



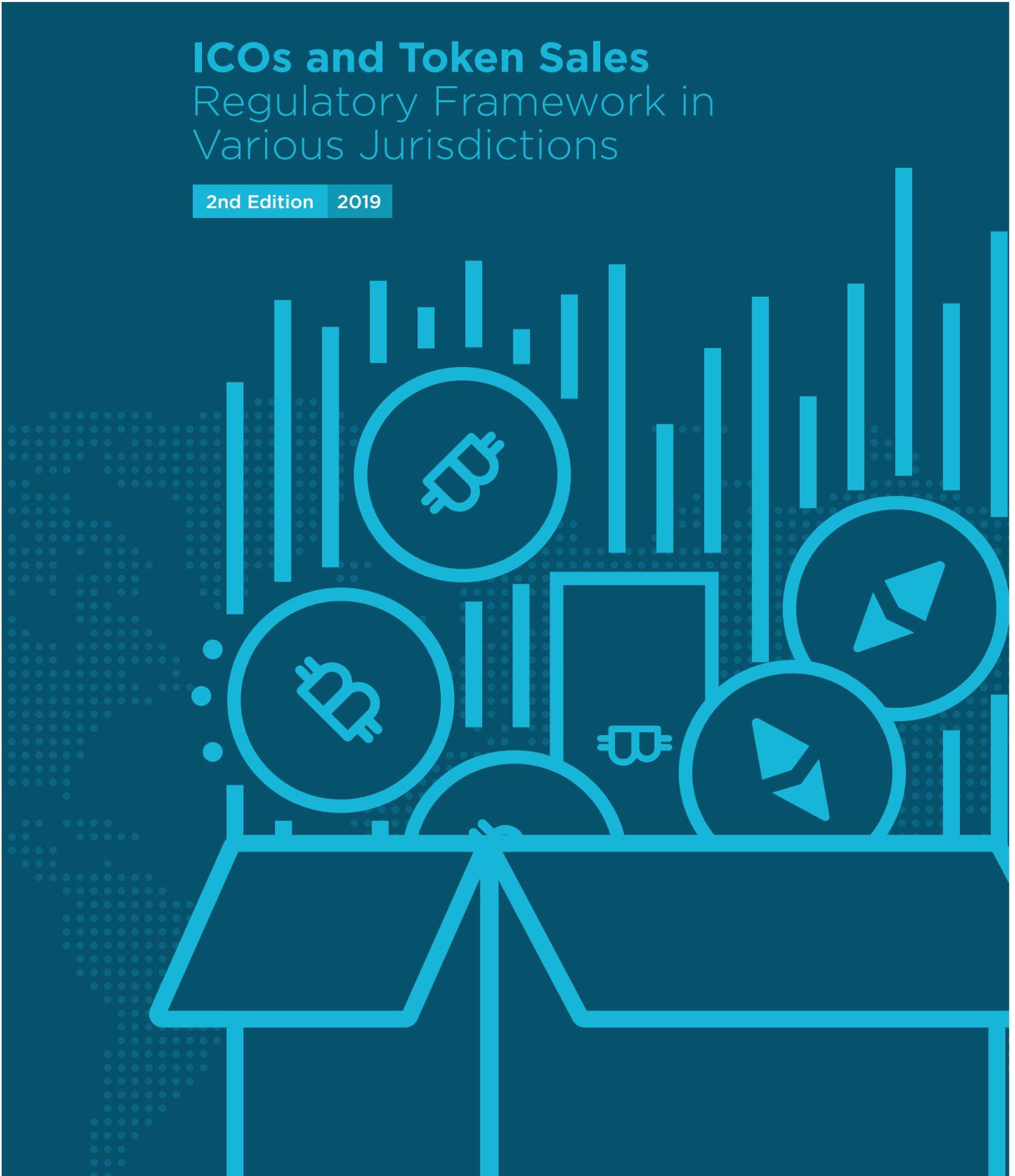
LEGALINK

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?

