 2001* (Cth) (**Corporations Act**) are broad, and cover facilities through which a person makes a financial investment, manages a financial risk or makes a non-cash payment. ASIC continues to reiterate its view that cryptocurrencies with similar features to existing financial products will trigger the Australian financial services laws.

ASIC recently updated its regulatory guidance on cryptocurrencies, *INFO 225 Initial coin offerings and crypto-assets* (**INFO 225**) to inform a greater range of crypto-asset participants, including issuers, crypto-asset intermediaries, miners and transaction processors, crypto-asset exchange and trading platforms, crypto-asset payment and

merchant services providers, wallet providers and custody service providers, and consumers. INFO 225 sets out ASIC's approach to determining the legal status of cryptocurrencies, which is dependent on the rights attached to the cryptocurrencies – ASIC has indicated this should be interpreted broadly – as well as their structure. Depending on the circumstances, coins or tokens may constitute interests in managed investment schemes (ie, collective investment vehicles), securities, derivatives, or fall into a category of more generally defined financial products, all of which are subject to the Australian financial services regulatory regime.

An entity that facilitates payments using cryptocurrencies may also be required to hold an AFSL and the operator of a cryptocurrency exchange may be required to hold an Australian market licence if the coins or tokens traded on the exchange constitute financial products.

Marketing

ASIC's recognition that an ICO may involve an offer of financial products has clear implications for the marketing of an ICO. For example, an offer of a financial product to a retail client (with some exceptions) must be accompanied by a regulated disclosure document (eg, a product disclosure statement or a prospectus and a financial services guide) that satisfies the content requirements of the Corporations Act and regulatory guidance published by ASIC. Such a disclosure document must set out prescribed information, including the provider's fee structure, to assist a client to decide whether to acquire the cryptocurrency from the provider. In some instances, the marketing activity itself may cause the ICO to be an offer of a regulated financial product.

Under the Corporations Act, depending on the minimum amount of funds invested per investor and whether the investor is a 'sophisticated investor' or wholesale client, an offer of financial products may not require regulated disclosure.

Cross-border issues

Carrying on a financial services business in Australia will require a foreign financial services provider (**FFSP**) to hold an AFSL, unless relief is granted. Entities, including FFSPs, should note that the Corporations Act may apply to an ICO regardless of whether it was created and offered from Australia or overseas. Currently, Australia has cooperation (passporting) arrangements with regulators in foreign jurisdictions

(including the United States of America and the United Kingdom), which enable FFSPs regulated in those jurisdictions to provide financial services in Australia without holding an AFSL. The passporting relief is currently only available in relation to the provision of services to wholesale clients (i.e. accredited investors), and the FFSP must only provide the services it is authorised to provide in its home jurisdiction. However, ASIC has announced that it will be repealing passport relief for FFSPs, and instead will introduce a new regime which will require FFSPs to apply for a new foreign AFSL. It is expected that the new regime will apply from 31 March 2020. FFSPs relying on passport relief will have 24 months (until 31 March 2022) to transition to a foreign AFSL or satisfy licensing requirements in some other way.

Foreign companies taken to be carrying on a business in Australia, including by issuing cryptocurrency or operating a platform developed using ICO proceeds, may be required to either establish a local presence (ie, register with ASIC and create a branch) or incorporate a subsidiary. Broadly, the greater the level of system, repetition or continuity associated with an entity's business activities in Australia, the greater the likelihood that registration will be required. Generally, a company holding an Australian financial services licence will be carrying on a business in Australia and will trigger the requirement.

Promoters should also be aware that if they wish to market their cryptocurrency to Australian residents, and the coins or tokens are considered a financial product under the Corporations Act, they will not be permitted to market the products unless the requisite licensing and disclosure requirements are met. Generally, a service provider from outside Australia may respond to requests for information and issue products to an Australian resident if the resident makes the first (unsolicited) approach and there has been no conduct on the part of the issuer designed to induce the investor to make contact, or activities that could be misconstrued as the provider inducing the investor to make contact.

