HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 07 May 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	H1/2026
File Title:	Poulton v. Conrad
Registry:	Hobart
Document filed:	Federal Commissioner of Taxation - Form 27C - Intervener's s
Filing party:	Intervener
Date filed:	07 May 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

H1/2026

BETWEEN:

ADAM POULTON
Appellant

and

JEFF CONRAD
Respondent

SUBMISSIONS OF FEDERAL COMMISSIONER OF TAXATION (SEEKING LEAVE TO INTERVENE)

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PARTS II AND III: INTERVENTION

2. The Federal **Commissioner** of Taxation seeks leave to intervene in this proceeding to make the submissions developed in Part IV below. The Commissioner's submissions are limited to Ground 1 of the appeal – whether a holding in Bitcoin is property for the purposes of the common law of Australia, and, if so, of what kind.

3. The Commissioner has an interest in the question whether a holding of Bitcoin is property under the general law because that bears upon whether Bitcoin holdings are property for the purposes of legislation that is administered by the Commissioner. In particular, in 2014 the Commissioner issued two **Taxation Determinations**.[1] One of these (TD 2014/26) determined that Bitcoin holdings are property within the meaning of s 108-5(1)(a) of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**) for capital gains tax (**CGT**) purposes. That determination had substantial regard to the common law position regarding property. The other determination (TD 2014/27) took as its starting point that Bitcoin is considered property for taxation purposes and determined that it can be "trading stock" under s 70-10(1) of the ITAA97.

4. A tax determination is a "public ruling" for the purposes of Div 358 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**), which sets out the Commissioner's view as to how a provision of the taxation law applies. Where a ruling is applicable, the Commissioner is bound to administer the law in accordance with the ruling in relation to taxpayers if a taxpayer relies upon the ruling by acting in accordance with it: s 357-60 of Sch 1 to the TAA. Accordingly, for the past nearly 12 years, the Commissioner has administered the law and the taxation affairs of members of the public on the basis that a holding in Bitcoin is property.

5. If this Court were to find that a Bitcoin holding is not property at common law, that is likely to bear significantly, if not determinatively, upon whether it is "any

[1] **TD 2014/26** Income tax: is bitcoin a 'CGT asset' for the purposes of subsection 108-5(1) of the *Income Tax Assessment Act 1997*?; **TD 2014/27** Income tax: is bitcoin trading stock for the purposes of subsection 70-10(1) of the *Income Tax Assessment Act 1997?*

property" for the purposes of the definition of "CGT asset" in s 108-5(1)(a) of the ITAA97. If it is not a CGT asset, this is likely to decrease the CGT revenue of the Commonwealth. Additionally, a conclusion that a Bitcoin holding is not property may affect whether it is "trading stock" under s 70-10(1) of the ITAA97.

6. Should this Court confirm that a holding in Bitcoin is property, the Court's conclusion as to the nature of that property may not (depending on the Court's reasoning) necessarily alter the Commissioner's administration of these provisions. Nevertheless, the Commissioner has to date proceeded on the publicly stated view that a Bitcoin holding is not a chose in action.[2] The Commissioner's submissions below on the question of characterisation address judicial and academic consideration of that issue that has emerged since the 2014 determination.

7. For the above reasons, the appeal raises a question of public importance, and the exercise of the Commissioner's functions and powers may be directly and substantially affected by this Court's decision on Ground 1.[3] The proposed submissions below, which the Commissioner seeks to supplement succinctly at the hearing of the appeal, make a contribution which is different from the parties and which would assist the Court to reach a correct determination on Ground 1 of the appeal without giving rise to undue cost or delay.[4]

PART IV: SUBMISSIONS

Introduction and overview

8. The basic features and operation of Bitcoin were explained below by reference to the evidence led before the Magistrate's Court: see FC [75]; CAB 70. They are further explained in the parties' submissions by reference to the case law and academic literature (see eg AS [20]-[26]; RS [10]-[15]). These submissions take those basic facts about Bitcoin as given and also draw further upon those materials, including the influential 2019 Report of the UK Jurisdiction Taskforce titled *Legal Statement*

2 TD 2014/26 at [9].

3 ***Roadshow Films*** *Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at 38-39 [2]-[3] (the Court). As to intervention by the Commissioner with respect to such interests, see also *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union* (2019) 270 FCR 359 at 394 [133] (Allsop CJ), 412-414 [195]-[202] (Collier J) and 450 [358] (Rangiah J, agreeing).

