

Article Information

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ASIC Guidance on cryptocurrency token sales: a ban or sensible regulation?

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The [Australian Securities and Investment Commission \(ASIC\)](#) yesterday issued a [press release](#) and [guidance](#) for those considering launching an Initial Coin Offering (**ICO/Token Sales**). Given the ease with which an ICO (also known as a Token Sale) can be launched, and the huge amounts raised to date (**USD\$2.115 billion** this year alone) this guidance has been eagerly awaited from ASIC.

Partner, Michael Bacina discusses.

Clickbait title aside, while Australia has not banned Token Sales, anyone looking to issue crypto tokens in or to Australian's will need to be careful they don't fall foul of the Australian regulatory landscape, which is markedly different to the US system.

The information sheet, descriptively named [INFO225](#) reiterates a similar position taken by the US Securities and Exchange Commission, namely that the legal status of a Token Sale will depend on the circumstances and features of the cryptocurrency coins being offered for sale.

ASIC Commissioner John Price also spoke the obvious in saying

"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 are considered a form of crowdfunding, ASIC has made clear that it does not consider that Token Sales will fall under the new Australian [crowdfunding regulatory framework](#) which commenced 29 September 2017. That crowdfunding framework permits licensed operators to raise capital in exchange for equity in public and private companies (subject of course to various requirements).

So when will a Token Sale in Australia fall under ASIC's regulatory reach?

1. When the token sale is a Managed Investment Scheme

A Managed Investment Scheme (**MIS**) is a regulated financial product which involves people contributing assets (such as cash or cryptocurrency) to purchase an interest in the scheme. The assets are pooled and used in a common enterprise and those participating don't have day to day control but may have voting rights for some matters.

Those offering an MIS must comply with disclosure obligations, registration and [licensing requirements](#) under the [Corporations Act](#).

The best example of an ICO which would be considered to be an MIS is [The DAO](#). The DAO (a Decentralised Autonomous Organisation) was set up specifically to raise money which was to be invested in start-up projects, with the intention that profits would be returned to those participating in the fundraising. It seems that utility tokens (which might be described as a pre-purchase of a future product) are unlikely to be considered an MIS at this time given they usually lack the features which are present in an MIS (for more on different types of tokens see [here](#)).

2. When the token is really a share in a company

If a company seeks to raise money by selling coins which are, in effect, share certificates, then all the regulation required by ASIC for the issue of shares under the [Corporations Act](#) will apply.

Australia doesn't use the [Howey test](#) applied in the USA to determine if a crypto coin is a security. But ASIC will still have regard to the bundle of rights attaching to the coins, and has stated it will look to the whitepaper issued with a Token Sale to help decide if an offer of cryptocurrency coins is in fact a share offer.

ASIC says:

"if there appears to be ownership of the body, voting rights in decisions of the body or some right to participate in profits of the body shown in the white paper — then it is likely that the coins could fall within the definition of a share."

While there is great opportunities for tokens to be used to facilitate a record of ownership of shares (such as by replacing share certificates) we are some time away from acceptance of tokens becoming a kind of [bearer share](#) for companies shares.

The obvious example of a crypto token which is likely to be considered a share are the tokens issued under [Aragon's platform](#) which are used to represent ownership in Decentralised Autonomous Organisations (but given the limbo status of those organisations, the allocation of tokens for any given DAO via Aragon is more analogous to an agreed proportion of a stake in a joint venture).

3. When the token is a derivative

Australia defines derivative financial instruments under [s761D](#) of the [Corporations Act](#). That section provides that a derivative is a product which derives its value from another thing, being an underlying asset or other instrument.

If a business is dealing in derivatives, it will need an [Australian Financial Services Licence \(AFSL\)](#) or risk prosecution.

Any coin which is designed to change in price based on factors such as an underlying financial product or market or asset price and which will require payment as part of the rights or obligations attaching to the coin may be considered to be a derivative by ASIC.

The definitions and interpretations of derivatives in Australian law are complex and have led to lengthy lawsuits. This area is one that those looking to issue tokens in a Token Sale will need to be very careful of given the very broad operation of [s761D](#) of the [Corporations Act](#).

4. When a business is operating a financial market

Exchanges trading crypto currency and crypto-currency agents have long recognised the need to be licensed and ASIC has confirmed that those offering a facility for others to acquire or dispose of financial products in Australia will need a licence.

Further to this, [recent changes to money laundering and anti-terrorism funding laws in Australia](#) have placed additional paperwork burdens on cryptocurrency exchanges.

So what's next?

With ASIC providing some guidance to help those looking to set-up a Token Sale, and with successful Token Sales such as [PowerLedger](#) taking place in Australia, we expect to see more Token Sales within Australia. Naturally, anyone considering launching a Token Sale or ICO should take [legal advice from lawyers who are experts in how crypto currencies and blockchain operate](#).

Disclosure: The author holds many crypto currencies, in particular Ethereum and Bitcoin. None of the above constitutes legal advice but if I can be of any assistance to your business or in assisting your ICO or Token Sale please connect here or follow me on [Twitter](#).

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