



Blockchain Australia

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21st October 2022

Director
Corporate Tax Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: CryptoTax@treasury.gov.au

Cc: Jessica Rankin-Dixon - Jessica.Rankin-Dixon@treasury.gov.au

Dear Director,

Thank you for the extension to our submission on the Treatment of Crypto as a Foreign Currency. We would welcome the opportunity to meet with Treasury to discuss any matters in our submission or broader tax issues associated with cryptocurrencies.

Please direct any questions you may have to:

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Or

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About Blockchain Australia

Blockchain Australia is the peak industry body representing Australian businesses and business professionals participating in the digital economy through blockchain technology. Blockchain Australia encourages the responsible adoption of blockchain technology by the government and industry sectors across Australia as a means to drive innovation and create jobs in Australia.

The Blockchain Australia membership base consists of 120+ leading cryptocurrency and Blockchain-centric businesses and 100+ individuals across multiple verticals, including:

- Accounting and Taxation
- Artificial Intelligence
- Art
- Banking
- Building & Construction
- Cyber Security
- Development
- Digital ID
- Education
- Energy and Resources
- Entertainment
- Gaming
- Health and Wellbeing
- Insurance
- Investment
- Legal
- Professional Services
- Recruitment
- Real Estate
- Risk and Compliance
- Supply Chain
- Venture Capital

The sector contributes AU\$2.1 billion, employs approximately 11,600 people ([Source](#)) and with support from government and natural market growth, these figures could increase to AU\$68.4 billion and over 206,000 people employed in the sector. To ensure Australia realises these opportunities, we seek a fit for purpose, technology-neutral, regulatory framework with clear guideposts for consumers and a focus on driving innovation and Investment.

In the preparation of this submission, Blockchain Australia was greatly assisted by Joni Pirovich at Blockchain & Digital Assets - Services + Law (BADASL) and Angus Eaton at Mycelium. We extend our gratitude to them for their efforts and also wish to thank the following for their contributions during final drafting:

Danny Talwar at Koinly
Eddie Ahn at DLA Piper
Elinor Kasapidis at CPA Australia
Elizabeth Morton at RMIT
Ken Woo at PwC
Maryna Kovalenko at Kova Tax
Shane Brunette at Crypto Tax Calculator



Background

On 22 June 2022, the Government announced it would introduce legislation to exclude crypto assets such as Bitcoin from being treated as a foreign currency for Australian income tax purposes. Exposure draft legislation, Treasury Laws Amendment (Measures for Consultation) Bill 2022: Taxation treatment of digital currency, and associated draft explanatory material, have been released for public consultation.

The proposed legislation maintains the current tax treatment of crypto assets and removes uncertainty following the decision of the Government of El Salvador to adopt Bitcoin as a legal tender. (Exposure Draft) (Explanatory Materials)

The draft legislation relies on amending the existing definition of *digital currency* in the GST Act (*A New Tax System (Goods and Services Tax) Act 1999*) before adopting it as an exclusion from the definition of *foreign currency* in the *Income Tax Assessment Act 1997*.

The Exposure Draft has been provided to clarify 'that digital currencies (such as bitcoin) continue to be excluded from the income tax treatment of foreign currency'. However, no consultation was undertaken before Exposure Draft legislation and no rationale has been provided for this policy position nor any modelling of the tax impact of various scenarios. Such information should be produced before this legislation can be further considered. We note on this point the current review being undertaken by the Board of Taxation (BoT) on digital assets and digital transactions in Australia, which is due to be finalised at the end of the year. The BoT review encompasses the issues being dealt with by the proposed amendments.

Recommendations

In this submission, we suggest the following:

- Consideration be given to the recommendation that taxpayers are provided with the choice of whether to make either a functional currency election (to keep accounts in Bitcoin) and a limited balance election (to have up to A\$250,000 in a Bitcoin wallet where foreign exchange gains and losses are ignored); and
- A sovereign currency exemption (which treats digital currencies that are non-government issued, but legally recognised as tender in a third party country to be recognised as foreign currency or 'Protocol Currency' (to preserve the integrity of the intended policy meaning of foreign currency) in Australia when constitutional bodies, bodies corporate and natural persons or domiciled entities of that country transact with Australia using the digital currency); and
- A carve out in the definition of *digital currency* definition in the GST Act to include within the *foreign currency* definition privately issued stablecoins where they are non-government issued, but recognised as legal tender by a country.
- A sovereign currency exemption for constitutional bodies, natural persons and bodies corporate of jurisdictions that elect a digital currency as legal tender in their jurisdiction, that is not issued by a central authority should be specifically allowed for in the definition of foreign currency;
- Regulations to *exclude* certain cryptocurrencies, or features of future digital assets, from falling within the scope of the definition of a 'foreign currency'. We consider that the draft legislation should also allow the Commissioner the discretion to *include* cryptocurrencies, or features of future digital assets, to fall within the scope of a 'foreign currency'.
- The explanatory materials to the draft legislation states that an investment in Bitcoin, and presumably other digital currencies, 'is typically held on capital account.' We consider that this should be amended to more accurately reflect the range of tax outcomes that may arise with respect to a taxpayer's cryptocurrency or digital asset holdings. Currently, cryptocurrency, or indeed other digital assets, may be held by a taxpayer on revenue or capital account, depending on a range of factors including, among other things, the taxpayer's underlying intention and the features of the relevant digital asset. Blanket statements indicating a likely treatment for cryptocurrencies and digital assets may mislead taxpayers, especially those who do not readily have the means to access professional tax advice on this topic.