4 *Roadshow Films* (2011) 248 CLR 37 at 39 [4], [6] (the Court).

on Cryptoassets and Smart Contracts (**UKJT Statement**),[5] which has been regularly cited with approval in authorities dealing with cryptoassets.[6]

9. In considering whether Bitcoin – or, more properly, the holding of Bitcoin – should be seen as "property" under the general law, it is necessary to begin with this Court's explanation of the ambiguity and reach of that term. "Property" is not " a monolithic notion of standard content and invariable intensity"; nor "a term of art with one specific and precise meaning".[7] The term is ambiguous[8] and the very concept may be elusive.[9] Importantly for present purposes, "property" does not refer to a thing, but to a person's relationship with a thing.[10] And the breadth of the word is such that
10 "it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter".[11]

10. Ground 1 of the appeal is to be approached with these qualifications and conceptions in mind. The ultimate question posed by that ground is whether a person's right or interest in Bitcoin is of a kind that involves possession of property. The answer to that question is "yes" because:

(a) that right or interest is one that comfortably comes within broadly accepted general law conceptions of property;

(b) the right or interest does not relate to "mere information"; and

---

5 (The LawTech Delivery Panel, November 2019) <https://lawtechuk.io/ukjt/legal-statement-on-cryptoassets-and-smart-contracts/>, last accessed 6 May 2026.

6 See, eg, ***AA*** *v Persons Unknown and Ors* [2019] EWHC 3556 (Comm) at [58] (Bryan J), quoted by Escourt J in FC [89]; CAB 74-76; ***D'Aloia*** *v Persons Unknown* [2024] EWHC 2342 (Ch) at [157] (Farnhill DJ); ***Ruscoe*** *v Cryptopia Ltd (in liq)* [2020] 2 NZLR 809 at 815-817 [21], 830 [64]-[65], 840 [102], 843 [121], 845 [131] (Gendall J).

7 ***Hocking*** *v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at 45 [89] (Kiefel CJ, Bell, Gageler and Keane JJ) quoting, respectively, ***Yanner v Eaton*** (1999) 201 CLR 351 at 366-367 [19] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) and *Kennon v Spry* (2008) 238 CLR 366 at 397 [89] (Gummow and Hayne JJ).

8 *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 485 [10] (French CJ, Crennan and Bell JJ), referring to *Minister of State for Army v Dalziel* (1944) 68 CLR 261 at 276 (Latham CJ) and *McCaughey v Commissioner of Stamp Duties* (1945) 46 SR (NSW) 192 at 201 (Jordan CJ). See also *Yanner v Eaton* (1999) 201 CLR 351 at 388 [85] (Gummow J), citing W N Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 21.

9 *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers appointed) (in liq)* (2013) 251 CLR 592 at 603 [35] (French CJ, Hayne and Kiefel JJ). See also K Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 292.

10 *Yanner v Eaton* (1999) 201 CLR 351 at 367 [17]-[18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) and [86] (Gummow J).

11 *Yanner v Eaton* (1999) 201 CLR 351 at 367 [20] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

(c) as to the nature of that right or interest, it is capable of possession.

Bitcoin holdings come within the general conception of property

11. The question whether a right or interest comes within the general law conception of property is often answered using Lord Wilberforce's well known formulation in *National Provincial Bank Ltd v* ***Ainsworth***: "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".[12] Consistent with *Yanner v Eaton*,[13] this formulation directs attention to the nature of the "right or interest", not merely the thing itself.

12. The *Ainsworth* formulation does not of course provide a monolithic and invariable definition of property: in view of the authorities already discussed it plainly could not. So much is underlined by the fact that, although alienability (the third *Ainsworth* criterion) is a common feature of property rights,[14] in Australia it has been said "categorically that alienability is not an indispensable attribute of a right of property".[15] Assignability may be "a consequence, not a test" of a proprietary right.[16]

13. However, as members of this Court have referred to the *Ainsworth* formulation on many occasions,[17] it is an appropriate starting point here. And, as will be seen, it is unnecessary to explore the theoretical limits of the *Ainsworth* formulation in this

---

12 [1965] AC 1175 at 1247-1248.

13 *Yanner v Eaton* (1999) 201 CLR 351 at 367 [17]-[18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) and [86] (Gummow J).

14 *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 576 [130] (The Court).

15 See ***National Trustees Executors*** *and Agency Company of Australasia Limited v Federal Commissioner of Taxation* (1954) 91 CLR 540 at 583 (Kitto J, with whom Dixon CJ and Fullagar J agreed). See also ***R v Toohey****; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342 (Mason J); and *Yanner v Eaton* (1999) 201 CLR 351 at 388 [85] (Gummow J).

