Australian Government

The Board of Taxation

REVIEW OF THE TAX TREATMENT OF DIGITAL ASSETS AND TRANSACTIONS

Consultation Guide

the board of taxation
www.taxboard.gov.au

August 2022

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The Board's Review

On 21 March 2022, the former Government released the Terms of Reference for a review to be undertaken by the Board of Taxation (the Board) into the appropriate policy framework for the taxation of digital assets and transactions in Australia.

The current Government notes that this review is in line with its commitment to improve transparency in our tax system and ensures the global system is more robust. This is aligned with the Government's recent announcement confirming that cryptocurrency will continue to not be regarded as foreign currency for tax purposes.

Background

On 8 December 2021, the former Treasurer announced, as part of a broader response to a review of Australia's payments system and the regulation of digital assets, that the Government would task the Board with undertaking a review into the appropriate policy framework for the taxation of digital transactions and assets (also known as crypto assets) in Australia.

Terms of Reference

With reference to Australia's strong competitive position as an early adopter of digital transactions and assets relative to other jurisdictions, and without increasing the overall tax burden, the Board is asked to:

- Consider the current Australian taxation treatment of digital assets and transactions and emerging tax policy issues;
- Consider the awareness of the taxation treatment by both retail and wholesale investors and those transacting in digital assets as part of their business;
- Consider the characteristics and features of digital assets and transactions in the market, including the rapid evolution of technology supporting the broader digital asset ecosystem;
- Analyse the taxation of digital assets and transactions in comparative jurisdictions and consider how international experience may inform the taxation of digital assets and transactions in Australia; and
- Consider whether or not any changes to Australia's taxation laws and/or their administration are warranted in the context of digital assets and transactions, both for retail and wholesale investors.

In carrying out the Terms of Reference, the Board is asked to consult with taxpayers, tax representative bodies, industry stakeholders and academics.

Timing

The Board is asked to report back to the Government by 31 December 2022.

Review and Consultation Process

The Board looks forward to working with the community in developing the Board's advice to Government. The Board will undertake an external consultation process, working closely and collaboratively with the Treasury and the Australian Taxation Office (ATO).

The Board has appointed Board members Mr Anthony Klein (Chair of the Working Group) and Ms Tanya Titman to oversee the review. They will be assisted by a working group comprising Board members, industry experts, academic experts, members of the tax profession, and representatives of the Treasury, and the ATO.

Interested parties may contribute to the review by participating in one of the consultation activities conducted by the Board or through online submissions. Set out below is an indicative timeframe for consultation. Further information will be made available at: www.taxboard.gov.au.

Timetable

August 2022	**Consultation guide – released**
	This Consultation Guide will be released in August 2022.
September 2022	**Consultations and submissions**
	The Board will hold a series of consultations to: • assist with identifying emerging tax policy issues associated with crypto assets; • consider the current tax treatment of crypto assets; and • consider the awareness of the tax treatment by both retail and wholesale investors and those transacting in crypto assets. More detailed information on session times and how to register is included in '*How to participate'* on page 15 of this Consultation Guide. Any written submissions to this Consultation Guide are due by **30 September 2022**. All submissions will be published on the Board's website once the review has been completed except where the submission is made on a confidential basis.
December 2022	**Final report**
	The Board is required to report to the Government by 31 December 2022.

Overview of Crypto Assets

The digital economy presents challenges not only for traditional areas of law such as contract law, but also for tax law.

The inherent characteristics of the internet mean that digitisation (as exemplified by crypto assets) potentially challenges fundamental concepts of tax law such as identification of a taxpayer's residence, the source of income and the characterisation of the relevant assets and transactions.