Consumer law

Even if an ICO is not regulated under the Corporations Act, it may still be subject to other regulation and laws, including the Australian Consumer Law set out at Schedule 2 to the *Competition and Consumer Act 2010 (Cth)* (**ACL**) relating to the offer of services or products to Australian consumers. The ACL prohibits misleading or deceptive conduct in a range of circumstances including in the context of marketing and

advertising. As such, care must be taken in ICO promotional material to ensure that buyers are not misled or deceived and that the promotional material does not contain false information. In addition, promoters and sellers are prohibited from engaging in unconscionable conduct and must ensure the coins or tokens issued are fit for their intended purpose.

The protections of the ACL are generally reflected in the *Australian Securities and Investments Commission Act 2001 (Cth)* (**ASIC Act**), providing substantially similar protection to investors in financial products or services.

ASIC has also received delegated powers from the Australian Competition and Consumer Commission to enable it to take action against misleading or deceptive conduct in marketing or issuing in ICOs (regardless of whether it involves a financial product). ASIC has indicated misleading or deceptive conduct in relation to ICOs may include:

- using social media to create the appearance of greater levels of public interest;
- creating the appearance of greater levels of buying and selling activity for an ICO or a crypto-asset by engaging in (or arranging for others to engage in) certain trading strategies;
- failing to disclose appropriate information about the ICO; or
- suggesting that the ICO is a regulated product or endorsed by a regulator when it is not.

ASIC has stated that it will use this power to issue further inquiries into ICO issuers and their advisers to identify potentially unlicensed and misleading conduct.

A range of consequences may apply for failing to comply with the ACL or the ASIC Act, including monetary penalties, injunctions, compensatory damages and costs orders.
Anti-money laundering

Cryptocurrencies and tokens were brought within the scope of Australia's anti-money laundering and counter-terrorism financing (**AML/CTF**) regulatory framework as a result of legislative amendments in the *Anti-Money Laundering and Counter-Terrorism Amendment Act 2017* which came into force in April 2018. The legislation was introduced to recognise the movement towards digital currencies becoming a popular

method of payments and the transfer of value in the Australian economy while posing significant money laundering and terrorism financing risks.

Broadly, digital currency exchange (**DCE**) providers are now required to register with the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) in order to operate, with a penalty of up to two years' imprisonment or a fine of up to A$105,000, or both, for failing to register. Registered exchanges will be required to implement know-your-customer processes to adequately verify the identity of their customers, with ongoing obligations to monitor and report suspicious and large transactions. Exchange operators are also required to keep certain records relating to customer identification and transactions for up to seven years.
Bringing DCE providers within the ambit of the AML/CTF framework is intended to help legitimise the use of cryptocurrency while protecting the integrity of the financial system in which it operates.

Recently, the Treasury has released for consultation the exposure draft legislation and accompanying explanatory material to implement an economy-wide cash payment limit of A$10,000 for payment made or accepted by businesses for goods or services (with limited exceptions). As part of the consultation, it has been proposed that reporting entities will generally no longer be required to report transactions above A$10,000 to AUSTRAC except where the transaction is exempt from the cash payment limit legislation. The consultation proposes implementation of this regime from 1 January 2020 and, for reporting entities, 1 January 2021. Breaching the payment limit will result in up to two years' imprisonment and/or a fine of A$25,200.

Notably, payments made in digital currency have been exempted from the cash payment limit regime including payments made only in part in digital currency, so long as the remainder of the payment is below A$10,000. The explanatory material notes that digital currencies have been exempted so as to not stifle innovation in the sector and because the Government has found "little current evidence" that digital currencies have been used to facilitate black economy activities. However, the consultation flags that whether this exemption is appropriate will remain subject to ongoing scrutiny.

Additionally, Australia is a member of the Financial Action Task Force (**FATF**), an intergovernmental organisation that establishes international standards for combating

money laundering and terrorist financing. The FATF recently announced that it plans to strengthen controls over cryptocurrency exchanges to stop digital currencies from facilitating money laundering and related crimes. Among other recommendations, the FATF specifically declared that it wanted crypto-asset participants to reveal the identity of crypto-asset investors, conduct proper due diligence processes and develop risk management programs.

Taxation

The taxation of cryptocurrency in Australia has been an area of much debate, despite recent attempts by the Australian Taxation Office (**ATO**) to clarify the operation of the tax law. For income tax purposes, the ATO views cryptocurrency as an asset that is held or traded (rather than as money or a foreign currency).