16 *Commissioner of Stamp Duties (NSW) v Yeend* (1929) 43 CLR 235 at 245 (Isaacs J); ***Australian Capital Television*** *Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 165 (Brennan J)

17 *R v Toohey* (1982) 158 CLR 327 at 342 (Mason J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 51 (Brennan J); *Australian Capital Television* (1992) 177 CLR 106 at 165 (Brennan J); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 528 (Dawson and Toohey JJ); *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 241 (Brennan J); *Wik Peoples v Queensland* (1996) 187 CLR 1 at 196 (Gummow J); *Commonwealth v* ***WMC Resources*** *Ltd* (1998) 194 CLR 1 at 88 (Kirby J); *Federal Commissioner of Taxation v Orica Ltd* (1998) 194 CLR 500 at 542 [109]-[110] (Gummow J), 562 [187] (Callinan J); *Smith v ANL Ltd* (2000) 204 CLR 493 at 554-555 [190] (Callinan J); *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 39 [15] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Director of Public Prosecutions (DPP) (Vic) v Le* (2007) 232 CLR 562 at 568 [11] (Gummow and Hayne JJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 178 [76] (French CJ, Gummow and Crennan JJ), 218 [197] (Heydon J).

matter because rights and interests in Bitcoin do not present a borderline case but comfortably satisfy that formulation. So much has already been accepted in numerous decisions.[18]

14. ***First*, rights and interests in Bitcoin are "definable"**. Each particular Bitcoin holding is distinguished by the numerical value recorded against a particular address on the blockchain, ie the token balance as it exists on the distributed ledger at any given time. The relevant thing is thus the ledger entry itself: a defined, discrete numerical quantity, capable of identification by reference to the unique address at which it is recorded, incapable of confusion with any other holding, and transferable only by a transaction that extinguishes the balance at the origin address and records it at the destination address. In this respect a Bitcoin holding is no less definable than the balance recorded by trusted banks in numbered accounts held with them.[19]

15. ***Second*, rights and interests in Bitcoin are "identifiable by third parties"**. A Bitcoin holder's rights and interests in particular Bitcoin – their "control over access"[20] to that Bitcoin – are identifiable by third parties through the rules of the system. The decentralised shared ledger system – the blockchain – is essentially a shared database containing a historical record of all transactions in Bitcoin.[21] The Bitcoin recorded, traded and stored on that shared ledger is publicly recorded and the address at which particular Bitcoin is held is viewable by all participants.[22] The design of the system thus means that third parties are able to identify not only that an address records the relevant holding and historical transactions in Bitcoin, but also identify that the owner at that publicly identifiable address has exclusive and excludable control over access to that holding of Bitcoin via their private key.[23]

16. ***Third*, rights and interests in Bitcoin are capable of assumption by third parties**. As already noted, Australian authority makes this third criterion strictly unnecessary.

---

18 See eg ***Yeates** (a pseudonym) v The King* [2025] VSCA 288 at [93]-[114] (Emerton P, Taylor and Kidd JJA); *Ruscoe* [2020] 2 NZLR 809 at 840-843 [102]-[120] (Gendall J); ***Re Blockchain** Tech Pty Ltd* (2024) 76 VR 578 at 601-602 [384]-[387] (Attiwill J).

19 *Ruscoe* [2020] 2 NZLR 809 at 840 [106] (Gendall J).

20 *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), quoting K Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 299. In the context of cryptoassets see also *Ruscoe* [2020] 2 NZLR 809 at 841 [109]-[112] (Gendall J).

21 *Yeates* [2025] VSCA 288 at [26]-[27] (Emerton P, Taylor and Kidd JJA).

22 *Yeates* [2025] VSCA 288 at [26]-[27] (Emerton P, Taylor and Kidd JJA).

23 *Ruscoe* [2020] 2 NZLR 809 at 841 [112] (Gendall J).

Nonetheless, it is satisfied because if a holder of Bitcoin has the address of a person to whom they wish to "transfer" Bitcoin, they may immediately pass all their rights and interests in that Bitcoin to the person at that address. Thereafter that transaction is verified through the mining process. The Bitcoin having thus been transferred, the original holder loses all control over access to that Bitcoin, and the new holder of the Bitcoin has exclusive control through new public and private keys.[24] Like other cryptoassets, Bitcoin is designed to be transferable between system participants.[25] Bitcoin, and a person's rights and interests in it, therefore have "tradability".[26]

17. To the extent that this third criterion might be said to also involve the need for third parties to respect the rights of the owner and to recognise the property as a desirable asset, those criteria are also met for the reasons explained in *Yeates (a pseudonym) v The King*.[27] As the evidence led below revealed, and as Shanahan CJ noted (FC [51]; CAB 66), Bitcoin "is a specie of wealth traded commercially and widely dealt with as property".[28] A significant aggregate of minds believe Bitcoin has value.[29] Like money, Bitcoin holdings are therefore "accepted by virtue of a collective act of mutual faith".[30]

18. ***Fourth*, rights and interests in Bitcoin have permanence and stability**. A Bitcoin holding is stable in that the Bitcoin remains at a particular address on the public ledger until such time as the holder of that Bitcoin uses the public and private keys to assign it to a different address.[31] By reason of the blockchain, it is not practically possible to remove or move that Bitcoin in any other way. Moreover, as already noted, that permanence and stability is supported and demonstrated by the way in which Bitcoin holdings are recorded on the shared ledger, held at a publicly viewable digital address. The shared ledger records the entire transactional history of Bitcoin holdings. That degree of stability is not gainsaid by the two issues described in the

