

30 September 2022

Director
Corporate Tax Unit
Corporate and International Tax Division
Treasury
Langton Cres
Parkes ACT 2600
By Email: CryptoTax@treasury.gov.au

To the Director,

Comment on Clarifying crypto not taxed as foreign currency

We write to provide our feedback and recommendations on the proposed amendment to clarify that cryptocurrencies, in particular Bitcoin, will not be taxed as foreign currency.

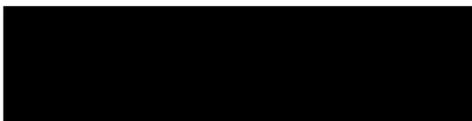
Whilst we welcome clarity and certainty with respect to cryptocurrencies being excluded from the foreign currency regime, we raise several concerns with the proposed amendments. We highlight a lack of clear policy underpinning the amendment, the overlap with the Board of Taxation review and the implications of the amendment to include the power to make regulations.

If you have any concerns or questions, please contact Elizabeth Morton by email at Elizabeth.morton@rmit.edu.au.

Yours faithfully,



Dr. Elizabeth Morton, RMIT Blockchain Innovation Hub.



Ms. Lisa Greig, Perigee Advisers Pty Ltd.

Acknowledgement is also offered to Ms. Joni Pirovich, Blockchain & Digital Assets Pty Ltd.

Inc:

Appendix A: Comment on Proposed Amendments

Appendix B: About the authors

Appendix A: Comment on Proposed Amendments

1.0 Clarity and Recognition Welcome

- 1.1 We agree that given the earlier media release confirming the Government's intention, there needs to be prompt action and clarity.
- 1.2 The Government has made an acknowledgement that the events in recent times, in particular with El Salvador accepting Bitcoin as legal tender and subsequently, the AAT decision in *Seribu Pty Ltd and Commissioner of Taxation (Taxation) [2020] AATA 1840*,¹ does raise the possibility that Bitcoin could be interpreted as meeting the definition of foreign currency in the ITAA97.²
- 1.3 This concession is contrary to the intransigent messaging in light of these events and accordingly is welcomed.
- 1.4 The inferred intention to exclude centralised Government-issued digital currencies further acknowledges the potential of the technology, especially with the release of the Reserve Bank of Australia's recent whitepaper³ proposing a pilot for an Australian CBDC eAUD.

2.0 Reform and Proper Tax Policy Objectives

- 2.1 The Government's approach focuses on a return to the status quo established in the 2014 tax determinations.

Bitcoin and other similar digital currencies were never intended to be foreign currencies for Australian income tax purposes.

- 2.2 The concern is whether this reflects an appropriate basis for tax reform. The crypto economy has substantially evolved and become more complex since 2014 and warrants more deliberate and considered attention.
- 2.3 As reflected in a related submission to the Board of Taxation (BoT) Review of Digital Assets and Transactions, tax policy should not distort or bias without a clear policy objective to incentivise or disincentive certain activities.⁴
- 2.4 Whilst it is recognised that there are inherent challenges to traditional economic principles and related risks to the government's revenue base, the proposed reform's objectives are arguably obscured.

¹ See for example, Elizabeth Morton, 'Creating certainty: crypto will not be foreign currency', RMIT Blockchain Innovation Hub (Blog, 23 June 2022) <<https://rmitbih.substack.com/p/creating-certainty-crypto-will-not>>.

² *Treasury Laws Amendment (Measures for Consultation) Bill 2022: Taxation Treatment of Digital Currency* Exposure Draft Explanatory Materials.

³ Reserve Bank of Australia, 'Australian CBDC Pilot for Digital Finance Innovation', White Paper 26 September 2022.

⁴ Elizabeth Morton, Lisa Greig, James Carey, Veronika Komarenko and Maryna Kovalenko, 'Comment on the Review of the Tax Treatment of Digital Assets and Transactions' (Board of Taxation Submission, 27 September 2022) ('Members of the Tax Profession'). Available on request.

2.5 Moreover, for a narrow aim, the mechanism to achieve this reform is via an amendment to the GST Act. While this makes some sense – aiding consistency across regimes – it does not consider the broader income tax implications.