The term crypto assets is commonly used to refer to types of digital financial assets that are based on distributed ledger technology (DLT) and cryptography as part of their perceived or inherent value.[1]

In today's market, crypto assets have three primary uses: as an investment; as a means of exchange; and to access goods and services. Crypto assets include (but are not limited to) cryptocurrencies such as bitcoin and litecoin, utility tokens such as filecoin, and security tokens. They may run on their own blockchain or use an existing platform like Ethereum. Crypto assets also include non-fungible tokens (NFTs).[2]

New decentralised business models have led to growth in the use of crypto assets across a number of areas including gaming, art, real estate, lending and security.

Electronic payment systems '*based on cryptographic proof instead of trust'*[3] challenge the role and effectiveness of monetary policy as an important government lever in managing the economy. They may also present challenges from a taxation and monetary policy perspective if more jurisdictions authorise a cryptocurrency as legal tender.[4]

A widely accepted principle for taxation is that profits should be taxed where the value is created. However, with respect to crypto assets, uncertainties arise in relation to the following tax policy issues:

1. Where to tax? (nexus) – what are the taxing rights in a country where entities transact using crypto assets;
2. What to tax? (value creation) – how to attribute profit (and recognise losses) with respect to these crypto assets; and
3. When to tax? (triggering of taxable events) – whether the creation, transacting and/or processing of crypto assets triggers a taxing point.

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[1] Organisation for Economic Co-operation and Development (OECD) (2020), *Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues:*10, OECD, Paris, https://www.oecd.org/tax/tax-policy/taxing-virtual-currencies-an-overview-of-tax-treatments-and-emerging-tax-policy-issues.htm.

[2] The Treasury, 21 March 2022, *Crypto asset secondary service providers: Licensing and custody requirements Consultation Paper*:2, The Treasury.

[3] Nakamoto, Satoshi.'Bitcoin: A peer-to-peer electronic cash system.' *Decentralized Business Review* (2008): 21260.

[4] As of August 2022, 11 countries have launched Central Bank Digital Currencies (CBDCs), being Nigeria, Jamaica, the Bahamas and eight members of the Eastern Caribbean Union; Atlantic Council (2022) Central Bank Digital Currency Tracker, Atlantic Council Website, accessed 11 August 2022.

The creation, trade and use of crypto assets is in an ongoing state of evolution, and it is important to ensure that the tax framework remains appropriate. The tax treatment of some aspects of these assets may be viewed as uncertain and unclear, not only in Australia, but in comparable jurisdictions. In this regard, the purpose of the Board's review is to consider Australia's tax framework and whether changes are required to the existing tax laws or their administration in light of rapidly evolving changes in technology and the digital economy.

Appropriate policy framework

In developing an appropriate policy framework, the Board will analyse the tax treatment of crypto assets from creation to the various forms of exchange or disposal with a view to determining whether Australian taxation laws need to be amended and/or updated. Depending on the findings from the Board's review, the recommendations made by the Board may include the establishment of a set of tax principles, amendments to current Australian taxation laws to comply with these principles, and/or the establishment of a new taxing regime.

It is important that a tax system does not impede businesses investment and innovation. The tax framework should also seek to deliver a neutral outcome; that is, it should not encourage or discourage substitution from crypto assets to other assets.

Additionally, this framework should support the ATO in administering compliance over the taxation of crypto assets in an efficient and cost-effective manner.

Current tax treatment of crypto assets

ATO guidance

In response to the development and growth in the use of cryptocurrencies, the ATO released guidance on the tax treatment of bitcoin in December 2014. Since this time, the ATO has continued to issue further guidance. A high-level summary of that ATO guidance released to date is as follows:

- ***Bitcoin is not a foreign currency***[5]

  Under current ATO guidance, the ATO's view is that Bitcoin does not fall within the definition of a 'foreign currency' under the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997). Accordingly, Division 775 of the ITAA 1997, which provides rules for recognising foreign currency gains and losses for income tax purposes, does not apply.

