# 13TH QUEENSLAND TAX RESEARCHER SYMPOSIUM Abstracts

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## Theme 1: Capital

### The CGT Consequences of Hard Forks in Australia

Professor Julie Cassidy (University of Auckland)

If a government chooses to allow cryptocurrencies to operate in its jurisdiction, whether that be through the operation of exchanges or the mere presence of traders in that jurisdiction, this raises many difficult questions that hark back to the very nature of a crypto asset. Part of the difficulty in encapsulating the nature of crypto assets is their intangible nature. Cryptocurrencies have no physical form. While we may think that intangible property is not a new concept in terms of property and consequent tax implications (ie shares), there are a number of distinct features that crypto assets encapsulate that make them particularly distinct.

They are entirely digital. Using blockchain technology, each new transaction involves adding a new link to the chain, the final coin being this "chain" of data strings. Added to this nebulous attribute is that in most cases the transfer of value between the parties involves a mere entry in a digital ledger that in itself has no intrinsic value. This is because unlike fiat currencies, in most cases crypto assets are not backed by currency or assets.

Following on from this last point, is the further conundrum that most crypto assets operate through a decentralized system with no official intermediatory, such as a government or reserve bank. Instead, each crypto asset is contained in its own network. Each time a person interacts with a crypto asset, their computer joins that network to record the transaction. Each transaction is effectively the application of a complex algorithm that is solved by the application of a public key and the owner's private key. It is these anonymous stakeholders in this computer network that determine if a transaction will be validated.

This paper focuses on a single aspect of this complex (mostly) decentralized authentication system. What happens if the members of the public ledger disagree? What if they decide to "Go your own way"? When the community splits into two, the currency may experience what is known as a "hard fork" and splits into two independent assets. Hard forks may be the most mysterious phenomenon of all these strange aspects of crypto assets. Certainly, currency such as the Australian dollar and "fiat" currencies are incapable of duplicating such a feat.

In light of this extreme novelty, it is not surprising that the treatment of hard forks has generated much confusion and controversy in the tax world. It will ultimately submitted, however, that crypto assets in general and hard forks, in particular, are by no means beyond comprehension by the lay person. Once their true "essence" is understood, the proper tax treatment of hard forks is not a difficult problem at all.

This gives rise to questions, particularly in a tax context. Does the fork constitute a taxable event? If so, what is the cost base of each of the fork's coins? This paper focuses on specific CGT questions outlined below.
The paper begins by explaining the unique features of crypto assets, outlined above. It provides some background by distinguishing 'air drops', 'soft forks' and 'hard forks'. The latter is the focus of our discussion.

This paper primarily focuses on taxpayers who are not in the business of trading in crypto assets, but rather those taxpayers who hold the cryptocurrencies for investment. In the former case, the crypto assets (including native tokens and arguably air drops) are treated as trading stock and profits from their sale are assessed as ordinary (business) income under s 6-5 ITAA 2007 in Australia, and business income under s CB1 ITA 2007 in New Zealand. New Zealand does not have a comprehensive Capital gains tax ('CGT') so for non-traders the only tax implications lie in *ad hoc* provisions such as s CB3 and CB4 that tax capital gains in limited situations, primarily requiring a profit making intent on the part of the taxpayer. It is the Australian CGT provisions that raise the most potentially complex issues.

In Australia, for non-traders, hard forks primarily concern the application of the Capital gains tax ('CGT') provisions currently found in Chap 3 ITAA 1997.

This raises many interesting issues:

a. What is the nature of a crypto asset? Is it currency? Is it property? Is it an asset? Is it a personal use asset? Is it trading stock?
b. When a hard fork occurs is there an acquisition of an asset?
c. When a hard fork occurs what is the possible cost base of the splintered crypto assets?
d. When a hard fork occurs is there a realisation (CGT event)?

These questions are considered in the context of the relatively new (30 March 2020) ATO statement "Tax treatment of crypto-currencies in Australia - specifically bitcoin." (https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-inAustralia---specifically-bitcoin/).

It is submitted that a hard fork is properly understood as a division of each coin of the original currency into two resulting coins. It is no more a taxable CGT event than when a property owner subdivides a larger parcel of land into two smaller lots or (non-dividend) bonus shares, or a more colourful analogy, pregnant livestock. Ultimately it is contended that the ATO incorrectly suggests that a hard fork does not divide the existing crypto asset but instead creates a new asset with a zero cost base, with the consequent CGT consequences. It will be suggested that this view is based on a fundamental misunderstanding of how forks work.

