



Guideline for Cryptocurrency as Payment for Legal Services

Purpose

The purpose of this Guideline is to provide legal practitioners with a starting point for exploring the risks and opportunities presented by cryptocurrency. It is not an exhaustive statement of all the relevant professional obligations and risks that may arise when accepting cryptocurrency as payment for legal services. Some law practices may be better placed than others to use cryptocurrency.

The busy practitioner should read paragraphs 44 – 51.

About Cryptocurrency

1. **Wikipedia defines Cryptocurrency as follows:**

“... a controversial digital asset designed to work as a medium of exchange that uses strong cryptography to secure financial transactions, control the creation of additional units, and verify the transfer of assets. Cryptocurrency is a kind of digital currency, virtual currency or alternative currency. Cryptocurrencies use decentralized control as opposed to centralized electronic money and central banking systems. The decentralized control of each cryptocurrency works through distributed ledger technology, typically a blockchain, that serves as a public financial transaction database. Bitcoin, first released as open-source software in 2009, is generally considered the first decentralized cryptocurrency. Since then, over 4000 altcoin (alternative coin) variants of bitcoin have been created.”

2. Cryptocurrency offers the promise of lower transaction fees compared with traditional online payment mechanisms and is operated by a decentralised authority, unlike government-issued currencies.
3. There is no physical currency, only balances kept on a public ledger in the cloud, that along with all cryptocurrency transactions, is verified by a tremendous amount of computing power.
4. All cryptocurrencies are supported by blockchain technology. It is not issued or supported by any banks or governments, nor are individual bitcoins and altcoins valuable as a commodity (blockchain provides a decentralised database, or “digital ledger”).
5. Despite it not being regarded as “money”, cryptocurrency has become very popular, but should be considered a high-risk asset.

Currency Act 1965 (Cth)

6. There is a question as to whether receiving cryptocurrency in lieu of legal fees would breach section 9 of the *Currency Act 1965 (Cth)* which says:

Subject to this section, every sale, every bill of exchange or promissory note, every security for money, and every other contract, agreement, deed, instrument, transaction, dealing, matter or thing relating to money, or involving the payment of, or a liability to pay, money,

that is made, executed, entered into or done, shall, unless it is made, executed, entered into or done according to the currency of some country other than Australia, be made, executed, entered into or done according to the currency of Australia provided for by this Act.

7. Further to this, section 16(1) of the *Currency Act 1965* (Cth) says:

A tender of payment of money is a legal tender if it is made in coins that are made and issued under this Act and are of current weight...

8. It appears that the existence of such breach will depend on whether the cryptocurrency constitutes “money” within the meaning of section 9 and if not, then there may not be a breach of section 9 of the *Currency Act 1965* (Cth).
9. Payment of legal services in cryptocurrency should therefore only be accepted if there is no breach of the *Currency Act 1965* (Cth).

Barter transactions

10. There is no requirement that law practices be paid in cash or even in Australian dollars, for example, overseas clients may pay their legal bill in foreign currency.
11. Law practices have in the past been paid for legal services by other means such as food, a particular service or other quid pro quo.
12. When participating in barter transactions, the payment should be reasonable in quantum and must be accounted for with regards to taxation obligations.
13. Accepting any cryptocurrency as payment for legal services appears to be no different to such barter transactions.
14. The ATO, on their website, states the following:

Transacting with bitcoin is akin to a barter arrangement, with similar tax consequences. Our view is that bitcoin is neither money nor a foreign currency, and the supply of bitcoin is not a financial supply for goods and services tax (GST) purposes. Bitcoin is, however, an asset for capital gains tax (CGT) purposes.

15. Even though the ATO does not regard bitcoin as “money” (official currency), it appears that normal taxation obligations will apply.
16. The ATO’s Guideline on Cryptocurrencies includes the following:

Under the guidance paper and rulings, bitcoin transactions are treated like barter transactions with similar taxation consequences.

Generally, there will be no income tax or GST implications for individuals if they are not in business or carrying on an enterprise and they pay for goods or services in bitcoin.

Where an individual uses bitcoin to purchase goods or services for personal use or consumption, any capital gain or loss from disposal of the bitcoin will be disregarded as a personal use asset – provided the cost of the bitcoin is \$10,000 or less.

Individuals who use bitcoin as an investment may be subject to capital gains tax rules when they dispose of it, as they would for shares or similar assets.

Businesses will need to record the value of bitcoin transactions as a part of their ordinary income. They must also charge GST when they supply bitcoin and may be subject to GST when receiving bitcoin in return for goods and services.

Record-keeping requirements are similar to other transactions. Where there may be a taxation consequence people should keep records of:

- *the date of the transaction*
- *the amount in Australian dollars*
- *what the transaction was for; and*
- *who the other party was (even if it is just the bitcoin address).*

There may be fringe benefit tax consequences for businesses using bitcoin to pay employee salaries.