New Zealand allows ICO and Token Sales

2 Does your country regulate ICOs and Token Sales?

Yes. As set out below, ICOs and Token Sales conducted in New Zealand or offered to New Zealand Residents should be regulated as if they are any other security.

3 If your country regulates ICOs and Token Sales, what are the names of the government agencies responsible for regulating them?

Primarily, the Financial Markets Authority (FMA) and, in some instances, the Financial Service Providers Register (FSPR) and the Companies Office.

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.

(a) The extent to which an ICO is regulated depends on whether a 'financial product' is being offered to retail investors in New Zealand and thus a 'regulated offer' is being made. Whether a token offered via an ICO is a particular type of financial product depends on its specific characteristics and economic substance.

(b) The Financial Markets Conduct Act 2013 (FMC Act) contains a list of situations where an offer is not being made to retail investors. Offers conducted in accordance with these exceptions are far less regulated.

(c) The FMC Act sets out four types of regulated offer:

- i. Debt securities;
- ii. Equity securities;
- iii. Managed investment products; and
- iv. Derivatives.

Debt securities

(d) A token is a debt security if investors have the right

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to be repaid money or interest by an entity making a token offer.

(e) To make a regulated offer of debt securities, and ICO offer or must:

- i. register a product disclosure statement (PDS);
- ii. appoint a licensed supervisor;
- iii. have a trust deed that sets out investor rights and the supervisor's role; and
- iv. meet financial reporting and fair dealing obligations.

Equity securities

(f) A token is an equity security if investors buy, or have the option to buy, a share in a company. If an ICO amounts to a regulated offer of equity securities, the offeror must register a PDS and set out certain investor interests and in their constitution. Financial reporting and fair dealing obligations also apply.

Managed investment products

A token is a managed investment product if:

- i. Investors contribute funds to receive interests (tokens) in a scheme (a structure or project that allows investors to pool their money);
- ii. Returns, income and rewards to investors from the scheme are principally produced by someone else; and
- iii. Investors do not have any day-to-day control over the operation of the scheme/its investments.

(g) The manager of a scheme must be licensed by the FMA in order to make offers to retail investors in New Zealand. The manager is the person, company, or unincorporated entity issuing the tokens. If an ICO amounts to a regulated offer of managed investment products, the manager must also:

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- i. register a PDS;
- ii. appoint a licensed supervisor;
- iii. have a trust deed that sets out investor rights and the supervisor's role; and
- iv. meet financial reporting and fair dealing obligations.

Derivatives

(h) A token may be a derivative if, under the terms of the token, the issuer or holder may be required to pay an amount or provide something else in the future, and the amount to be paid or the value of the token is derived from the value or amount of something else, such as a commodity or asset.

(i) The issuer of the tokens must also be licensed by the FMA in order to make offers to retail investors in New Zealand. If the issuer makes a regulated offer of derivatives, it must register a PDS and meet financial reporting and fair dealing obligations.

Other Obligations

(j) Even if the token or cryptocurrency is not a financial product or financial service, the issuer/manager will need to comply with the Fair Trading Act 1986 to the extent that the issuer is in 'trade'.

(k) The Fair Trading Act also applies to overseas-based tokens and cryptocurrencies offered in New Zealand.

(l) It is important to note that all tokens or cryptocurrencies are securities under the FMC Act – even those that are not 'financial products'. A security is any arrangement or facility that has, or is intended to have, the effect of a person making an investment or managing a financial risk.

(m) If appropriate, the FMA can designate any security to be a particular financial product based on its economic substance.

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

(l) It is important to note that all tokens or cryptocurrencies are securities under the FMC Act - even those that are not 'financial products'. A security is any arrangement or facility that has, or is intended to have, the effect of a person making an investment or managing a financial risk.

(m) If appropriate, the FMA can designate any security to be a particular financial product based on its economic substance.

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.

Yes. Part 3 of the FMC Act (discussed in our response to question 4 above) applies to 'offers of financial products in New Zealand'. Financial products are offered in New Zealand (subject to some exceptions) if an offer of the financial products is received by a person in New Zealand, unless the offerer demonstrates that it has taken all reasonable steps to ensure that persons in New Zealand may not accept the offer. This applies even if the issue or transfer occurs outside of New Zealand and even if the issuer or offerer is based outside of New Zealand.