## Doing Good While Doing Well: A Proposal to Expand Affordable Housing in the Private Rental Sector

Professor Helen Hodgson (Curtin University) and Dr John Minas (Curtin University)

The current shortage of affordable rental housing in Australia, particularly for low to middle income earners, is a social problem as well as an economic challenge which requires urgent action. Affordable housing is defined by the 30:40 indicator, where people in the lowest 40% of the income distribution pay less than 30% of that income on housing (AHURI, 2019). Around 80% of rental housing provided through the private rental sector is owned by small-scale, or "Mum and Dad", investors who prefer direct ownership of property to investment in intermediaries such as Real Estate Investment Trusts, but proposals to increase affordable rental housing are currently focussed on larger projects through developers. The main supply-side incentives for small-scale investors are through the taxation system, in which there is an asymmetry between negative gearing and capital gains tax (Duncan et al 2018). The former National Rental Affordability Scheme (NRAS) provided owners of eligible dwellings with a cash subsidy and a refundable income tax credit until it was terminated in 2014 due to concerns that it was not meeting its objectives.

Rental property ownership is generally regarded by small investors as an investment for long-term growth. Concurrently there is a growing Socially Responsible Investment (SRI) movement that leverages the motivation that investors have to be seen as environmentally and socially responsible, including bonds and units in entities that invest according to SRI principles. To date, there has been limited application of SRI principles to affordable housing in the private rental sector, although financial institutions are developing discounted green loans to build or retrofit housing to improve the environmental sustainability of that property.

Our article considers how to position affordable rental housing as a form of SRI that is attractive to small-scale investors who would prefer to invest directly in rental housing. The literature on socially responsible investment shows that SRI investors are motivated by a mixture of pragmatism and altruism. There are three major drivers that are thought to be the primary motivators for investors in social-based investments such as affordable housing. According to Chatzitheodorou et al (2019), the 'idealistic investor' is motivated by their own intrinsic values, the opportunistic investor is motivated by wealth maximisation and the prudent investor aims to reduce or avoid risk. The proposal in this article comprises three parts that are designed to appeal to SRI investors – embedding Community Housing Providers as (tax) Deductible Gift Recipients; providing access to cheaper finance; and modifying the capital gains tax discount for socially responsible investment. These proposed policy instruments work through utilising the existing expertise of Community Housing Providers and financial institutions to position affordable housing as a socially responsible investment. Each part of the proposal is targeted, respectively, at idealistic investors, opportunistic investors, and prudent investors.

## Defining "digital currency" in the Australian income tax law

Dr Christina Allen (Curtin University)

*Recording of presentation available from the conference organisers*

Australia moved to define "digital currency" for the purposes of its goods and services tax law in 2017. Five years later, the Australian government proposed amending the definition to ensure that Bitcoin, declared legal tender in El Salvador, would still be considered a digital currency. Meanwhile, government-issued digital currencies like the digitalised version of the Chinese yuan would be classified as money instead of digital currencies. The original definition of digital currency in the good and services tax law aimed to treat certain crypto assets, defined as digital currency, the same way as money for goods and services tax purposes. In other words, digital currency was considered payment for a good or service unless it was exchanged for money or another digital currency, in which case it would be exempt (input-taxed).

The Australian Parliament recently reviewed an exposure draft containing proposed amendments to the goods and services tax definition of digital currency. One of the proposals was to adopt the amended definition in the income tax law.

While the proposal to introduce a definition of "digital currency" is new, I argue that adopting the proposed legislative definition is desirable. Despite the lack of industry consultations, it would provide legal and administrative certainty to taxpayers and to prevent unintended revenue loss and unnecessary post-lodgment compliance activities. The basis for this argument is that the taxation determination issued on 17 December 2014 (specifically, TD 2014/25), which states that Bitcoin is not a foreign currency for the purposes of taxing foreign exchange gains and losses in the income tax law, and the decision in *Seribu Pty Ltd v Federal Commissioner of Taxation* (2020) 111 ATR 882, where the administrative appeals tribunal generally agreed with the Commissioner's view in that determination, are outdated. Following the outdated legal logic, taxpayers may be allowed to immediately reduce taxable income through losses incurred from cryptocurrency trading, which is not the intended policy perspective.

The presentation discusses taxation policy and principles related to goods and services tax, capital gains tax, and the taxation of foreign currencies in the Australian income tax law. It argues that adopting the amended goods and services tax definition of digital currency in the income tax law will restore the intended operations of income taxation in Australia.