Cryptocurrency transactions

17. To commence accepting cryptocurrency as a payment method, law practices will need a cryptocurrency wallet (the cryptocurrency equivalent of a bank account).
18. A transaction is a transfer of value between cryptocurrency wallets and each transaction is included on the shared public ledger (blockchain).
19. The entire cryptocurrency network relies on this shared public ledger which contains all confirmed transactions.
20. Cryptocurrency payments are irreversible and can only be refunded by the person/entity receiving the funds (which may be the law practice).
21. Transactions are not irreversible from the start. Each transaction receives a “*confirmation score*” that indicates how hard it is to reverse the transaction. The confirmation can take anything between a couple of seconds and up to 90 minutes (10 minutes being the average).
22. Unconfirmed transactions are not secure.
23. Upon receipt of payment in cryptocurrency, it can be converted into Australian dollars. The timing of the exchange is crucial because the value can change, up or down.
24. Cryptocurrency is not anonymous and all transactions are stored publicly and permanently on the network.

Professional Obligations/Risks

25. Cryptocurrency is based on rewards and if law practices participate in “cryptocurrency mining” they may create a conflict of interest with the practice/practitioner’s own interest.
26. The independent individuals and companies who own the governing computing power and participate in the cryptocurrency network, also known as “[miners](#),” are motivated by rewards (the release of new cryptocurrency units) and transaction fees paid in cryptocurrency.

27. Cryptocurrency miners are processing transactions and securing the network using specialised hardware and are collecting new cryptocurrency units in exchange.
28. New cryptocurrency units are generated by this competitive and decentralised process called "mining", which sees individuals rewarded by the network for their services.
29. This process appears to be based on the same principle as using a credit card linked to a rewards programme.
30. Law practices may therefore stand to benefit by accepting payment in cryptocurrency and such benefit may create a conflict of interest.
31. Cryptocurrency is volatile and has the potential for severe fluctuations in value in a short timeframe. It has been known to move at least 10% in value per day.
32. Accordingly, where cryptocurrency is accepted as payment, it may have the unintended consequence of law practices receiving more than the value of services rendered and billed.
33. This may result in a breach of the fiduciary duty not to profit from the lawyer-client relationship and may require a refund of the over-payment to the client. The over-payment cannot be held as "trust money" as discussed below.
34. Such unintended gain also has the potential to cause an inadvertent breach of professional obligations if, for example, a compulsory fee scale applies or if the value received is not fair and reasonable for the legal services provided.
35. When providing fee estimates to clients, it is recommended to continue to do so in Australian dollars.
36. Providing a fee estimate in cryptocurrency can result in the fee agreement being set aside as being unfair and unreasonable, where the value of the cryptocurrency has rapidly appreciated and the estimate is therefore no longer fair and reasonable in exchange for the legal services to be provided.
37. Where the value of a cryptocurrency declines, the law practice could suffer a substantial loss and as the law practice has drafted the fee agreement there may not be recourse to having it set aside as unreasonable.
38. Bitcoin and any other cryptocurrency provides clients with the opportunity to arbitrage against law practices - the terms of payment of an account may be 30 days and during that time clients may choose to make payment when the value of the cryptocurrency is low.
39. This may not be to the law practice's commercial advantage but would appear to be part and parcel of accepting a cryptocurrency as payment for legal services as the client will choose when, within the terms, to make payment via the cryptocurrency network.
40. It is up to the law practice to choose when to exchange the cryptocurrency for Australian dollars, having regard to the possibility of either sudden appreciation or depreciation.
41. The cryptocurrency system operates as a public ledger and all transactions are publicly available for viewing thus creating possible privacy (Notifiable Data Breach Scheme) and confidentiality concerns.

42. From the available information it further appears that unconfirmed transactions are not secure, also risking privacy and confidentiality breaches.
43. The source of the funds may not be traceable and funds can be moved covertly and independently of the formal financial sector.

Trust Money

44. Law practices cannot accept cryptocurrency payments into their trust accounts because cryptocurrencies do not fall within the definition of “trust money”.
45. Trust money is defined in schedule 2 of the *Legal Practitioners Act 1981 (SA)* to be *...money entrusted to a law practice...and money is defined in section 5 of the Legal Practitioners Act 1981 (SA) and...includes any instrument for the payment of money that may be negotiated by an ADI.* Cryptocurrency does not currently meet this requirement.
46. Where there may be defalcation involving a cryptocurrency, clients may also not have recourse against the Fidelity Fund as it does not meet the definition of “trust money”.

