

**ASIC**

Australian Securities &amp; Investments Commission

## Initial coin offerings and crypto-currency

This information sheet (INFO 225) gives guidance about the potential application of the *Corporations Act 2001* (Corporations Act) to entities that are considering raising funds through an initial coin offering (ICO) and to other crypto-currency or digital token (referred to as 'crypto-asset') businesses. This information sheet covers:

- › Part A: What is the legal status of ICOs or crypto-assets? This part discusses when laws prohibiting misleading or deceptive conduct, or the Corporations Act, would apply to an ICO or crypto-asset.
- › Part B: When could an ICO be an offer of a financial product?
- › Part C: When could a platform for secondary trading of ICO tokens or other crypto-assets become a financial market?
- › Part D: What about financial products that reference ICO tokens or other crypto-assets?
- › Part E: How can prospective ICO issuers and crypto-asset businesses obtain informal assistance from ASIC?

ASIC is aware of the global interest in crypto-assets, including the use of ICOs by entities to raise funds. A number of international regulators have issued guidance on the application of their securities and financial services laws to ICOs.

Crypto-assets and the use of distributed ledger technology has the potential to make an important contribution to fintech innovation. ICOs can be an option available to businesses to raise funds. Issuing and trading of crypto-assets, and specifically ICOs, must be conducted in a manner that promotes consumer trust and confidence and complies with the relevant laws. ASIC uses the term 'consumer' to also include investors.

For a discussion of distributed ledger technology see [ASIC Information Sheet 219](#).

ASIC is also aware that entities may propose to issue financial products that would be linked to or reference crypto-assets. For clarity, a financial product that references or is linked to crypto-assets is subject to the standard regulatory regime under the Corporations Act that applies to that kind of specific product. These products are addressed in Part D, [What about financial products that reference ICO tokens or other crypto-assets?](#).

ASIC aims to assist businesses to understand their potential obligations under the Corporations Act and ASIC Act by issuing this information sheet. This information sheet also refers to other relevant Australian legislation including the Australian Consumer Law.

### Part A: What is the legal status of ICOs and crypto-assets?

A range of ICOs and crypto-assets are available in Australia. The laws applicable to a crypto-asset or ICO may differ depending on whether the crypto-asset or ICO is (or is not) a financial product.

## Misleading or deceptive conduct

Australian law prohibits misleading or deceptive conduct in a range of circumstances, including in trade or commerce, in connection with financial services, and in relation to a financial product. Care should be taken to ensure promotional communications about any crypto-currency or ICO do not mislead or deceive potential consumers and do not contain false information.

For ICOs and crypto-assets that are financial products, the Corporations Act includes prohibitions against misleading and deceptive conduct. Regulatory Guide 234 Advertising financial products and services (including credit): Good practice guidance contains guidance to help businesses comply with their legal obligations to not make false or misleading statements or engage in misleading or deceptive conduct.

For ICOs and crypto-assets that are not financial products (for example, ASIC has stated that it does not consider bitcoin to be a financial product), the same prohibitions against misleading or deceptive conduct apply under the Australian Consumer Law.

Conduct that may be misleading or deceptive to consumers can include:

- the use of social media to generate the appearance of a greater level of public interest in an ICO
- undertaking or arranging for a group to engage in trading strategies to generate the appearance of a greater level of buying and selling activity for an ICO or a crypto-asset
- failing to disclose adequate information about the ICO, or
- suggesting that the ICO is a regulated product or the regulator has approved the ICO if that is not the case.

It is a serious breach of the Australian law to undertake misleading or deceptive conduct. ASIC has received a delegation of power from the Australian Competition and Consumer Commission (ACCC) that enables ASIC, in coordination with the ACCC, to take action where there is potential misleading or deceptive conduct.

## Financial products

For ICOs and crypto-assets that are financial products, financial products as defined in the Corporations Act are subject to the general law as well as to the Corporations Act. See Part B of this Information Sheet for further information on 'When could an ICO be a financial product?'

For ICOs and crypto-assets that are not financial products, these are subject to the general law and the Australian consumer laws.

Australian law and regulations may apply even if the ICO or crypto-asset is issued or sold by a foreign entity. Likewise, foreign law may apply to an ICO or crypto-asset sold by an Australian entity.

## Does the Corporations Act apply?

Whether the Corporations Act applies to an ICO or a crypto-asset will depend on the crypto-currency or the ICO offering.

For ICOs, the mere fact that the token issued is described as a utility token does not mean it is not a financial product. The mere existence of a statement that the ICO or the token is not a financial product also does not mean it is not a financial product. It is important for entities to consider all of the rights and features associated with the token.

Similarly, the mere fact that a crypto-asset is described as a digital currency does not mean it is not a financial product.