2.6 For example, there are fundamental issues concerning the GST definition of digital currency, which will not be resolved with the proposed amendment. These include:

- 2.6.1 What tokens are arguably excluded from the definition (e.g., collateralised stable coins and utility tokens) therefore still subject to double taxation issues; and,
- 2.6.2 Practicalities with administration, such as knowing customer locations to appropriately determine correct categorisation as either input taxed or GST free sales.⁵

2.7 This is fundamentally linked to the BoT Review and the proposed token mapping currently underway.

3.0 The Relevance and Timing of the BoT Review

3.1 We raise the concern over whether the Government should be awaiting the BoT report before proceeding with the proposed amendment. Whilst lagging regulation is a fundamental issue to effective tax administration, the outcome of the BoT review is fundamental to the issues underpinning the proposed amendment.

3.2 More broadly, token characterisation and decentralised entity characterisations are necessary to frame taxing reform and, at minimum, understand the interrelationships with other regulatory frameworks.⁶

3.3 International developments are also relevant in considering broader issues of reform. In particular, the UK *Law Commission* has proposed a third category of property distinct from ‘things in possession’ and ‘things in action’ that focuses on *data objects*. In doing so, recognises idiosyncrasies within the technology.⁷

3.4 Any tax reform in response to the crypto economy should be consistent and not add unnecessary complexity to an already complex tax system. As Graeme Cooper describes:

If words and sections are the bricks-and-mortar of a tax statute, then individual regimes within the Act are its rooms and corridors. Collections of regimes may be aggregated in the tax legislation around broader themes — taxation of capital gains, corporate distributions, international transactions, financial transactions and so on... [Rules and regimes] need to be able to sit comfortably with each other and work together. Their metes and bounds need to be clear, as well as their relationship with other proximate regimes.⁸

⁵ As outlined in Members of the Tax Profession (n 4); Peter Murray and Joni Pirovich, ‘The taxation of cryptocurrencies’ (NSW Annual Tax Forum, 25 May 2018) (‘Murray and Pirovich’).

⁶ As outlined in Members of the Tax Profession (n 4).

⁷ Law Commission, ‘Digital Assets: Consultation Paper’ (Online, Law Com No 256, 28 July 2022) <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/07/Digital-Assets-Consultation-Paper-Law-Commission-1.pdf>>. Discussed further in in Members of the Tax Profession (n 4) and Murray and Pirovich (n 5).

⁸ Graeme Cooper, ‘The defective jigsaw,’ (2016) 30 Australian Tax Forum, 783, 787-788.

3.5 There is an inherent risk to constructing new tax law that yields systematic, structural flaws.⁹ I.e., any reform in this space should not add complexity, but rather simplify the tax system and offer synergies directed towards an increasingly digitalised society.

3.6 Given the earlier Government announcement, the tax profession is cognisant of the intention to exclude Bitcoin from the foreign currency regime, so compliance certainty will not be unnecessarily impacted by awaiting the outcomes of the BoT Review.

4.0 Appropriateness and Effectiveness of Power to Make Regulations

4.1 As reflected in the related BoT submission,¹⁰ whilst the use of regulations offers a mechanism to be flexible, agile, and proactive in managing an ever-changing digital environment, such an approach comes with the risks or concerns of appropriate power and control, political bias and appropriate expertise driving changes.¹¹

4.2 The construction of this power is also a power only to be *exclusionary* rather than *inclusionary*, so may be limited in enabling positive changes in the crypto economy.

4.3 It also raises the question over whether every relevant section of the income tax assessment acts (ITAA97/ITAA36) will be amended to include an equivalent power. This is arguably inefficient and may even be perceived as inappropriate.

4.4 There is a real risk of, not only over complicating the tax system but creating a constant level of temporality in the operation of these laws. This may result in concerns over the administration and compliance burden given the self-assessment nature of the tax system.

4.5 This also leads to an overarching concern of the imbalance away from tax principles established by the judiciary versus the legislature. It is neither timely nor cheap to proceed to litigation, thus having a capacity to respond to new issues as they arise directly is beneficial, the question of prescription versus principle-based tax reform needs to be considered. In addition, early engagement and the private ruling process is not providing prompt tax certainty for proactive taxpayers that pave the way for the rest of taxpayers in similar situations.