---

24 *Yeates* [2025] VSCA 288 at [26]-[27] (Emerton P, Taylor and Kidd JJA); *Ruscoe* [2020] 2 NZLR 809 at 841 [112] (Gendall J).
25 UKJT Statement at 15 [51].
26 *Yeates* [2025] VSCA 288 at [103] (Emerton P, Taylor and Kidd JJA).
27 [2025] VSCA 288 at [101]-[105] (Emerton P, Taylor and Kidd JJA).
28 What his Honour said is to be qualified – it is a person's rights and interests in Bitcoin that are the relevant "property".
29 *Yeates* [2025] VSCA 288 at [104] (Emerton P, Taylor and Kidd JJA).
30 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [36] (Jeyaretnam J).
31 *Yeates* [2025] VSCA 288 at [107] (Emerton P, Taylor and Kidd JJA); *Ruscoe* [2020] 2 NZLR 809 at 841 [112] (Gendall J).

UKJT Statement: where it may take some time for consensus to form as to the state of the ledger, and where a change in the consensus rules may not be unanimously adopted.[32] As was there pointed out, those matters do not affect the conclusion of sufficient permanence and stability in circumstances where a cryptoasset system has a significant number of participants, an established history of transactions and a generally stable set of rules.[33]

19. While the *Ainsworth* approach is comfortably satisfied, it remains the case that no single test is determinative in identifying whether something is or is not property (consistent with the statements of this Court in *Yanner v Eaton*[34] and *Hocking v Director-General of the National Archives of Australia*[35]). Accordingly, other approaches can be taken and other considerations emphasised.[36] For example, commercial value (whether something is treated in commerce as a valuable proprietary right) has been said to be an important matter to be considered,[37] and was relied upon by Shanahan CJ below (FC [51]; CAB 66). Similarly, whether it is possible to exclude others from the right in question and a capacity to assert control over access are critical requirements of property (as discussed below at [33]-[34], [36]). When such further conceptions are emphasised, as they have been in various cryptoasset cases,[38] the argument for treating Bitcoin holdings as property becomes even stronger.

20. It may be that this Court will consider the *Ainsworth* formulation to have outlived its usefulness. While the Commissioner would not oppose that conclusion, he does not press for such a development as it is unnecessary here and so may be better left to a different case where it more squarely arises.[39]

---

32 UKJT Statement at 15-16 [53]-[55].
33 UKJT Statement at 16 [56].
34 *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 [18]-[20] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 388-389 [85]-[86] (Gummow J).
35 (2020) 271 CLR 1 at 45 [89]-[90] (Kiefel CJ, Bell, Gageler and Keane JJ).
36 See, eg L B Moses, "The Applicability of Property Law in New Contexts: From Cells to Cyberspace" (2008) 30 *Sydney Law Review* 639 at 647-652.
37 See, eg, *Halwood Corporation Ltd v Chief Commissioner of Stamp* Duties (1992) 33 NSWLR 395 at 403 (Loveday J) ("The reality is that commerce regards transferable floor space as a proprietary right. The courts should do likewise").
38 See, eg, FC [51]; CAB 66; *Ruscoe* [2020] 2 NZLR 809 at 845 [129]-[131] (Gendall J); *ByBit Fintech Limited v Ho Kai Xin* [2023] SGHC 199 at [36] (Jeyaretnam J).
39 See eg *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 490 (Barwick CJ); *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248 [57]-[58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

Bitcoin is not mere information

21. The appellant contends that a person's holding of Bitcoin cannot be property because it is "simply information in a database" (AS [59]) and "mere information" (AS [61]-[62]). Were those propositions correct, the argument may have some force, because it has been held that "[i]n general, information is not property at all".[40] The reason for that is that when mere information is communicated by one person to another, it belongs equally to them both:[41] "[u]pon such communication, the transferor still has everything that [they] had before and the transferee continues to have what [they] ha[ve] received".[42] However, the argument breaks down because it is not accurate to describe a Bitcoin holding as being mere information. Again, so much has been recognised in a number of recent decisions.[43]

22. A number of factors make Bitcoin qualitatively different from mere information. The holder of Bitcoin is prevented from double-spending the Bitcoin by the nature of the transaction ledger and the consensus mechanisms by which transactions are verified.[44] Double-spending is also inhibited by the creation of a new private key after each transfer of Bitcoin.[45] In that way, "[o]wnership by one person prevents ownership by another."[46] That is, a holder of Bitcoin has excludable control over access to the Bitcoin and, unlike information, which remains usable even when it is shared, Bitcoin may only be transferred by its owner once, making it rivalrous, like tangible things.[47]

23. These are not accidental or incidental characteristics. The whole purpose of cryptoassets such as Bitcoin "is to create an item of tradeable value not simply to