Transitional Treatment

Notably, gains and losses from dealings in Bitcoin, and other digital currencies, are still assessable (under s 6-5 ITAA 1997) or deductible (under s 8-1 ITAA 1997), as the case may be, if the Bitcoin is held on revenue account. If it is held on capital account, the capital gains and losses incurred are dealt with under Part 3.1.

This approach was invalidated in 2021 when El Salvador adopted bitcoin as one of its monetary units. The Government has responded by releasing draft legislation to restore the ATO's position stated in the Tax Determination.⁶

The current legislation does not provide any transitional treatment where an asset ceases to be a revenue or capital asset and becomes foreign currency such as is the case in the income year ended 30 June 2022 with the El Salvadorean and Central African Republic's recognition of bitcoin as legal tender.

While the recommendations may deliver simplicity in removing the burden of taxpayers working their way through Division 775, it should be noted that Division 775 was introduced because the case law on foreign exchange gains and losses was unclear and delivering inappropriate outcomes.

As noted in the GST legislation, the AMLCTFA and the Reserve Bank of Australia see digital currencies as currencies, so it is questionable whether this new legislation is going in the right direction.

The proposed legislation creates tax uncertainty for taxpayers specific to the income year ended 30 June 2022 (FY22 year). Clarity is needed on how taxpayers could and should reflect in their tax returns a transition from BTC treated as a CGT asset held on capital account or trading stock, to a foreign currency. The tax rules do not cater for such a change in characterisation as they do when an asset ceases to be held on capital account and becomes trading stock or vice versa.

Taxpayers that may have purchased and dealt with BTC in the FY22 year may have relied on the existing tax treatment (as a CGT asset or trading stock, rather than foreign currency) in making their decision, so some sort of administrative approach and/or legislated transitional treatment would have been required.

Sovereign currency exemption proposal

On 22 April 2022, the Central African Republic became the second country in the world to adopt bitcoin as an official currency after El Salvador.

Considering that the Gross Domestic Product rankings for both El Salvador and the Central African Republic are relatively depressed when considered broadly, being 104 and 165 out of 212 global economies respectively, care should be taken to consider why a slower economy has adopted a new currency. Loosely stated, one of the reasons for the shift to recognise bitcoin as legal tender in those

jurisdictions is inflation risk.¹ Blockchain Australia is of the view that limiting the ability of developing countries to determine their own legal tender and afford it similar treatment to their own centrally issued currency is problematic. If a digital currency is a state's legal tender, ensuring the citizens and states, where such is the case, are able to efficiently engage in the global financial system (in a personal capacity and in the course of business), is a valid consideration. The Exposure Draft currently disincentivises Australians to do business with or substantially with countries like El Salvador that have adopted bitcoin as a form of legal tender.

This goes to the fundamental issue that the proposed amendments do not rely on robust rationale or modelling, rather they reflect an objective to return to the positioning outlined in the 2014 tax determination. We note that the status quo and digital economy has substantially shifted since that time and along with the BoT review currently underway, there is an opportunity for the Government to reflect on overarching tax policy objectives for a digital economy. Whilst we recognise that tax policy needs to ensure tax objectives are met, consequences (such as incentivising or disincentivising activity) are purposeful and moreover, align with overlapping regulatory frameworks.

For countries like El Salvador and the Central African Republic, Blockchain Australia suggests modelling a **sovereign currency exemption** for countries that adopt non government-issued digital currency as legal tender. The sovereign currency exemption could allow funds directed from constitutional bodies, bodies corporate and natural persons or domiciled entities of countries that declare a non government-issued digital currency as legal tender to be caught under the definition of foreign currency.