[5] Taxation Determination TD 2014/25: *Income tax: is bitcoin a 'foreign currency' for the purposes of Division 775 of the income Tax Assessment Act 1997?.*

- ***Capital Gains Tax***[6]

  Crypto assets including cryptocurrencies, such as bitcoin, generally fall under the Capital Gains Tax (CGT) provisions.

  Where crypto assets are held as an investment, a CGT event can occur for a variety of reasons, the most common being the disposal of crypto assets at the time the asset is sold. However, a disposal can include:

  - selling or gifting crypto assets;
  - trading or exchanging crypto assets (including the disposal of one crypto asset for another crypto asset);
  - converting crypto assets to fiat currency such as Australian dollars; or
  - use of crypto assets to obtain goods or services or to remunerate employees.

  If a capital gain is made on the disposal of crypto assets, some or all of the gain may be taxed. Certain capital gains or capital losses from disposing of crypto assets that are treated as personal use assets for tax purposes (i.e. CGT assets used or kept mainly for personal use or enjoyment) are disregarded.

- ***Trading stock***[7]

  Crypto assets held by entities carrying on a business of mining and trading crypto assets or carrying on a crypto asset exchange business will generally be treated as trading stock for tax purposes. Further, crypto assets received as a form of payment in the ordinary course of business will also be treated as trading stock where the crypto asset is held for the purpose of sale or exchange.

  As such, proceeds from the sale of crypto assets held as trading stock in a business are considered ordinary income for the entity (rather than taxed under CGT rules).

- ***Fringe Benefits Tax***[8]

  On the basis that bitcoin is not considered 'foreign currency', cryptocurrencies provided to employees will be a 'property benefit' for fringe benefits tax (FBT) purposes under the *Fringe Benefits Tax Assessment Act 1986* (Cth), but only where there is a valid salary sacrifice agreement in place. The provision of crypto assets by an employer to an employee as remuneration, other than as salary and wages, will be a property benefit and the employer may be subject to FBT.

  Crypto assets provided to an employee as a fringe benefit is not assessable and is not exempt (NANE) income of the taxpayer.

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[6] Taxation Determination TD 2014/26: *Income tax: is bitcoin a 'CGT asset' for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997?;* ATO (2022) *Crypto asset transactions*, ATO website, accessed 12 August 2022.

[7] Taxation Determination TD 2014/27: *Income tax: is bitcoin trading stock for the purposes of subsection 70-10(1) of the Income Tax Assessment Act 1997?;* ATO (2022) *Crypto assets used in business*, ATO website, accessed 12 August 2022.

[8] Taxation Determination TD 2014/28: *Fringe benefits tax: is the provision of bitcoin by an employer to an employee in respect of their employment a property fringe benefit for the purposes of subsection 136(1) of the Fringe Benefits Tax Assessment Act 1986?*; ATO (2022) *Paying salary or wages in crypto assets*, ATO website, accessed 12 August 2022.

However, if the employee subsequently receives income from holding that crypto asset (such as, interest income or capital gains arising upon disposal), then that income will be assessable to the employee (and not to the employer who originally provided the fringe benefit).

- ***Goods and Services Tax***[9]

Digital currency is defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), and the goods and services tax (GST) consequences of using it as a method of payment are the same as the consequences of using money as payment.

When a business sells digital currency and is paid with Australian, foreign, or digital currency, it makes an input taxed supply of digital currency. The buyer, if they are a business, also makes an input taxed supply of Australian, foreign, or digital currency.

- ***Donating crypto assets***[10]

An entity may be eligible for a deduction for a gift or donation of a crypto asset where the donation is made to a deductible gift recipient and the relevant gift conditions and rules are met.

A donation of a crypto asset will be a CGT event as it represents a disposal of property and may result in CGT consequences. The crypto assets are valued at market value at the time of the CGT event for the purposes of calculating any capital gain or loss. Generally, the disposal of crypto assets gifted under a will, donated under the Cultural Gifts Program or personal use assets will not result in a CGT liability.

