

30 September 2022

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

By email: CryptoTax@treasury.gov.au

Dear Director,

Taxation treatment of Digital Currency

Chartered Accountants Australia and New Zealand, CPA Australia, Institute of Public Accountants, Law Council of Australia and The Tax Institute (together, the **Joint Bodies**) write to you as the peak professional accounting and tax practitioner bodies in Australia representing the tax profession.

The Joint Bodies welcome the opportunity to make a submission to the Treasury in relation to the Treasury Laws Amendment (Measures for Consultation) Bill 2022: Taxation treatment of digital currency (**draft legislation**) and accompanying explanatory material.

In the development of this submission, we have closely consulted with members of the Joint Bodies with specific knowledge, experience and expertise in the taxation of cryptocurrencies and other digital assets. We set out below our observations and overarching comments for your consideration.

Holistic policy approach

The primary objective of the draft legislation is to clarify 'that digital currencies (such as Bitcoin) continue to be excluded from the income tax treatment of foreign currency.' However, it is difficult to ascertain whether the draft legislation seeks to incentivise or disincentivise economic activity relating to Bitcoin and other 'digital currencies.'

We consider that there is a need for the Government to make a clear and holistic policy statement outlining its intent as to whether Australia supports the use and increased adoption of cryptocurrencies and other digital assets. Legislative changes that potentially impact the economic activity related to these assets should reflect the Government's underlying policy approach. The Joint Bodies recommend that Government should undertake public consultation and seek a broad range of views to determine Australia's policy intent regarding economic activity for cryptocurrencies and digital assets.

Need for legislative certainty

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.

Scope of regulation-making power

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 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'.

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 of the Commissioner 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.

Some members of the Joint Bodies have also noted that the definition of a 'digital currency' may need to be reviewed after the conclusion of the Board's ongoing Review of the Tax Treatment of Digital Assets and Transactions (**Review**). If an activities-based taxation of cryptocurrencies is recommended and adopted, there are potential implications for the suitability of the existing definition.

Tax treatment of digital assets

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.

We note that the outcome of the Board's ongoing Review may provide the Government with clarity on the appropriate tax outcomes for cryptocurrencies and other digital assets. Consideration of the outcome of the Review may help to ensure that the draft legislation and explanatory materials do not quickly become outdated or incorrect in the future.

If you would like to discuss any of the above, please contact The Tax Institute's Tax Counsel, Julie Abdalla, on (02) 8223 0058.

Yours faithfully,



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