Therefore, ASIC encourages entities seeking to undertake an ICO or issue a crypto-asset to carefully consider the nature of the ICO or crypto-asset, and the information provided to consumers. They can do so by seeking professional advice

(including legal advice) on all of the circumstances of the issue or sale, not just a part of the sale. ASIC also encourages entities to ensure the professional advice and disclosures are kept up-to-date where the design of the ICO or the crypto-asset changes over the course of product development. Failure to do so will increase the risk that the offer of the ICO, the issue of the crypto-asset and/or the information provided about the ICO or crypto-asset could mislead or deceive consumers.

ASIC also reminds entities of other general Corporations Act obligations that may need to be considered in the offer of an ICO or the issue of a crypto-asset. For example, officers' duties to act in the best interests of a corporation or discharge their duties for a proper purpose.

## Part B: When could an ICO be a financial product?

This part considers types of ICO offers and whether the Corporations Act might apply to them based on attributes of some typical forms of offering. It provides guidance on the legal status of ICOs made available to consumers in Australia regardless of whether the ICO is created and offered from within Australia or offshore.

### When could an ICO be a managed investment scheme?

#### What is a managed investment scheme?

A managed investment scheme is defined within the Corporations Act. The following are basic indicators of whether an arrangement is a managed investment scheme:

- people contribute money or assets (such as digital currency) to obtain an interest in the scheme ('interests' in a scheme are generally a type of 'financial product' and are regulated by the Corporations Act)
- any of the contributions are pooled or used in a common enterprise to produce financial benefits or interests in property, and
- the contributors do not have day-to-day control over the operation of the scheme but, at times, may have voting rights or similar rights.

#### Application to ICOs

An assessment of what rights are attached to the tokens issued under an ICO is the key consideration in relation to assessing the legal status of an ICO. These rights are generally described in the ICO's 'white paper', an offer document issued by the business making the offer or sale of an ICO token. What is a right should be interpreted broadly and includes rights that may arise in the future or on a contingency, and rights that are not legally enforceable. If the value of the token is related to the management of an arrangement as described above, the issuer of the ICO is likely to be offering a managed investment scheme.

In some cases, ICO issuers may frame the entitlements received by contributors as a receipt for a purchased service. However, if the value of the digital tokens acquired is affected by the pooling of funds from contributors or use of those funds under the arrangement, then the ICO is likely to fall within the requirements relating to managed investment schemes. This is often the case if what is offered through the ICO has the attributes of an investment.

If a managed investment scheme is being used there are a range of product disclosure, licensing and potential managed investment schemes registration obligations under the Corporations Act.

- › More information about managed investment schemes
- › Licensing requirements for operators of managed investment schemes

## When could an ICO be an offer of shares?

### What are shares?

A share is a collection of rights relating to a company. There are a range of types of shares that may be issued. Most shares issued by companies that offer shares to the public are 'ordinary shares', and carry rights regarding the ownership of the company, voting rights in the decisions of the body, some entitlement to share in future profits through dividends, and a claim on the residual assets of the company if it is wound up.

Most shares issued in Australia come with the benefit to shareholders of limited liability as well.

› More information about shares

### Application to ICOs

When an ICO is created to fund a company (or to fund an undertaking that looks like a company) then the rights attached to the tokens issued by the ICO may fall within the definition of a share.

The bundle of rights referred to above may be used by ASIC to help determine if a token is in fact a share. If the rights attached to the token (which are generally found in the ICO's 'white paper') are similar to rights commonly attached to a share – such as 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 tokens could fall within the definition of a share.

Where it appears that an issuer of an ICO is actually making an offer of a share, the issuer will need to prepare a prospectus. Such offers of shares are often described as initial public offerings (IPOs).

By law, a prospectus must contain all information that consumers reasonably require to make an informed investment decision.

Importantly, though an ICO may look similar to an IPO, the ICO may not offer the same protections to consumers and may result in liability for the issuer and those involved in the ICO. Issuers of an ICO need to be aware that where an offer document for an ICO is, or should have been, a prospectus and that document does not contain all the information required by the Corporations Act, or includes misleading or deceptive statements, consumers may be able to withdraw their investment before the tokens are issued or pursue the issuer and those involved in the ICO for the loss.

For more details about the information a prospectus should contain see [Regulatory Guide 228](#).

## When could an ICO be an offer of a derivative?

### What is a derivative?

Section 761D of the Corporations Act provides a broad definition of a derivative. For the purpose of this information sheet a 'derivative' is a product that derives its value from another 'thing' which is commonly referred to as the 'underlying instrument' or 'reference asset'. The underlying instrument may be, among other things, a share, a share price index, a pair of currencies or a commodity (including a cryptocurrency).