- ***Pay as you go withholding***[11]

If an employer uses crypto assets to satisfy an obligation to pay salary or wages to an employee, the employer will be subject to Pay as You Go (PAYG) withholding obligations and the amount will be subject to income tax in the hands of the employee.

- ***Non-fungible Tokens***[12]

The income tax treatment of NFTs depends on how the NFT is held and used and follows the same general principles as cryptocurrencies. Transactions relating to NFTs may be subject to income tax:

- on revenue account as trading stock
- as part of a business or profit-making scheme; or
- under the CGT regime.

For GST purposes, an NFT is not a form of digital currency. The GST treatment of an NFT depends on whether the transaction meets the requirements of being either a taxable or GST-free supply under the GST rules.

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[9] ATO (2018) *GST and digital currency*, ATO website, accessed 12 August 2022.

[10] ATO (2022) *Gifts and donations of crypto assets*, ATO website, accessed 12 August 2022.

[11] ATO (2022) *Crypto assets used in business,* ATO website, accessed 12 August 2022.

[12] ATO (2022) *Non-fungible tokens,* ATO website, accessed 12 August 2022.

Relevant reports

The Senate Select Committee on Australia as a Technology and Financial Centre Final report

On 20 October 2021, the Senate Select Committee on Australia as a Technology and Financial Centre released a report which focussed on key areas affecting the competitiveness of Australia's technology, finance and digital asset industries, including the regulatory future of cryptocurrencies and digital assets.

The report discussed the concerns and issues relating to how cryptocurrencies and other digital assets are treated for tax purposes in Australia. The report highlighted various excerpts from submissions made to the Senate Select Committee, including:

> "…*Australia's current taxation regulations and guidance relating to cryptocurrencies and other digital assets need updating in order to keep pace with the rapid evolution of technology*…
>
> …*stakeholders expressed concern about a lack of clear guidance from the ATO about the application of existing principles in the tax law to new and emerging technologies"*

The report noted that there is a need to update the rules around CGT to ensure that new types of technology structures are appropriately accounted for and made a recommendation to Government that the CGT regime should be amended so that digital asset transactions only create a CGT event when they genuinely result in a clearly definable capital gain or loss.

Former Federal Government's response to the report

On 8 December 2021, the former Federal Government released its response to the report (and other reports relating to Australia's payments systems).

In response to the recommendation made in the report in relation to the taxation of digital assets, the former Treasurer announced that to provide holders of digital assets (such as crypto assets) with clarity, the Board would commence a review into the appropriate policy framework for the taxation of digital assets and transactions in Australia. Hence, the purpose of the Board's review.

In addition, the former Treasurer announced that, in the interim, the Treasury will liaise with the ATO on the potential for issuing more expansive guidance on the current tax treatment of crypto assets.

Other Federal Government announcements

On 22 June 2022, the Treasurer and Assistant Treasurer issued a joint media release confirming that "*Crypto currencies will continue to be excluded from foreign currency tax arrangements*" from 1 July 2021. This announcement was made to provide certainty and clarity for crypto asset holders following the decision by the Government of El Salvador to allow bitcoin as legal tender of that country. When legislated, this will confirm the position in ATO guidance that crypto assets are not foreign currency for Australian tax purposes.

International developments

The Organisation for Economic Cooperation and Development (OECD) issued *Addressing the Tax Challenges of the Digital Economy Action 1: 2015 Final Report,* which sets out the challenges arising as a result of the spread of the digital economy.[13] In this report, the OECD, amongst other things, indicated that:

> "*The digital economy also raises broader tax challenges for policy makers. These challenges relate in particular to nexus, data, and characterisation for direct tax purposes. These challenges trigger more systemic questions about the ability of the current international tax framework to deal with the changes brought about by the digital economy and the business models that it makes possible and hence to ensure that profits are taxed in the jurisdiction where economic activities occur and where value is generated* ".