Investors and holders of cryptocurrencies

The tax implications for investors, holders and users of cryptocurrency depends upon the intended use of that cryptocurrency. The summary below applies to investors who are Australian residents for tax purposes.

Investors (including funds) in the business of trading cryptocurrencies are likely to be subject to the trading stock provisions, much like a supermarket treats its goods for sale as trading stock. The gain on the sale of cryptocurrencies will be taxable to such investors on "revenue account", and any losses will be deductible on a similar basis.

Otherwise, the ATO has indicated that cryptocurrency will likely be a capital gains tax (**CGT**) asset. The gain on its disposal will be subject to CGT. Capital gains may be discounted under the CGT discount provisions, so long as the investor satisfies the conditions for the discount. Note that the ATO's views on the income tax implications of transactions involving cryptocurrencies is in a state of flux due to the rapid evolution of both cryptocurrency technology and its uses.

Capital losses made on cryptocurrencies which are "personal use" assets are disregarded. This includes cryptocurrencies acquired or kept for personal use or consumption (i.e., to buy goods or services). Capital gains on personal use assets are only disregarded where the asset was acquired for less than A$10,000.

Issuers of cryptocurrencies

Issuance of a token or coin, in the context of an ICO, by an entity that is either an Australian tax resident, or acting through an Australian "permanent establishment", will likely be taxable in Australia. The current corporate tax rate in Australia is either 27.5% or 30%. If the issued coins are characterised as equity for tax purposes, the ICO proceeds should not be taxable to the issuer, but all future returns to the token holders will be treated as dividends.

*Australian Goods and Services Tax (**GST**)*

Supplies and acquisitions of digital currency made from 1 July 2017 are not subject to GST on the basis that they will be input taxed financial supplies. Consequently, suppliers of digital currency will not be required to charge GST on these supplies, and a purchaser would not be entitled to GST refunds (i.e., input tax credits) for these corresponding acquisitions. On the basis that digital currency is a method of payment, as an alternative to money, the normal GST rules apply to the payment or receipt of digital currency for goods and services.

The term "digital currency" in the GST legislation requires that it is a digital unit of value that has all the following characteristics:

- it is fungible and can be provided as payment for any type of purchase;
- it is generally available to the public free of any substantial restrictions;
- it is not denominated in any country's currency;
- the value is not derived from or dependent on anything else; and
- it does not give an entitlement or privileges to receive something else.

Enforcement

The ATO has created a specialist task force to tackle cryptocurrency tax evasion. The ATO also collects bulk records from Australian cryptocurrency designated service providers to conduct data matching to ensure that cryptocurrency users are paying the right amount of tax. With the broader regulatory trend around the globe moving from guidance to enforcement, it is likely that the ATO will also begin enforcing tax liabilities more aggressively.

9. Are there any prohibitions on the use or trading of cryptocurrencies in your jurisdiction?

There are currently no express prohibitions on the use or trading of cryptocurrencies in Australia. However, to the extent that cryptocurrencies are financial products, on-selling or trading financial products fall within the existing regulatory regime.

The Government has passed the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth) (PIP Act) and released the Corporations Amendment (Design and Distribution Obligations and Product Intervention Powers) Regulations 2018, which may impact the way cryptocurrencies are structured and distributed. The PIP Act introduces new design and distribution obligations in relation to financial products, scheduled to commence April 2021, and provides ASIC with temporary product intervention powers where there is a risk of significant consumer detriment. The product intervention powers are currently available for ASIC's use.

The purpose of the new regulations is to ensure that financial products are targeted at the correct category of potential investors. In January, ASIC consulted on the proposed administration of its product intervention power. Though ASIC has been empowered to use this power on a market-wide basis, it is required to consult before making any orders and can only take temporary actions like banning a product or product feature, imposing sale restrictions, or amending product information or choice architecture. ASIC intends to release its final regulatory guidance with respect to its product intervention powers and open consultation on the design and distribution obligations later in late 2019.

10. To what extent have initial coin offerings taken place in your jurisdiction and what has been the attitude of relevant authorities to ICOs?

While the data on ICO activity in Australia is opaque, a number of Australian businesses such as Synthetix (formerly Havven), Power Ledger and CanYa have raised significant

sums of money through ICOs.