PI Insurance

47. Any claim against an Insured to *“refund, account for, or pay damages calculated by reference to any fee, charge, disbursement or counsel fee rendered or incurred by the Insured”* is not indemnified pursuant to clause 16.3.2 of the 2017 Policy of Insurance of the South Australian Professional Indemnity Insurance Scheme (SA PII).
48. It may be risky for an Insured to provide legal advice regarding cryptocurrency in commercial transactions, such as where advice is sought on the use of cryptocurrency as consideration and/or where an Insured may hold a deposit in cryptocurrency and/or where the Insured transfers the cryptocurrency funds to an incorrect account.
49. If the advice is wrong the client may then pursue a claim against the Insured:
 - 49.1. Clause 1.1 (Schedule 2) of the 2017 Policy of Insurance of the SA PII Scheme provides that an Insured is covered for *“any civil liability incurred in connection with the Insured’s Legal Practice”*. Clause 4.30 of Schedule 4 defines *“Legal Practice”* as *“the provision of such legal services as are usually provided by a legal practitioner in private practice in Australia...”*
 - 49.2. Prima facie, clause 1.1 may indemnify an Insured for providing advice to a client about a legal matter, for example, a contract with cryptocurrency as consideration, should the advice provided be negligent. It’s important to note clause 16.5.4 of the 2017 Policy of Insurance which excludes indemnity where the Insured has provided a *“financial service”* where the person is required to be licensed or authorised under Chapter 7 of the *Corporations Act 2001 (Cth)*.
50. There is a *“sanctions”* exclusion in the Scheme which states the following:

“No Insurer shall be deemed to provide cover and no Insurer shall be liable to pay any claim or provide any benefit to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that Insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, Commonwealth of Australia, United Kingdom or United States of America.”

The media has associated cryptocurrency with money-laundering and reported its attraction by criminals. There is a risk that an Insured may become involved (unwittingly) in a transaction involving cryptocurrency that is for a purpose which the “*sanctions*” exclusion may cover and therefore not indemnify.

51. Legal practitioners who are insured through other Schemes should consult their provider to ascertain what they may or may not be indemnified for.

Accounting Software

52. A practical problem is that bitcoin and other cryptocurrencies can go down to 18 decimal places, whereas most accounting systems don’t go below 2 decimal places. This will make it difficult for law practices to accurately record such transactions.

AUSTRAC

53. On 3 April 2018, the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (Cth) commenced, providing AUSTRAC with authority to regulate digital currencies in Australia including bitcoin.

Summary

54. Subject to the transaction not falling foul of the *Currency Act 1965* (Cth), it may be open to law practices to accept a truckload of pineapples in payment of legal fees if they choose to do so (barter transaction).
55. Cryptocurrencies can be accepted in the same way having regard to the risks and uncertainties as discussed above.
56. Where a cryptocurrency is received prior to the legal services being delivered, it may have to be held as some kind of security (possibly under a solicitor’s lien) as it does not constitute “money” nor does it constitute “trust money” and can therefore only be traded and/or converted into Australian dollars once legal services have been delivered and billed to the client.
57. This may require a specific clause in the retainer to address such arrangement and any subsequent consequences that may flow.
58. Should the value increase significantly in this period of retention the law practice will likely only be entitled to the value of the services rendered with the balance returned to the client.
59. Should the value decrease significantly in this period of retention the law practice will likely have to accept the value at time of payment, even if it is not commensurate with the legal services provided.
60. Where legal services are delivered, the client is billed and the cryptocurrency is accepted as payment, any increase in the cryptocurrency value after payment has been made may be regarded as a lawful gain by the practice if the practice has intentionally waited for the cryptocurrency value to increase before exchanging it.
61. Similarly, where the cryptocurrency value decreases after payment has been made, the practice may need to accept the loss.

62. As such potential gain is a foreseeable consequence of accepting cryptocurrency as payment for legal services, it is recommended that law practices disclose to clients and obtain their informed written consent in anticipation of such potential gain.
63. Law practices should continue to provide fee estimates and bill in Australian dollars but they can expand their options for payment by indicating acceptance of cryptocurrencies to the value of the dollar billing at the time of payment.
64. There is certainly risk in accepting any form of cryptocurrency as payment for legal services and law practices need to balance the risks and advantages of accepting same.
65. Law practices may choose to only accept cryptocurrency payments from particular clients or for particular transactions.
66. Before providing this option to clients it's important that practitioners educate themselves on bitcoin or any other cryptocurrency, appreciate the risks involved and consider whether the client will be sufficiently protected and also whether the practitioner will be indemnified under the Professional Indemnity Insurance provider.

Resources

- ATO's Tax Treatment of Cryptocurrencies
<https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia---specifically-bitcoin/>
- ASIC's Information Sheet on Initial Coin Offerings and Cryptocurrency
<http://asic.gov.au/regulatory-resources/digital-transformation/initial-coin-offerings/>
- Australian Digital Commerce Association
<http://adca.asn.au/>
- AUSTRAC – Operational Intelligence Report on Criminal Usage of Bitcoin
<http://www.austrac.gov.au/information-publication-scheme-disclosure-log>
- Bitcoin
<https://bitcoin.com.au/>
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)
http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/alacfa2006522/
- Law Council of Australia's Anti-Money Laundering Guide for Legal Practitioners
<https://www.lawcouncil.asn.au/resources/policies-and-guidelines>

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