



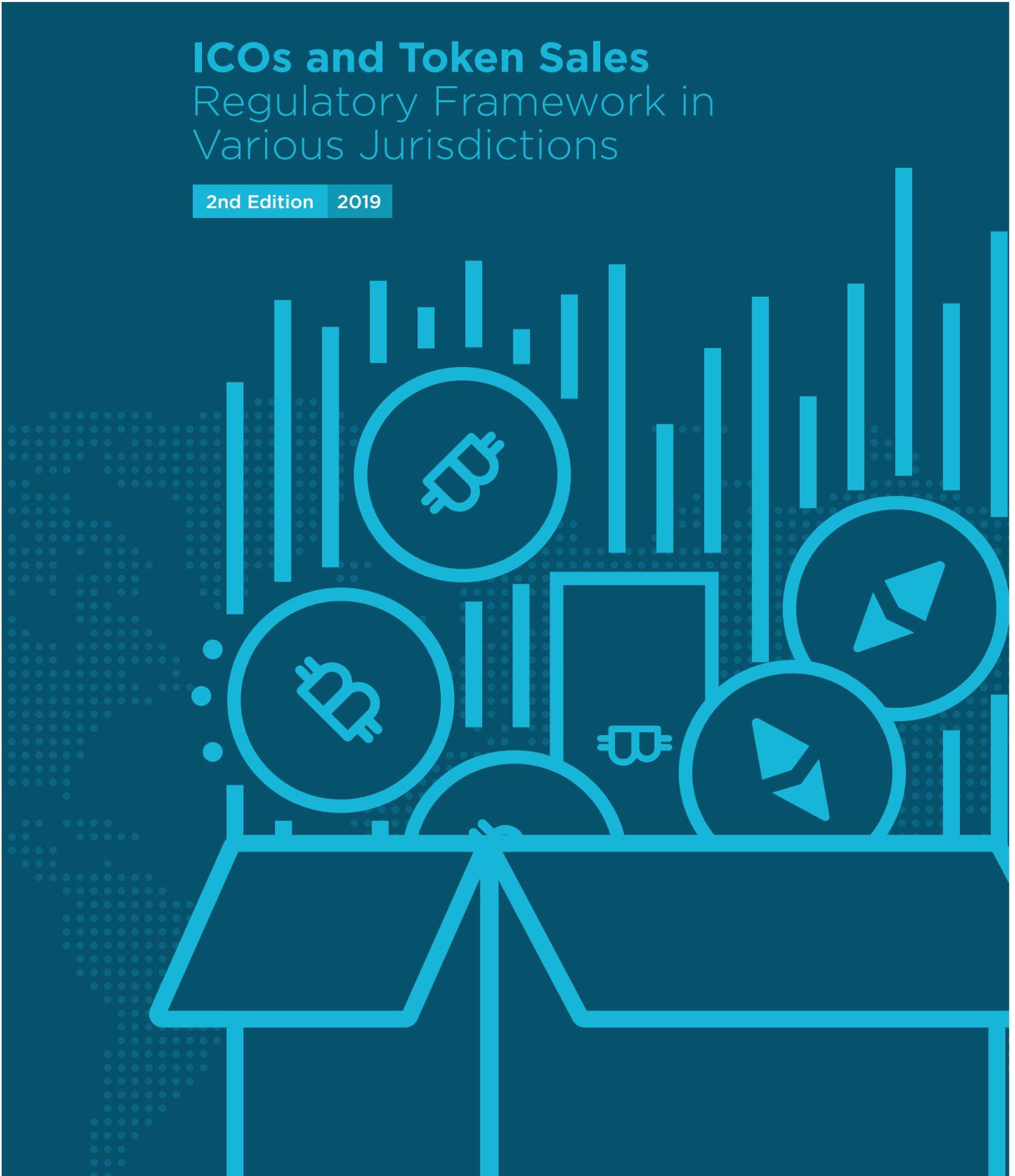
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INTERNATIONAL BUT PERSONAL

ICOs and Token Sales

Regulatory Framework in Various Jurisdictions

2nd Edition 2019



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THE **13** QUESTIONS WE ASKED