As discussed, regulators such as ASIC and AUSTRAC have generally been receptive to fintech and innovation but at the same time, regulators have been active in highlighting the risks of trading and investing in cryptocurrencies particularly in respect of retail consumers. ASIC has referred to ICOs as being “a highly speculative investment” and that “while the potential returns may look attractive, these projects are mostly unregulated and the chance of losing your investment is high”. This approach to issue public statements and warnings to consumers specific to ICOs aligns with the approach of that of many members of the International Organization of Securities Commissions.

The ASX has taken a staunch stance towards cryptocurrency in its recent announcement of plans to crackdown on ICOs to help protect consumers investing in speculative investments. ASX recently compared the increase in investments of cryptocurrency to the tulip crisis in Holland stating that ‘cryptocurrency has been used for fraud right around the world’ and ‘needs to be stopped’.

11. If they are permissible in your jurisdiction, what are the key requirements that an entity would need to comply with when launching an ICO?

Section 8 outlines the key aspects of Australia’s financial services regulatory regime as it relates to the sale of cryptocurrency through an ICO including licensing requirements, marketing requirements, cross border issues and consumer law issues.

Depending on the circumstances, coins or tokens may constitute interests in managed investment schemes (collective investment vehicles), securities, derivatives, or fall into a category of more generally defined financial products, all of which are subject to the Australian financial services regulatory regime.

ASIC has provided high-level guidance to assist in determining whether an ICO may fall within the Australian financial services regulatory framework in the ICO Information

Sheet mentioned above. A summary of ASIC's guidance is provided in the Australian Treasury Issues Paper on Initial Coin Offerings published in January 2019.

12. Is cryptocurrency trading common in your jurisdiction? And what is the attitude of mainstream financial institutions to cryptocurrency trading in your jurisdiction?

Mainstream financial institutions in Australia have largely stayed away from any involvement with cryptocurrency trading citing money laundering and terrorism financing risks. Industry association bodies have raised concerns in recent times of 'de-banking' with banks closing the accounts of a notable number of Australian digital currency exchanges to meet 'compliance and assurance requirements'.

While the ASX has endorsed blockchain with development plans for its own blockchain-based replacement for its equities clearing and settlement operations, the embracing of blockchain does not extend to cryptocurrencies. In August 2019 the exchange released updated compliance guidance regarding cryptocurrency-related activity, stating that such activities raise 'significant legal, regulatory and public policy issues' and its 'concerns regarding cryptocurrency-related activities have been reinforced and amplified'. The ASX's position remains that listing a crypto-currency business will need to satisfy stringent listing requirements.

13. Are there any relevant regulatory restrictions or initiatives concerning tokens and virtual assets other than cryptocurrencies (e.g. trading of tangible property represented by cryptographic tokens)?

There are no regulatory restrictions concerning tokens and other virtual assets. The legal obligations and requirements applicable to any cryptocurrency, token or virtual asset will depend upon the rights which are attached to, and features of, them (as discussed above at section 8).

While Australia has not adopted any specific initiatives concerning tokens, virtual assets or cryptocurrencies, ASIC and AUSTRAC have established initiatives to assist fintech businesses more broadly in understanding their obligations such as setting up innovation hubs (see section 5). Section 15 outlines the co-operation agreements ASIC has entered into with overseas regulators to further understand the approach of fintech businesses in other jurisdictions.

14. Are there any legal or regulatory issues concerning the transfer of title to or the granting of security over tokens and virtual assets?

ASIC has indicated how Australian financial services laws may apply to ICOs as an alternative form of funding. See section 8 as to how the legal status of an ICO may trigger licensing, registration and disclosure requirements if the tokens represent financial products. Regardless of whether a token constitutes a financial product, ICOs and STOs will be subject to ACL restrictions and AML/CTF reporting requirements. Entities engaging in lending activities within the scope of the National Credit Code, as contained in Schedule 1 of the National Consumer Credit Protection Act 2009 (Cth), will need to hold an Australian credit licence or be exempt from the requirement to be licensed. Credit licensees must also comply with a range of obligations including in relation to responsible lending.