---

40 *Boardman v Phipps* [1967] 2 AC 46 at 127 (Lord Upjohn).
41 *Breen v Williams* (1996) 186 CLR 71 at 90 (Dawson and Toohey JJ).
42 *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 at 534 (Latham CJ). See also *Brent v Federal Commissioner of Taxation* (1971) 125 CLR 418 at 425 (Gibbs J).
43 See eg *Yeates* [2025] VSCA 288 at [66]-[92] (Emerton P, Taylor and Kidd JJA); *Ruscoe* [2020] 2 NZLR 809 at 844-845 [126]-[128] (Gendall J); *D'Aloia* [2024] EWHC 2342 (Ch) at [156] (Farnhill DJ).
44 UKJT Statement at 17 [63].
45 *Ruscoe* [2020] 2 NZLR 809 at 841 [113] (Gendall J).
46 *Yeates* [2025] VSCA 288 at [71] (Emerton P, Taylor and Kidd JJA).
47 See eg FC [55]; CAB 66; *Yeates* [2025] VSCA 288 at [68]-[69] (Emerton P, Taylor and Kidd JJA). See also *Tulip Trading Limited v van der Laan* [2023] EWCA Civ 83 at [24] (Birss LJ, Lewison and Popplewell LJJ agreeing); *D'Aloia* [2024] EWHC 2342 (Ch) at [156] (Farnhill DJ); and UKJT Statement at 15 [50].

record or to impart in confidence knowledge or information."[48] As was pointed out in the UKJT Statement, "the commercial value of a cryptoasset is not in the recorded data itself but in the fact that the person possessing that data is able to effect and authenticate dealings in the cryptoasset in accordance with the rules of the system."[49]

24. As noted, the conclusion that a person's relationship with mere information is not property is principally informed by information's non-exclusivity: when it is transferred – or, more accurately, when it is transmitted[50] – mere information belongs to both the transferor and the transferee. It can thus be infinitely duplicated.[51] That is not the case with Bitcoin. Each address is unique on the blockchain where it is recorded and is protected by the private key such that the Bitcoin recorded at that address can only be transferred by a person in control of that private key. It has therefore rightly been described as a "set of transactional functionalities", the most important of which is the private key to effect new transactions, rendering the holding of Bitcoin "a specific transactional power over unique data entries on the ledger."[52]

25. For those reasons, Bitcoin is not mere information, and a person's rights and interests in Bitcoin amount to excludable control over access, as described in *Yanner v Eaton*.[53]

The characterisation of the rights and interests in Bitcoin

26. The Commissioner does not seek to make submissions on whether conversion and detinue are made out in this proceeding, but does make the following submissions concerning the proper legal characterisation of rights and interests in Bitcoin.

27. In *Colonial Bank v Whinney*, Fry LJ famously said that "all personal things are either

---

48 *Ruscoe* [2020] 2 NZLR 809 at 844 [127(a)] (Gendall J).

49 UKJT Statement at 16 [60].

50 UKJT Statement at 17 [62], citing M Bridge et al, *The Law of Personal Property* (Sweet & Maxwell, 3rd ed, 2017) at [9-031].

51 *Ruscoe* [2020] 2 NZLR 809 at 844 [127(c)] (Gendall J), referring to *Boardman v Phipps* [1967] 2 AC 46 at 127 (Lord Upjohn).

52 D Fox, "Digital Assets as Transactional Power" (2022) 1 *Journal of International Banking and Financial Law* 3 at 3, quoted in United Kingdom Law Commission, *Digital Assets: Final report* (2023) at 59 [4.14(2)]. See also *D'Aloia* [2024] EWHC 2342 (Ch) at [156] (Farnhill DJ).

53 (1999) 201 CLR 351 at 365-366 [18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), quoting K Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 299.

in possession or in action. The law knows no *tertium quid* between the two."[54] In three cases (the last of which was decided in 1963) members of this Court appear to have acknowledged that same kind of "bright line" exclusivity (although they do not suggest it to be established in Australia in quite such emphatic terms).[55]

28. The appellant contends that if Bitcoin is property (contrary to his principal contention), Bitcoin, being intangible, is not possessable and so is to be seen as a chose in action which is not amenable to the torts of detinue and conversion: AS [72]-[73], relying upon the majority decision in ***OBG*** *Ltd v Allan*.[56] In the Full Court, Estcourt J considered there to be a "powerful case" for recognising a third category of intangible property which would include Bitcoin (FC [93]; CAB 78-79), a view with which Jago J was inclined to agree: FC [100]; CAB 80. The respondent supports recognising such a third category (RS [40]) and also argues that, even if such a category not be recognised, Bitcoin holdings can be seen as a chose in action (RS [41]) and a form of intangible property capable of possession: RS [51]-[64].