- 1 Does your country allow or prohibit ICOs and Token Sales?
- 2 Does your country regulate ICOs and Token Sales?
- 3 If your country regulates ICOs and Token Sales, what are the names of the government agencies responsible for regulating them?
- 4 If your country regulates ICOs and Token Sales, please provide a short summary of the regulatory framework. For example, do ICOs and Token Sales need to be registered or comply with any rules; or can they only be sold to certain types of purchasers/investors.
- 5 Please provide any additional information you feel is important to understanding ICO and Token Sale regulation in your country.
- 6 If a foreign entity conducts an ICO and offers tokens to residents of your country, will your government require the foreign entity to comply with any rules and regulations? If so, please provide an overview of how ICOs conducted by foreign entities are regulated by the government of your jurisdiction.
- 7 What is the legal nature of crypto in your country (for example, is crypto considered a security, commodity, currency etc.)?
- 8 Has the government of your country prosecuted, civilly or criminally, any ICO issuers, token developers or crypto exchanges for violating your country's laws? If so, please provide an executive summary of the most significant prosecution(s).
- 9 In your country, are there any significant commercial disputes or civil cases (non- government) involving crypto? If so, please provide an executive summary of the most significant dispute(s)/ case(s).
- 10 Does your jurisdiction tax crypto transactions? If so, please provide a basic explanation of how and at what rate they are taxed.
- 11 Separate from ICOs, does your jurisdiction regulate crypto trading or crypto exchanges? If so, please provide an overview of the regulation.
- 12 Does your country offer any unique or important benefit to crypto-focused companies (for example, clear regulatory guidance)? If so, please describe the unique/ important benefit.
- 13 Please identify a point of contact at your firm for cryptocurrency- related matters.

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1 Does your country allow or prohibit ICOs and Token Sales?

Australia allows ICOs and token sales and is considered to be a country with a favourable regulatory approach to blockchain and cryptocurrencies.

The largest Australian ICOs have been PowerLedger (AUS\$30 million), Synthetix (formerly Havven) (AUS\$35 million) and CanYa (AUS\$12 million).

2 Does your country regulate ICOs and Token Sales?

Yes. Under existing securities legislation, ICOs are regulated if a cryptographic token meets the definition of a security, share, derivative or interest in a managed investment scheme.

The Australian Securities and Investment Commission (ASIC) has issued Information Sheet INFO225, a general guide on the current legal treatment of cryptocurrencies and ICOs, including limited guidelines for determining whether a token may be considered a financial product. In 2018, the powers of the Australian Competition and Consumer Commission (ACCC) relating to misleading and deceptive conduct were delegated to ASIC such that ASIC now has jurisdiction to intervene if it believes that an ICO or token sale is misleading or deceptive (including whether or not the offer is the offer of a security or regulated fundraising).

The Australian Transactions and Reporting Analysis Centre (AUSTRAC) regulates the provision of designated services. The conversion of fiat currency into cryptocurrencies/virtual currencies is a designated service, and businesses providing such services generally need to register with AUSTRAC as digital currency exchange providers and comply with anti-money laundering and counterterrorism financing rules and regulations.

3 If your country regulates ICOs and Token Sales, what are the names of the government agencies

ASIC is the agency with jurisdiction over corporate fundraising and misleading and deceptive conduct occurring in connection with ICOs and token sales.

As well as ASIC, those involved in the area will also need to be aware of the requirements of the Australian

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responsible for
regulating them?

4 If your country regulates ICOs and Token Sales, please provide a short summary of the regulatory framework. For example, do ICOs and Token Sales need to be registered or comply with any rules; or can they only be sold to certain types of purchasers/investors.

Taxation Office (ATO) and the anti-money laundering and counterterrorism financing laws administered by AUSTRAC.

ASIC Commissioner John Price said in 2018:

“ICOs are highly speculative investments, are mostly unregulated, and the chance of losing your investment is high. Consumers should understand the risks involved, including the potential for these products to be scams, before investing.”

While token sales and ICOs are considered by many to be a form of crowdfunding, ASIC has made it clear that it does not consider that token sales will fall under the Australian crowdfunding regulatory framework which commenced on 29th September 2017. That framework permitted licensed operators to raise capital up to certain limits.

An ICO or token sale will be regulated in Australia if the rights and obligations or features of a cryptographic token offered cause that token to be a security, such as a share, derivative or an interest in a managed investment scheme (MIS). If so, then the normal fundraising regulations under chapter 6D of the Corporations Act apply to the issue of the tokens. Australia does not yet have a specific framework for ICO issuance.