4.6 Moreover, *interoperability* of blockchain technology means that even if the Government intends to ensure government-issued digital currencies may be considered foreign currency, this effectiveness may be limited.

4.7 The crypto economy traverses a vast array of blockchains and unique eco-systems. As such, unless these government-issued digital currencies are designed to have restricted uses, they will likely be subject to bridging and/or wrapping to facilitate their use.¹²

4.8 Currently, bridging and wrapping are considered by the ATO as disposals. This in itself is both contentious and subject to the BoT Review,¹³ however raises the issue of the limited reach of the proposed amendment but also arbitrage activities.

⁹ Ibid 783.

¹⁰ This reflects details also outlined in the BoT submission by Members of the Tax Profession (n 4).

¹¹ As has been found in relation to giving the relevant Minister legislative instrument power to supplement the TASA Code of Conduct pursuant to TPB Review recommendations examined in recent work by Ken Devos, Elizabeth Morton, Michael Curran and Chris Wallis, 'Tax Practitioner Perspectives on selected 2019 TPB Review Recommendations' (Working paper, 2022). Further details can be made available on request.

¹² See also Chris Berg, 'Interoperability as a Critical Design Choice for Central Bank Digital Currencies' (SSRN Paper, 22 September 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205405>.

¹³ See for example, Members of the Tax Profession (n 4).

4.9 By the proposed amendment enabling power to make regulations, as highlighted above, this is limited to exclusions. Thus, the power will not allow government-issued digital currencies to be included in relevant circumstances (e.g., distinct eco-systems).

4.10 Thus again, on this aspect of the proposed amendment, the Government should await the BoT report before proceeding.

5.0 Proper Process with Appropriate Transparency and Consultation

5.1 We propose that an independent body or forum be established to ensure an appropriate balance is maintained, including appropriate consultation and experts being brought together to achieve positive outcomes.

5.2 This is critical if regulations are to be included in legislative amendments.

Appendix B: About the authors

Dr. Elizabeth Morton

Dr Elizabeth Morton is a Lecturer of Taxation in the School of Accounting, Information Systems and Supply Chain at RMIT University, as well as a Research Fellow at the RMIT Blockchain Innovation Hub. Her research is currently underpinned by three core themes: tax compliance, crypto-related activities, and practitioner competencies. As well as publishing in peer-reviewed academic and professional tax journals, Elizabeth engages with industry through discussion groups, policy submissions, articles, blogs, seminars, podcasts, radio and more. As well as being on the Tax Institutes Academic Board, Elizabeth is also co-author of Bevacqua et al.'s Australian Taxation published by Wiley, which incorporates a series of crypto-related content to complement student's tax education.

Previous to academia, Elizabeth worked as an accountant in small business taxation in regional Victoria. Her professional experience includes various aspects of accounting and taxation services for all entity types, including matters in relation to capital gains tax and investments, GST and FBT compliance, as well as superannuation.

As well as other associations, Elizabeth is a Fellow of the Tax Institute, is a Chartered Accountant, member of the Institute of Public Accountants, and the Accounting and Finance Association of Australia and New Zealand (AFAANZ).

Ms. Lisa Greig

Lisa Greig operates her own accounting practice servicing small and micro businesses in Melbourne. She has more than a decade of experience in tax consulting and is a true tax consulting generalist. She has worked for a "big four" firm in a variety of tax roles including corporate tax, tax business school and private enterprise. She has advised small business on tax issues through roles with mid-tier and suburban firms. She has a passion for tax policy, and has participated in many TPB, ATO and IGT consultative forums.

Lisa contributes back to the profession through her mentoring and education. She presents tax sessions and webinars focusing on practical solutions for practitioners for the Institute of Public Accountants. She supports candidates undertaking the CA program with the CAANZ, and teaches sessional classes for Melbourne University for undergrads in tax law as well as Holmesglen TAFE. She holds a Master's in Adult Education and recently completed the Graduate Certificate in Blockchain Enabled Business from RMIT.

She volunteers at the Melbourne Law School (MLS) Tax clinics on a pro bono basis guiding students to assist disadvantaged taxpayers with their tax affairs.