29. The present case therefore throws up the question whether the common law of Australia should continue to require that all property be classified into one of the two historically recognised categories and, if so, which one. As it is the "thing" – tangible or intangible – that is selected as the frame of reference for the distinction, rather than the *relationship* with the thing, it is arguable that the dichotomy is not consistent with the current Australian position as expressed in *Yanner v Eaton*.[57] This may support an argument for moving away from such a "bright line" classification, such as by recognising a third category of property. However, if the dichotomy is to be

---

54 (1885) 30 Ch D 261 at 285, referring to *Blackstone's Commentaries* Book 2 at 389. Fry LJ was in dissent but his Lordship's judgment was approved in the House of Lords in *Colonial Bank v Whinney* (1886) 11 App Cas 426.

55 *Australian Machinery and Investment Co Ltd v Deputy Federal Commissioner of Taxation* (1946) 180 CLR 9 at 57 (Williams J); *National Trustees Executors* (1954) 91 CLR 540 at 584 (Kitto J); *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 26 (Windeyer J). Other cases in which members of this Court have recognised the distinction more generally include ***Goldsbrough Mort*** *and Co Ltd v Tolson* (1909) 10 CLR 470 at 479 (O'Connor J); *Crichton v Crichton* (1930) 43 CLR 536 at 554 (Rich J); *Croton v The Queen* (1967) 117 CLR 326 at 330-331 (Barwick CJ); *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 576 [130] (The Court); *Calidad Pty Ltd v Seiko Epson Corporation* (2020) 272 CLR 351 at 396 [119] (Gageler J).

56 [2008] AC 1.

57 (1999) 201 CLR 351 at 365-367 [18]-[20] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 388-389 [85]-[86] (Gummow J). See J Edelman and S Elliot, "Two Conceptions Equitable Assignment" (Paper presented to the Current Legal Issues Seminar Series 2013, Banco Court, Supreme Court of Queensland, 6 June 2013) at 4-5.

retained, the question is whether Bitcoin is a chose in action or chose in possession.

30. To date the focus has been principally on whether a Bitcoin holding is a chose in action; that is because such a holding is intangible, and intangibility is a key feature of a chose in action.[58] However, there has been considerable debate about this, judicial and non-judicial, in both directions.[59] Less attention has been given to the possibility that a Bitcoin holding might be a chose in possession. Scope for that has been recognised by academics[60] but it does not appear to have been the subject of judicial consideration, presumably because of the existing tangibility requirement.

31. The Commissioner supports this Court recognising that, consistent with the realities of the digital world, Bitcoin holdings are capable of possession notwithstanding that they are intangible. That recognition would align with the respondent's proposition that it is possible to possess (in the legal sense) certain intangible things, here Bitcoin (RS [54]-[64]]). And if, in order to recognise that a Bitcoin holding can be possessed, it be necessary to characterise it as either a chose in action or a chose in possession, the latter is to be preferred.

32. A long history underpins the notion that only tangible things can be possessed.[61] This

---

58 *National Trustees Executors* (1954) 91 CLR 540 at 584-587 (Kitto J).

59 See, eg, UKJT Statement at 18 [68], 22 [86(a)]; *AA* [2019] EWHC 3556 (Comm) at [55] (Bryan J); *In Re Gatecoin Limited (in liq)* [2023] HKCFI 914 at [47] (Chan J). And contrast United Kingdom Law Commission, *Digital Assets: Final report* (2023) at 52 [3.65]; Justice Ian Jackman "Is Cryptocurrency Property?" (21 June 2024, Commercial Law Association) at 9-11, analysing *National Trustees Executors* (1954) 91 CLR 540 at 584-587 (Kitto J); *Re Blockchain* (2024) 76 VR 578 at 602 [389] (Attiwill J).

60 See S Green and J Randall, *The Tort of Conversion* (Hart Publishing, 2009) at 118-128; J C Lai, "Creating Coherency in Conversion of (In)tangible Property in New Zealand (2021) 28 *Tort Law Review* 36; A Stafford and Chapman-Booth, "Technology & the Law: When Worlds Collide [2021] *New Law Journal* 11; L Clover Alcolea and J Mihal, 'The tiptoe to crypto: An analysis and account of property in cryptocurrency' (2025) 54(1) *Common Law World Review* 43 at 58. See also, although more qualified, the Report of the UK Financial Markets Law Committee, *Issues of Legal Uncertainty arising in the context of virtual currencies* (July 2016) at 7-8.

61 The ancient concept of "seisen", being possession in law, involved the notion that all proprietary rights stemmed from physical possession: see F Pollock and S R Wright, *An Essay on Possession in the Common Law: Parts I and II* (1888) at 20 and A E S Tay, "The Concept of Possession in the Common Law Foundation for a New Approach" (1964) 4 *Melbourne University Law Review* 476 at 482. That idea has carried through subsequent developments in the law: see eg *Millar v Taylor* (1769) 98 ER 201 at 232 (Yates J); *Blackstone's Commentaries* Book 2 at 389; *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 275 (Cotton LJ), quoting J Williams, *Personal Property* (12th ed, 1884) at 4; *Goldsbrough Mort* (1909) 10 CLR 470 at 479 (O'Connor J); *National Trustees Executors* (1954) 91 CLR 540 at 584 (Kitto J); J W Carter et al, *Helmore Commercial Law and Personal property in New South Wales* (Law Book Co, 10th ed, 1992) at 5; and UKJT Statement at 18 [67], citing *Your Response Datateam Business Media Ltd* (2015) 1 QB 41 at 51 [23] (Moore-Bick LJ, Davis and Flloyd LJJ agreeing).

can be seen as having emerged from descriptions of the types of possessable property that were known to the law during the development of the concept of possession. However, that does not dictate that tangibility is and must remain an immutable requirement for possession.