While it is possible for a token to be issued in Australia as a genuine pre-sale of a digital good or asset or as a pre-purchase of a loyalty point, the design and characterisation of the token, together with the manner in which it is marketed, will be the deciding factors, and these tend to be the challenging areas for token issuers. If the offer of a token is the offer of an interest in a managed investment scheme, then disclosure and licensing obligations will apply which will require the issuer to hold an Australian Financial Services Licence (AFSL) (or be the authorised representative of a licence holder and be issuing the interest on behalf of the licence holder). Disclosure obligations increase

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dramatically where investors are not 'sophisticated' (in Australia a sophisticated investor is one with in excess of AUS\$250,000 income in the past two financial years or assets, excluding principal place of residence, in excess of AUS\$2.5 million).

Piper Alderman has written further on the analysis of tokens in an article available [here](#).

5 Please provide any additional information you feel is important to understanding ICO and Token Sale regulation in your country.

If a token is not to be a financial product (security), then a token sold through an ICO is likely to receive the same treatment as any good or service sold in Australia as part of the normal commercial activities of a business. This means the token sale may be subject to goods and services tax (GST), and the company may also be liable for company tax on the profit from the sale.

If the token is a financial product (security), the money raised may not be subject to GST or company tax, but a financial licence and compliance costs carry a significant cost.

While foundations and not-for-profit structures provide some tax exemptions, the Australian Not For Profit and Charities Commission assesses applications for not-for-profit status.

In determining whether the token is a financial product, ASIC will take into account whether the service/product has already been built or whether the money is being raised to fund the initial development or is in reality the offer of an investment.

6 If a foreign entity conducts an ICO and offers tokens to residents of your country, will your government require the foreign entity to comply with any rules and regulations? If so, please provide an

Yes. As set out above, the rights and features of the tokens will need to be analysed, and the issuer will need advice on whether the token is likely to constitute a financial product or security. If so, then licensing may be required. Further, the offer of conversion between fiat currency and cryptocurrencies may require registration by the issuer as a digital currency exchange with AUSTRAC.

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overview of how ICOs conducted by foreign entities are regulated by the government of your jurisdiction.

7 What is the legal nature of crypto in your country (for example, is crypto considered a security, commodity, currency etc.)?

In 2014, ASIC submitted to an Australian Senate inquiry that Bitcoin was not a financial product for the purposes of Australian law. Other than for Bitcoin, there is limited clear guidance. However, leading cryptocurrency exchanges including Independent Reserve (a client of Piper Alderman) and BTC Markets have been offering Bitcoin, Ethereum, Litecoin and Ripple trading for several years. Independent Reserve in particular has been operating for over five years. An inference may be drawn that the high-profile nature of these businesses and lack of regulatory intervention means that the tokens listed on those platforms are not presently considered to be financial products or securities, but this could of course change at any time.

There is no 'one size fits all' regulatory approach, given that tokens have almost infinite varieties of rights and obligations. ASIC has indicated it will consider whether a particular token has features rendering it a financial product, security or offer of an interest in a managed investment scheme. Information Sheet INFO225 titled 'Initial Coin Offerings' from September 2017 and updated in May 2018 may assist in understanding how ASIC views cryptocurrency more generally.

For the purposes of GST, the Australian Government has enacted laws with a definition of digital currency as follows:

'digital currency means digital units of value that:

- (a) are designed to be fungible; and
- (b) can be provided as *consideration for a supply; and
- (c) are generally available to members of the public without any substantial restrictions on their use as consideration; and

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- (d) are not denominated in any country's currency; and
- (e) do not have a value that depends on, or is derived from, the value of anything else; and
- (f) do not give an entitlement to receive, or to direct the supply of, a particular thing or things, unless the entitlement is incidental to:
 - (i) holding the digital units of value; or
 - (ii) using the digital units of value as consideration;but does not include:
 - (g) *money; or
 - (h) a thing that, if supplied, would be a *financial supply for a reason other than being a supply of one or more digital units of value to which paragraphs (a) to (f) apply.'

If a token meets the above requirements, then the sale and purchase of the token is generally not subject to GST.

8 Has the government of your country prosecuted, civilly or criminally, any ICO issuers, token developers or crypto exchanges for violating your country's laws? If so, please provide an executive summary of the most significant prosecution(s).

In September 2018, ASIC released a statement titled 18-274MR advising that it had taken action to shut down a number of ICOs which it considered were engaging in misleading conduct and which were targeting retail investors, or which were operating an illegal and unregistered managed investment scheme, and failing to hold an Australian financial services licence.