On 12 October 2020, the OECD released its report on *Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues,* which analyses the emerging issues related to the taxation of virtual currencies, as well as the evolution of the consensus mechanisms used to maintain blockchain networks (a shared, distributed ledger that records transactions across business networks) and the growth of decentralised finance. [14] This report also highlights a number of key insights that policymakers may wish to consider in strengthening their legal and regulatory frameworks for taxing virtual currencies.

Separately, the OECD is developing a reporting framework that would allow jurisdictions to collect and share information on transactions in crypto assets.[15] A mechanism, the Common Reporting Standard, already exists for jurisdictions to share information on transactions in traditional financial assets. The purpose of this new reporting standards is to allow tax administrators to obtain high-level tax information on persons engaging in certain transactions in crypto assets.

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[13] OECD (2015), *Addressing the Tax Challenges of the Digital Economy ACTION 1: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241046-en.

[14] OECD (2020), *Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues*, OECD, Paris, https://www.oecd.org/tax/tax-policy/taxing-virtual-currencies-an-overview-of-tax-treatments-and-emerging-tax-policy-issues.htm.

[15] OECD (2022), *OECD seeks input on new tax transparency framework for crypto-assets and amendments to the Common Reporting Standard*, OECD, https://www.oecd.org/ctp/exchange-of-tax-information/oecd-seeks-input-on-new-tax-transparency-framework-for-crypto-assets-and-amendments-to-the-common-reporting-standard.htm.

Consultation questions

The Board encourages you to reflect on the consultation questions below to assist in formulating your input to the review. You should not feel obliged to address all of these questions and we encourage you to raise any other issues relevant to the current Australian tax treatment of crypto assets and emerging tax policy issues.

Current tax treatment of crypto assets

1. Is the current tax treatment of crypto assets clear and understood under the Australian tax law? If not, what are the areas of uncertainty that may require clarification?

2. Do crypto assets and associated transactions feature particular characteristics that are 'incompatible' with current tax laws? If yes, what are these and why are they incompatible?

Awareness of the tax treatment of crypto assets

3. Do entities which carry on a business in relation to crypto assets or accept crypto assets as a form of payment, have a comprehensive awareness of the current tax treatment of crypto assets and their tax obligations?

4. Are retail investors aware of the current tax treatment of crypto assets? To what extent are they receiving professional tax advice?

5. Do wholesale investors understand the current tax treatment of crypto assets? To what extent are they receiving professional tax advice?

6. How can taxpayer awareness of the tax treatment of crypto assets be improved?

Characteristics and features of crypto assets

7. How should the tax transparency of crypto assets be improved, including what information tax administrators need to know about transactions for purposes of compliance and enforcement?

International tax treatment of crypto assets and experience

8. What lessons can Australia draw from the taxation of crypto assets in other comparable jurisdictions, including novel ways of taxing these transactions?

Changes to Australia's taxation laws for crypto assets

9. What changes, if any, should be made to Australia's taxation laws in relation to crypto assets, whilst maintaining the integrity of the tax system? If changes are required, please specify the reasons.

10. How could tax laws be designed to ensure that they keep pace with the rapidly evolving nature of crypto assets?

Administration of Australia's taxation laws for crypto assets

11. How can the existing tax treatment of crypto assets be improved to ensure better compliance and administration?

12. What data sources are available to assist taxpayers in completing their tax obligations and/or the ATO in implementing its compliance activities?

13. Are there intermediaries (such as exchanges) that are involved in particular crypto asset transactions that could play a role in the administration of the tax laws? If so, what would their involvement look like?

14. How can taxpayers be further supported to understand their tax obligations in relation to crypto assets?

15. What additional support can be provided to the tax adviser community to assist them in advising their clients in relation to the tax treatment of crypto assets?

How to participate

The Board invites comment on the consultation questions set out in this consultation guide and looks forward to engaging further with interested parties throughout the course of this review.