Noting that there is limited bipartisan trade between Australia, El Salvador and the Central African Republic, the revenue impact would be ostensibly negligible.² However, the explanatory materials should refer to any international treaty obligations that Australia may have to not discriminate against or inhibit the free flow of trade between countries, such as UN member countries.

Alternatively (or in addition), for constitutional bodies, bodies corporate and natural persons or domiciled entities of countries that declare a non government-issued digital currency as legal tender, Australia should consider providing relevant taxpayers with the choice of whether to make either a functional currency election (to keep accounts in bitcoin) and a limited balance election (to have up to A\$250,000 in a bitcoin wallet where foreign exchange gains and losses are ignored).

Blockchain Australia notes the liability to pay tax is dependent largely on residency, among other things. It is suspected the revenue impact would be nominal in providing these carve-outs as a sovereign currency exemption, and placate the relevant constituents' State theory of money considerations.³

Stable coins as foreign currency (if adopted as legal tender, but not government issued)

¹ El Salvador has also recognised the US Dollar as legal tender since 2001.

² \$148,000 in 2021 export from Australia to Central African Republic [Australia Exports to Central African Republic - 2022 Data 2023 Forecast 1989-2021 Historical](#); and El Salvador Exports to Australia were US\$7.53 Million during 2021

[El Salvador Exports to Australia - 2022 Data 2023 Forecast 1994-2021 Historical](#).

³ [TD 2014/25EC | Legal database](#)



The issue arises where a non government-issued stable coin is recognised as legal tender by a third party jurisdiction. Due to the relatively stable nature of such digital currencies, and limited up and down price movement of the asset itself (and therefore limited capital gains or losses), it would be useful to have recourse against the foreign exchange tax treatment in section 775 ITAA 1997. We have already seen bitcoin being adopted as legal tender by third party states and it is not inconceivable to see a situation where one of the more prominent non government-issued stable coins would be. Particular attention could be given to the characteristics of the stable coins (e.g., pegging mechanisms).

Additionally, and for similar underlying reasons, treating stable coins pegged to fiat currency as foreign currency, irrespective of the recognition by a third party state, would suitably fit in the foreign currency.

Powers to make Regulations

As noted in the CPA's recommendation Cryptocurrencies and digital assets are constantly evolving. There is a degree of uncertainty regarding the features they may have in the future, or whether they will be adopted, or disallowed, by some or all jurisdictions, globally. We consider it important for the draft legislation to provide fundamental, future-proofed principles that can give taxpayers a sufficient degree of certainty.

The explanatory memorandum suggests the amendments include the power to make regulations to provide further exclusions to the proposed definition of a 'foreign currency', which includes a 'digital currency'. Although regulations generally allow for greater flexibility and timely response to evolving environments, there is a need to appropriately balance flexibility with providing certainty to taxpayers regarding their tax affairs. We do not consider it appropriate for potential future regulations to be made on a frequent basis that may introduce substantial changes to the underlying definition and a taxpayer's resultant tax obligations. There is a risk of this occurring with the constantly evolving nature of all types of cryptocurrencies and digital assets.

Therefore, we recommend that the language used is future-proofed to the extent possible to mitigate the need for frequent tweaks. Where possible, wording should be principles-based rather than prescriptive. Furthermore, the definition of a 'digital currency' (or other appropriate definitions that may be recommended by the Board of Taxation (Board) review and Treasury token mapping exercise) should be subject to Parliamentary review at a regular interval (e.g. every three years). Doing this will help to determine if the regulations remain appropriate and whether there is a need for changes to account for notable developments. Such a process will ensure that there is a greater degree of Parliamentary oversight over the definition in a changing environment. It will also ensure a greater degree of certainty for taxpayers, with potential major changes and developments being regularly reviewed in the appropriate forum."

Currently, the draft legislation only permits regulations to *exclude* certain cryptocurrencies, or features of future digital assets, from falling within the scope of the definition of a 'foreign currency'. We consider that where the power to make regulations is enabled, it should extend to the ability to make regulations to *include* cryptocurrencies, or features of future digital assets, to fall within the scope of a 'foreign currency'.



I.e., limiting to only the exclusion of certain cryptocurrencies or features only operates to a narrow scope rather than offering robustness in flexibility and timeliness.

As noted above, and throughout the explanatory materials, the ecosystem surrounding cryptocurrencies and digital assets is constantly evolving. It is difficult to predict what developments may occur and, while it may be inconceivable at the moment, it is possible that future changes may necessitate the inclusion of certain digital currencies in the scope of a 'foreign currency'. An exclusionary-only power may significantly limit the ability to ensure the intended policy of the legislation is achieved and may also unintentionally limit the objective of allowing government-issued digital currencies to be captured by the foreign currency regime.