Within the statement, ASIC also noted that raising money from the Australian public carries important legal obligations and that prospective ICO offerers need to ensure that disclosure about a proposed offer is complete and accurate, and that such determinations as to validity will be made with respect to the actual legal substance of the offer, rather than simply how it is entitled.

In addition to that release, we are aware of a number of other projects which have ceased offers after engaging with ASIC to discuss their offering, in many cases where the offer was for a token which paid dividends or shared revenue.

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9 In your country, are there any significant commercial disputes or civil cases (non-government) involving crypto? If so, please provide an executive summary of the most significant dispute(s)/ case(s).

10 Does your jurisdiction tax crypto transactions? If so, please provide a basic explanation of how and at what rate they are taxed.

At this stage, there are still no published decisions with respect to commercial or civil cases involving cryptocurrency.

However, a number of disputes are currently before the courts, including claims of misleading and deceptive conduct against the Australian promoter of an overseas issuer. It would be premature to comment on these matters at this time.

The ATO maintains the view that Bitcoin (and other cryptocurrencies with similar characteristics) are neither money nor Australian or foreign currency. Further, the ATO has issued a taxation determination, TD2014/26, confirming that Bitcoin is to be treated as property or an asset for the purposes of capital gains tax under the Income Tax Assessment Act 1997 (Cth). This means that if an individual makes a capital gain when disposing of identified cryptocurrencies, they will be required to pay tax on some or all of that gain.

Alternatively, if the proceeds from the disposal of cryptocurrency are less than what was initially paid to acquire it, then a capital loss may be recorded, which can be used to offset other capital gains made in the same financial year or in a future year (including investments outside of cryptocurrency).

For individuals, if the value of a digital currency holding is below AUS\$10,000 and it is only being used to pay for personal goods or services, then it may fall under a personal use exemption, and no capital gains tax would then be payable. Personal use assets do not include:

- Things acquired as an investment;
- Things forming part of a profit-making scheme; or
- The purchase and sale of cryptocurrencies in the course of carrying on a business.

If a cryptocurrency (or any other asset subject to capital gains tax) is held for at least one year prior to disposal,

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then a 50% discount on capital gains taxes payable may be available.

For companies, no discounts are provided on capital gains, and therefore they are required to pay the prevailing company tax rate on any gains. For individuals, the rate paid is the same as the income tax rate for that financial year, which scales depending on the income bracket into which the individual falls.

If trading between cryptocurrencies occurs, without conversion back into Australian dollars taking place, capital gains tax will still be applicable to those transactions unless an exemption applies. This is because the Australian Tax Office classifies digital currencies as property rather than currency, and so records of the values of those cryptocurrencies received and disposed of should be kept.

11 Separate from ICOs, does your jurisdiction regulate crypto trading or crypto exchanges? If so, please provide an overview of the regulation.

For all businesses which exchange fiat currency into cryptocurrencies (or vice versa), the Anti-Money Laundering and Terrorism Financing Act 2006 (Cth) (AML/CTF) prescribes a registration and reporting obligation, including adopting and maintaining a KYC and AML/CTF compliance programme that requires the reporting of suspicious matters and threshold transactions conducted on their trading platforms.

12 Does your country offer any unique or important benefit to crypto-focused companies (for example, clear regulatory guidance)? If so, please describe the unique/important benefit.

Australia provides a guideline for cryptocurrency or blockchain-related projects through Information Sheet INFO225, together with a well-developed crypto and blockchain community which is centred around Sydney and Melbourne (with Brisbane and Adelaide communities building up).

ASIC has also invested in the development of its Innovation Hub, a programme which aims to streamline the licensing process for start-ups. By extending the offer of informal regulatory assistance to eligible start-ups, the Innovation Hub states that it offers a helping hand

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in getting crypto-focused companies off the ground in the quickest and most effective manner. However, the Innovation Hub cannot provide legal advice, so it is important that crypto-focused companies obtain that advice from lawyers who understand distributed ledger technologies and cryptocurrencies. The Australian community of lawyers who are technologically knowledgeable continues to grow and provides an important benefit to companies operating in a compliant fashion and engaging with regulators in a constructive way.

Australia also has generous research and development tax incentives for eligible projects and a growing number of innovation hubs and blockchain-specific hubs beginning to be established.

13 Please identify a point of contact at your firm for cryptocurrency-related matters.¹ Does your country allow or prohibit ICOs and Token Sales?

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