Notably, there has been continuous development in the use of blockchain in debt capital market transactions, specifically bond issuances. Blockchain technology is being used to issue debt instruments, so all transactions (including issue, transfer of title and redemption) would be implemented through smart contracts and recorded on the blockchain. Currently, the majority of blockchain issued bonds only mirror off-chain transactions on the on-chain ledger, rather than effecting the transaction using blockchain. The technology generally has not yet not extended to allow for the recordings in the ledger to constitute a transfer of legal title to the bonds and consequently, transactions are executed through an off-chain bond register then replicated on the blockchain.

15. **To what extent are tokens and virtual assets in use in your jurisdiction? Please mention any key initiatives concerning the use of tokens and virtual assets in your jurisdiction.**

While there are no specific initiatives concerning the use of tokens and virtual assets in Australia, both ASIC and AUSTRAC have established innovation hubs to assist fintech businesses in understanding their legal obligations and requirements (see section 5).

Beyond these Innovation Hubs and the fintech licensing exemption, ASIC has engaged with regulators overseas to deepen its understanding on innovation in financial services, including in relation to cryptocurrencies. In particular, ASIC and the United Kingdom's Financial Conduct Authority have signed an Enhanced Cooperation Agreement, which allows the two regulators to, among other things, information-share, refer innovative businesses to each regulator's respective regulatory sandbox, and conduct joint policy work. ASIC currently has such information-sharing or cooperation agreements with regulators in Hong Kong, Singapore, Canada, Kenya and Indonesia. These arrangements facilitate the cross-sharing of information on fintech market trends, encourage referrals of fintech companies and share insights from proofs of concepts and innovation competitions.

Other international initiatives include ASIC's commitment to supporting financial innovation in the interests of consumers by joining the Global Financial Innovation Network (GFIN), which was formally launched in January 2019 by a group of financial regulators across 29 member organisations. The GFIN is dedicated to facilitating regulatory collaboration in a cross-border context and provides more efficient means for innovative businesses to interact with regulators.

In 2019, a group of fintech associations formed the Asia-Pacific FinTech Network, which is designed to facilitate greater collaboration, cooperation and innovation across the region. The network will focus on sectors including RegTech, Blockchain, Payment Systems, Artificial Intelligence and Financial Inclusion and is expected to accelerate fintech development and lower financial costs both domestically and internationally.

ASIC is also a signatory to the IOSCO Multilateral Memorandum of Understanding, which has committed over 100 regulators to mutually assist and cooperate with each

other, particularly in relation to the enforcement of securities laws.

16. **How are smart contracts characterised within your legal framework? Are there any enforceability issues specific to the operation of smart contracts which do not arise in the case of traditional legal contracts?**

Smart contracts (including self-executing contracts) are permitted in Australia under the Electronic Transactions Act 1999 (Cth) (ETA) and the equivalent Australian state and territory legislation. The ETA provides a legal framework to enable electronic commerce to operate in the same manner as paper-based transactions. Under the ETA, self-executing transactions are permitted in Australia, provided that they meet all traditional elements of a legal contract; intention to create legally binding obligations, offer and acceptance, certainty and consideration.

The pre-determined and self-executing form of smart contracts creates difficulties where there is a required element of discretion by either party, particularly relating to dispute mechanisms (eg, arbitration and mediation) and non-deterministic provisions. There has been very little case law on the subject. Self-executing contracts may alter traditional dispute resolution in Australia based on the possibility of self-executing dispute resolution through online dispute resolution platforms.

17. **To what extent are smart contracts in use in your jurisdiction? Please mention any key initiatives concerning the use of smart contracts in your jurisdiction.**

Aside from a small number of pilot phase testing programs, the use of smart contracts has historically been limited to the cryptocurrency sector. This has predominantly occurred through ICOs in which smart contracts are used to automatically mint tokens upon payment. Additionally, they have also been used through numerous cryptocurrency exchanges for order matching and transaction execution.

However, the past year has witnessed an increase in institutional adoption of smart contracts to digitise readily automatable processes. This has primarily taken hold in the financial services sector with multiparty arrangements (for example, issuing bank guarantees or debt instruments through smart contracts). The most prominent implementation of smart contracts in Australia is the ASX's proposed replacement of its clearing and settlement system with a blockchain-based system as discussed above at section 2.