33. In the context of new forms of intangible property, treating tangibility as a necessary requirement leads to artificial distinctions. That is what prompted Moore-Bick LJ in *Your Response Datateam Business Media Ltd* to refer to there being "a powerful case" for reconsidering the dichotomy[62] (that being the development preferred by Estcourt J below at FC [93]; CAB 78-79). The "powerful case" his Lordship was referring to was made by Sarah Green and John Randall QC in their text, *The Tort of Conversion*.[63] The authors' argument includes the proposition that for property to be capable of possession, it is sufficient that there be "indirect manual control" of the asset – being that "the individual claiming possession has a means of controlling access to that asset" (so long as the asset has the characteristics of excludability and exhaustibility)[64] – coupled with what the authors term the "cognitive indicia" of possession – being an awareness of the asset's existence and form, and an active intention to exclude others from it.[65]

34. So much is consistent with Pollock and Wright's much earlier observations that the holding of a physical key amounts to "actual possession" in law and "manual control" in fact of the contents of whatever lies behind the lock:[66] "[p]ossession in fact, with the manifest intent of sole and exclusive dominion, always imports possession in law".[67] Despite Bitcoin's intangibility, a holding in Bitcoin displays those elements. This analysis is consistent with the current Australian position set forth in *Yanner v Eaton* as to what amounts to property.

35. The artificiality of determining that an intangible thing cannot be possessed can also be seen in the way the concept of possession has been applied to "documentary

---

62 [2015] QB 41 at 52 [27].
63 S Green and J Randall, *The Tort of Conversion* (2009).
64 S Green and J Randall, *The Tort of Conversion* (2009) at 111.
65 S Green and J Randall, *The Tort of Conversion* (2009) at 110.
66 F Pollock and S R Wright, *An Essay on Possession in the Common Law: Parts I and II* (1888) at 65.
67 F Pollock and S R Wright, *An Essay on Possession in the Common Law: Parts I and II* (1888) at 20-21.

intangibles".[68] This artificiality was persuasively recognised by the dissentients in *OBG*. Baroness Hale referred to the law in the 17th and 18th centuries adapting the law of conversion to accommodate new forms of chose in action by "pretending that the document or other token representing or evidencing the obligation has the same value as the obligation itself." [69] And Lord Nicholls pointed out that the availability of the tort of conversion to documentary intangibles is based on the "fiction" that the intangible is embodied in a tangible object.[70] Accordingly, in such cases conversion has already developed to be directed to the intangible *rights* one has over possessable things.[71] The question therefore is whether Bitcoin can be possessed. One may pause here to note that, if Bitcoin is capable of being categorised as a chose in possession, the result reached by majority by the House of Lords in *OBG*[72] that choses in action are not amenable to the tort of conversion, need not trouble this Court.

36. Other than tangibility, what has historically been required, and what has always been required, of possession is excludability.[73] As the joint judgment noted in *Yanner v Eaton*, quoting Gray*:* "An extensive frame of reference is created by the notion that 'property' consists primarily in *control over access*. '[P]roperty is … a legally endorsed *concentration of power* over things and resources".[74] The Commissioner submits that, just as for tangible property, the factual capacity of a person to have control over access to intangible property such as a Bitcoin holding involves the requisite concentration of power which has to date been (and should be in this case) legally endorsed.

37. In appropriate cases this Court can, and has the responsibility to, reconsider common

---

68 See E McKendrick and R Goode, *Goode on Commercial Law* (LexisNexis, 4th ed, 2009) at 32, quoted in *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at 532 [86] (Crennan and Bell JJ). See also *Parsons v The Queen* (1999) 195 CLR 619 at 631-632 [32]-[33] (the Court) and *Balkin & Davis: Law of Torts* (6th ed) at 117-119 [4.16]-[4.17].

69 *OBG* [2008] AC 1 at 88 [309] (Baroness Hale).

70 *OBG* [2008] AC 1 at 68 [228] (Lord Nicholls).

71 *Penfold Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 229 (Dixon J).

72 *OBG* [2008] AC 1 at 42 [94], 45 [106] (Lord Hoffmann), 75 [271] (Lord Walker), 91 [319], 92 [321]-[322] (Lord Brown).