Consultations

The Board will be holding a series of consultations on the following dates (all times are Australian Eastern Standard Time):

- 5 September 2022 at 9:30 am
- 8 September 2022 at 10:00 am (in person in Sydney and virtual)
- 14 September 2022 at 9:30 am
- 15 September 2022 at 2:00 pm
- 19 September 2022 at 9:30 am
- 21 September 2022 at 9:30 am
- 23 September 2022 at 9:30 am

All consultation sessions will be conducted virtually (except for 8 September 2022 which will be both virtual and in person in Sydney). However, we may conduct additional consultation sessions in person depending on the level of interest per session and the location of the participants.

Private discussions with the Board may also be arranged.

If you would like to participate in the consultations or private discussions, please express your interest at TaxDigitalAssets@taxboard.gov.au and advise where you are located and your industry.

Submissions

In addition to participating in consultations, the Board welcomes any written submissions to this review. Submissions can be made to TaxDigitalAssets@taxboard.gov.au

The written submissions in response to this Consultation Guide will be due by **30 September 2022**. All submissions will be published on the Board's website once the review has been completed except where the submission is made on a confidential basis.

Contact information

The Board is supported by a secretariat based in the Treasury.

Email: TaxDigitalAssets@taxboard.gov.au

Phone: (02) 6263 4366

Definitions

Definitions for terms used in this Consulation Guide have been set out below.

Term	Definition
Blockchain	A 'blockchain' is a particular type of data structure used in some distributed ledgers which stores and transmits data in packages called 'blocks' that are connected to each other in a digital 'chain'. Blockchains employ cryptographic and algorithmic methods to record and synchronize data across a network in an immutable manner.[16]
Crypto asset	Commonly used to refer to types of digital financial assets that are based on distributed ledger technology (e.g. blockchain) and cryptography as part of their perceived or inherent value.[17]
Cryptocurrency	Cryptocurrencies are digital tokens. They are a subset of crypto assets that rely on cryptographic techniques to achieve consensus (i.e. validation), for example Bitcoin and ether.[18]
Cryptography	Cryptography is at the core of distributed ledger technology, in particular for blockchain, and is the technique of protecting information by transforming it (i.e. encrypting it) into an unreadable format that can only be deciphered (or decrypted) by someone who possesses a secret key. [19] Each new data entry/transaction record is "hashed", which means that a cryptographic hash function is applied to the original message. A hash takes data of any size input and computes a digital fingerprint similar to a human fingerprint that cannot be changed unless the data itself is changed.[20]
Decentralised finance (DeFi)	DeFi covers the crypto-assets, financial smart contracts, software/protocols and decentralised applications used to decentralise and automate financial transactions.[21]

[16] Krause, Solvej Karla Natarajan,Harish Gradstein and Helen Luskin*, Distributed Ledger Technology (DLT) and blockchain (English). FinTech note, no. 1,* Washington, D.C, World Bank Group, http://documents.worldbank.org/curated/en/177911513714062215/Distributed-Ledger-Technology-DLT-and-blockchain.

[17] See footnote 14.

[18] See footnote 16.

[19] European Parliament, Directorate-General for Internal Policies of the Union, Snyers, A., Houben, R., *Cryptocurrencies and blockchain : legal context and implications for financial crime, money laundering and tax evasion*, European Parliament, 2018, https://data.europa.eu/doi/10.2861/280969.

[20] See footnote 16.

[21] See footnote 14.

Term	Definition
Distributed ledger technology	A novel and fast-evolving approach to recording and sharing data across multiple data stores (ledgers). This technology allows for transactions and data to be recorded, shared, and synchronized across a distributed network of different network participants.[22]
Nodes	Nodes are network participants in a distributed ledger network (e.g. computers or phones).[23]
Token	A token is a representation of a crypto asset. It typically does not have intrinsic value but it is linked to an underlying asset, which could be anything of value.[24]

[22] See footnote 16.

[23] Ibid.

[24] Ibid.