Two examples of derivatives are options and futures. An option is a contract between two parties. The buyer has the right, but not the obligation, to buy (or sell) an asset, at a set price, on or before a specified future date, other than a right to acquire by way of issue a security of the entity, such as a share. Futures are generally contracts to buy or sell a particular asset (or cash equivalent) at some time to come. This may involve the use of intermediaries, who themselves may need to be licensed.

## Application to ICOs

If an ICO produced a token that is priced based on factors such as another financial product or underlying market index or asset price moving in a certain direction before a time or event which resulted in a payment being required as part of the rights or obligations attached to the token, this may be a derivative. For example, payment arrangements associated with changes in the relevant product, index or asset could be structured as a 'smart contract' or self-executing contract represented in the token itself.

For more information on the licensing of derivatives see our [licensing pages](#).

When could the coin issued under an ICO be a non-cash payment facility?

### What is a non-cash payment facility?

A non-cash payment (NCP) facility is an arrangement through which a person makes payments, or causes payments to be made, other than by physical delivery of currency.

This type of facility can be a financial product for which an AFS licence is required if payments can be made to more than one person. An intermediary that arranges for issue of a NCP facility may need an AFS licence, or to act on behalf of an AFS licensee.

## Application to ICOs

Tokens offered under an ICO are unlikely to be NCP facilities – though they may be a form of value that is used to make a payment (instead of physical currency). An ICO may involve an NCP facility if it includes an arrangement that allows:

- payments to be made to a number of payees in this form, or
- payments to be started in this form and converted to fiat currency to enable completion of the payment.

For general information on NCP facilities, including the low-value exemption that can apply, see [Regulatory Guide 185](#).

### Relationship between ICOs and crowd-sourced funding?

ICOs are sometimes referred to by industry as a form of crowd funding. Crowd funding using an ICO is not the same as 'crowd-sourced funding' (CSF) regulated by the Corporations Act. Care should be taken to ensure the public is not misled about the application of the CSF laws to an ICO.

Under the recently amendments to the Corporations Act, 'crowd-sourced funding will be a financial service, often including a platform or market, where start-ups and small businesses raise funds, generally from a large number of consumers that invest small amounts of money. There are specific rules for the CSF regime which reduce the regulatory requirements for public fundraising while maintaining appropriate investor protection measures.

The laws require that a provider of CSF services must hold an Australian financial services licence with authorisation to provide this service.

› More information about the CSF regime

## Part C: When could a crypto-asset trading platform become a financial market?

This part provides about guidance about platforms that enable trading of ICO tokens or other crypto-assets.

## What is a market?

A financial market is a facility through which offers to acquire or dispose of financial products are regularly made. Anyone who operates a financial market in Australia must obtain a licence to do so or otherwise be exempted by the Minister.

## Application to ICOs and crypto-assets

Where an ICO token or a crypto-asset is a financial product (whether it is a managed investment scheme, share or derivative), then any platform that enables consumers to buy (or be issued) or sell these tokens or crypto-assets may involve the operation of a financial market.

To operate in Australia, the platform operator may need to hold an Australian market licence unless covered by an exemption.

› More information on markets

## Part D: Financial products that reference crypto-assets

ASIC has also engaged with businesses on proposals for financial products that would invest in crypto-assets or otherwise enable consumers to have exposure to crypto-assets.

ASIC reminds businesses to carefully consider that they will provide a financial service in relation to the proposed financial product and may require a new licence or licence variation (such as a new product authorisation) to provide financial services involving the proposed product.

ASIC also provides the following guidance for those businesses that may seek a new licence or a licence variation:

- If ASIC receives an application for a licence, or for a licence variation, in relation to a crypto-asset related financial product, we would assess the application in accordance with applicable policy and based on our risk-targeted framework.
- Currently, we consider that applications relating to crypto-asset related financial products are more likely to be novel applications. Where the application is a novel application, our experience indicates assessment of the application may be expected to take more time.
- ASIC will work with businesses to identify the issues to be addressed in the application. We will consider issuing additional guidance where doing so may be of assistance to industry.

ASIC also reminds industry that, where a financial product is proposed to be an exchange-listed product, licensed Australian market operators are expected to play an important gatekeeper role in ensuring the suitability of issuers and the products that they are permitted to list and trade on their markets.

## Part E: Where can I get more information?

Entities that have specific requests or questions about an ICO or a crypto-asset may contact ASIC's Innovation Hub or their existing ASIC contact.

For all inquiries, ASIC strongly encourages entities to carefully consider their proposal and seek professional advice (including legal advice). In particular, ASIC is not in a position to review a draft white paper and provide a view about the operation of Australian law.

## More information

› ASIC's role and the laws we administer

- › Australian financial services licences
- › ASIC's Innovation Hub
- › Investing in initial coin offerings - ASIC's MoneySmart website

This is **Information Sheet 225 (INFO 225)**, updated in May 2018. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

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