There have also been a number of initiatives and consortia established that aim to develop a framework for the standardisation and regulation of smart contracts (most recently through Australia's national science agency, CSIRO's Data61). However, there is yet to be a widely-adopted framework.

18. Have there been any governmental or regulatory enforcement actions concerning blockchain in your jurisdiction?

There have not been any governmental or regulatory enforcement actions taken specifically against the use of blockchain in Australia. However, regulators have moved from observational positions to enforcement with respect to fintech solutions more generally (some of which may involve the use of blockchain). This has predominantly occurred in the context of ICOs where ASIC has undertaken multiple actions against issuers where they have attempted to offer a regulated product outside of the financial services framework or have materially failed to appropriately disclose important information to retail investors.

While not specifically related to blockchain, the ATO has established a special taskforce that actively investigates potential tax evasion arrangements that are facilitated through blockchain-based cryptocurrency transactions. Aligning with this approach, AUSTRAC requires digital currency exchanges to register, monitor and report on transactions occurring on these platforms. However, at the time of writing, no public information has been released regarding any enforcement actions that may have been taken against entities by these agencies.

As discussed above, ASIC has released extensive and regularly updated guidance on

ICOs and blockchain implementations, which outline how arrangements may be treated and the steps that ASIC will expect entities to undertake to comply with applicable obligations. This represents an overall pre-emptive mitigation approach by the regulators, rather than after the fact enforcement strategy.

19. Has there been any judicial consideration of blockchain concepts or smart contracting in your jurisdiction?

At the time of writing, there has not been any specific judicial consideration of blockchain or smart contracts in Australia.

20. Are there any other generally-applicable laws or regulations that may present issues for the use of blockchain technology (such as privacy and data protection law or insolvency law)?

In Australia, the Privacy Act 1988 (Cth) (Privacy Act) regulates the handling of personal information by Government agencies and private sector organisations with an aggregate group revenue of at least AUD 3 million, and which have a jurisdictional link to Australia. In some instances, the Privacy Act will apply to businesses (eg, credit providers and credit reporting bodies) regardless of turnover. The Privacy Act includes 13 Australian Privacy Principles, which impose obligations on the collection, use, disclosure, retention and destruction of personal information. Relevantly, before entities collect personal information, they must disclose the way in which this data will be used, the purposes for which it will be used and third parties to which it is likely to be disclosed. This is the basis on which individuals provide consent for their personal information to be collected, used and disclosed.

Blockchain arrangements can be structured in various ways, from information being readily visible to all participants on a network, to closed networks where information is limited to specific participants in specific instances. Therefore, entities wishing to collect and use personal information through blockchain implementations must ensure that they have gained appropriate consents for the contemplated use and disclosure.

The Notifiable Data Breaches (NDB) scheme was implemented in 2018. The NDB scheme mandates that entities regulated under the Privacy Act are required to notify any affected individuals and the Office of the Australian Information Commissioner in the event of a data breach (ie, unauthorised access to or disclosure of information) which is likely to result in serious harm to those individuals. The NDB scheme applies to agencies and organisations that the Privacy Act requires to take steps to secure certain categories of personal information. Therefore, entities will also need to ensure that any blockchain implementations are sufficiently protected from security issues such as unauthorised access and operational failure, and in the case of a data breach, ensure that they have adequate processes in place to comply with the NDB scheme.

21. Are there any other key issues concerning blockchain technology in your jurisdiction that legal practitioners should be aware of?

Entities offering solutions that incorporate blockchain technology (as well as their legal advisers) should be aware of the regulations that may apply to the broader context in which the solution is offered. This particularly relates to the extent to which the general public may not accurately understand how the blockchain components operate, and how they fit within the overall solution.

The ACL provides various consumer protections in relation to goods and services sold to Australian consumers (irrespective of where the business is located). These protections include prohibitions against:

- misleading and deceptive conduct;
- false or misleading representations;
- unfair contract terms; and
- unconscionable conduct.

Where the blockchain solution forms part of a financial services offering, the *Australian Securities and Investments Act 2001* (Cth) will apply, and sets out identical consumer protections as the ACL.

Therefore, where an offering incorporates blockchain technology, entities must ensure that consumers have the necessary information to understand how the solution works, the purpose and use of the blockchain components and what that means from an end-user perspective.