73 F Pollock and S R Wright, *An Essay on Possession in the Common Law: Parts I and II* (1888) at 20-21.

74 *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), quoting K Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 299. See also *Hocking* (2020) 271 CLR 1 at 45-47 [89]-[97] (Kiefel CJ, Bell, Gageler and Keane JJ).

law rules and precepts which operate unsatisfactorily[75] or which are no longer in keeping with modern understanding.[76] Development should nonetheless be incremental, paying close attention to any risk of incoherence.[77] In the present case, recognising that Bitcoin holdings can be possessed would be coherent because they have the characteristics of control that are central to property and possession as discussed above.

38. Moreover, noting the "symbiotic relationship" between legislation and the common law,[78] such a recognition would cohere with the way in which such property is being treated by the legislature, which in turn reflects recent developments in the common law (including the decision in the Full Court below).

39. By way of the *Corporations Amendment (Digital Assets Framework) Act 2026* (Cth), which received Royal Assent on 8 April 2026, new licensing requirements will be introduced into Ch 7 of the ***Corporations Act*** *2001* (Cth) commencing 9 April 2027. Section 86 of the *Corporations Act* will be replaced[79] so that it includes a new s 86(2) which will define when a person "possesses" a "digital token", such as Bitcoin:[80]

> **86 Meaning of *possession***
>
> *General (things other than digital tokens)*
>
> (1) A thing that is in a person's custody or under a person's control is in the person's ***possession***.
>
> (2) However, a person ***possesses*** a digital token if:
>
> (a) for an electronic record that is a digital token because of paragraph 761GB(1)(a)—the person is capable of factually controlling the electronic record as described in subsection 761GB(2) …

---

75 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 123 (Mason CJ and Wilson J). See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 585 (McHugh J); *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575 at 619-620 [92] (Kirby J); see also at 629-630 [123], [125] (Kirby J).

76 See, eg, *Bropho v Western Australia* (1990) 171 CLR 1 at 18-23 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at 23-31 [60]-[78] (Gageler J).

77 See, eg, *Mallonland Pty Ltd v AdvantaSeeds Pty Ltd* (2024) 98 ALJR 956 at 967 [37] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ) and the cases there cited.

78 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 532 [31] (Gleeson CJ); *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 183 [17] (French CJ, Bell and Keane JJ). See also *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 at 362-363 [57] (Gageler and Gordon JJ).

79 *Corporations Amendment (Digital Assets Framework) Act 2026* (Cth), Sch 1, Item 30.

80 See **Explanatory Memorandum**, Corporations Amendment (Digital Assets Framework) Bill 2026 (Cth) at 5 [1.8].

40. The new s 761GB that will be inserted[81] then relevantly defines a "digital token" as "an electronic record that one or more persons are capable of factually controlling as described in subsection (2)" (s 761GB(1)(a)), and subsection (2) provides that "[a] person is capable of factually controlling an electronic record if the person can (whether alone or jointly with one or more other persons): (a) transfer the electronic record; and (b) exclude one or more other persons from transferring the electronic record; and (c) demonstrate that the person can do the things in paragraphs (a) and (b)". Subsection (3) then provides that "[i]n working out whether a person can do a thing in paragraph (2)(a), (b) or (c): (a) it only matters what the person can do as a matter of fact rather than law; and (b) it does not matter if another person can also do that thing."

41. The Explanatory Memorandum explained[82] these amendments as giving effect to the characteristics recognised in the decision of the Full Court below, and the decision in *Re Blockchain Tech Pty Ltd*,[83] stating that that the rivalrous nature of digital tokens "is why a digital token is something that a person is able to have the same legal relationship with as they would a physical object"[84] and that the "amendments recognise that digital tokens are *functionally* equivalent to physical tokens in that they can be used and valued in the same ways".[85]

PART V: ESTIMATED TIME

42. The intervener estimates that 30 minutes will be required to present oral argument.

Dated: 7 May 2026

T M Begbie
T: (02) 6253 7061
E: tim.begbie@ags.gov.au

E L Beechey
T: (02) 9151 2021
E: beechey@newchambers.com.au

N J Carey
T: (02) 9151 2034
E: carey@newchambers.com.au

81 *Corporations Amendment (Digital Assets Framework) Act 2026* (Cth), Sch 1, Item 1.
82 Explanatory Memorandum at 16 [1.51]-[1.56].
83 (2024) 76 VR 578.
84 Explanatory Memorandum at 16 [1.51]-[1.56].
85 Explanatory Memorandum at 20 [1.69] (emphasis in original).

ANNEXURE TO THE INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	*Income Tax Assessment Act 1997* (Cth)	Current	ss 70-10(1), 108-5	To indicate Commissioner's current interest in the proceeding	N/A
2.	*Taxation Administration Act 1953* (Cth)	Current	Div 358 of Sch 1	To indicate Commissioner's current interest in the proceeding	N/A
4.	*Corporations Amendment (Digital Assets Framework) Act 2026* (Cth)	Current		To indicate recent development to regulate cryptocurrency	N/A