Issuers of cryptocurrency and offer tokens based outside New Zealand will also be subject to other New Zealand laws, including those discussed in our response to question 12 below.

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

The legal nature of cryptocurrency is context-specific. For tax purposes, cryptocurrency is treated as property, not currency. Cryptocurrency can also be treated as a financial product in other contexts. (Please refer to our response to question 4 above.)

8 Has the government of your country prosecuted, civilly or criminally, any ICO issuers, token

We are not aware of any prosecutions against ICO issuers, token developers or crypto exchanges.

However, in 2017 the FMA raised concerns about a

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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.

proposed ICO by Sell My Good and issued a notice advising New Zealanders not to invest in the scheme. After discussions with the FMA, Sell My Good stopped the ICO voluntarily and agreed to refund all money to investors.

There are also reported criminal cases where cryptocurrency was used to facilitate crimes, but the providers of cryptocurrency were not defendants in those cases.

We are not aware of any such cases.

There are no special tax rules for cryptocurrencies. Ordinary New Zealand tax rules have been interpreted to apply to cryptocurrencies.

Cryptocurrency received as payment for goods or services is business income, which is taxable. The value of the cryptocurrency must be converted into New Zealand dollars at the time it is received.

If a person purchased cryptocurrency for the purpose of disposal (selling or exchanging it, for example, to exchange it for another cryptocurrency) then the proceeds are taxable.

New Zealand's tax authority, the Internal Revenue Department (IRD), has not provided guidance on goods

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

and services tax (GST) (New Zealand's value-added tax), but is reportedly working on the issue. It is likely that the view taken that cryptocurrency is property means that technically GST is payable on all purchases and sales of cryptocurrency in New Zealand. If GST is charged when businesses accept cryptocurrencies as payment for goods and services, double taxation will occur. Therefore, there have been recommendations (not yet acted upon) that GST be removed from cryptocurrency payments.

New Zealand does not currently have any laws drafted specifically with regard to the trading of cryptocurrency or cryptocurrency exchanges. However, existing laws apply to cryptocurrency, as discussed below.

Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act): The FSP Act requires everyone who provides, or offers to provide, a 'financial service' in New Zealand, or from New Zealand to other countries, to register as a financial service provider on the Financial Service Providers Register and (in some circumstances) to belong to a recognised dispute resolution scheme. The FMA has indicated that issuers of asset-backed tokens will be offering a financial service and other ICOs might also involve the provision of financial services, depending on the specific characteristics and economic substance of that token.

Fair Trading Act 1986 (FTA): The FTA prohibits 'misleading and deceptive conduct'. Issuers of cryptocurrencies will need to ensure that they provide honest disclosure both during and after the ICO or token-generating event.

Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML Act): The AML Act requires reporting entities (i.e. those conducting certain financial activities) to undertake 'know your client' procedures designed to detect and trace money laundering and the financing of terrorism. It also requires reporting entities to have procedures in place to identify and report

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suspicious activities. Some banks, citing anti-money laundering concerns, have closed bank accounts used to trade cryptocurrency.

Non-bank Deposit Takers Act 2013: This Act regulates 'non-bank deposit takers' and could apply in some circumstances to an ICO issuer if its 'regulated offer' involves 'debt securities'. (See discussion of the FMC Act in our response to question 4 above.)

Financial Advisers Act 2008: This Act requires financial advisers (persons who give financial advice, provide investment planning or provide investment management services) to take an appropriate degree of care in providing services to investors and consumers.

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.

The New Zealand regulators, including the FMA and IRD, have shown a willingness to work with entities planning on conducting an ICO or token-generating event in New Zealand. The involvement of the regulators at an early stage will save compliance costs.

New Zealand is in the process of reviewing the application of its laws to cryptocurrency, and there may be some significant developments in this area of law in the future.

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13 Please identify a point of contact at your firm for cryptocurrency-related matters.



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