

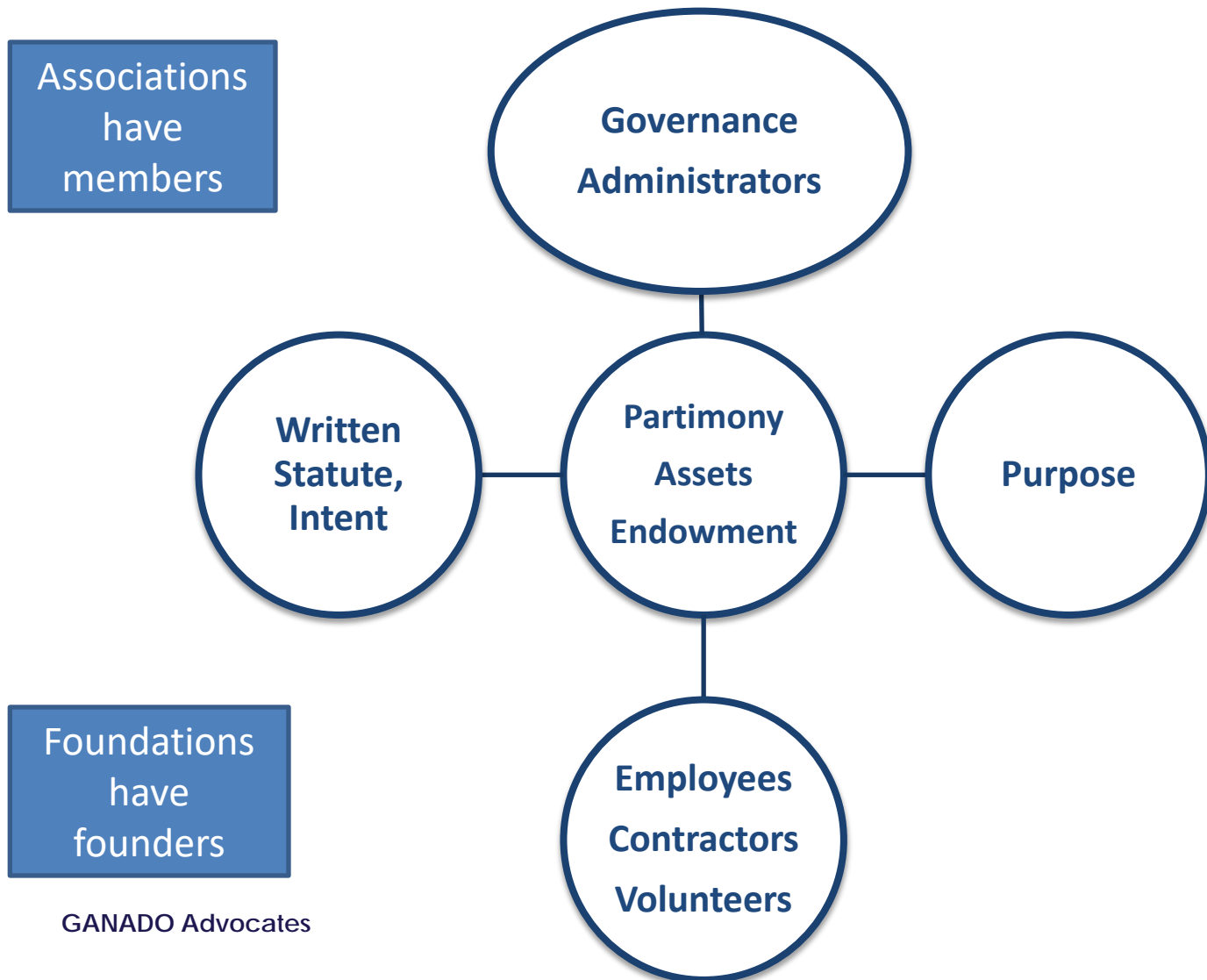
The logo for GANADO ADVOCATES, featuring the word "GANADO" in a large, bold, sans-serif font above the word "ADVOCATES" in a smaller, all-caps, sans-serif font. The background of the slide is a light blue network of interconnected nodes and lines, with a dark blue curved shape at the top right.

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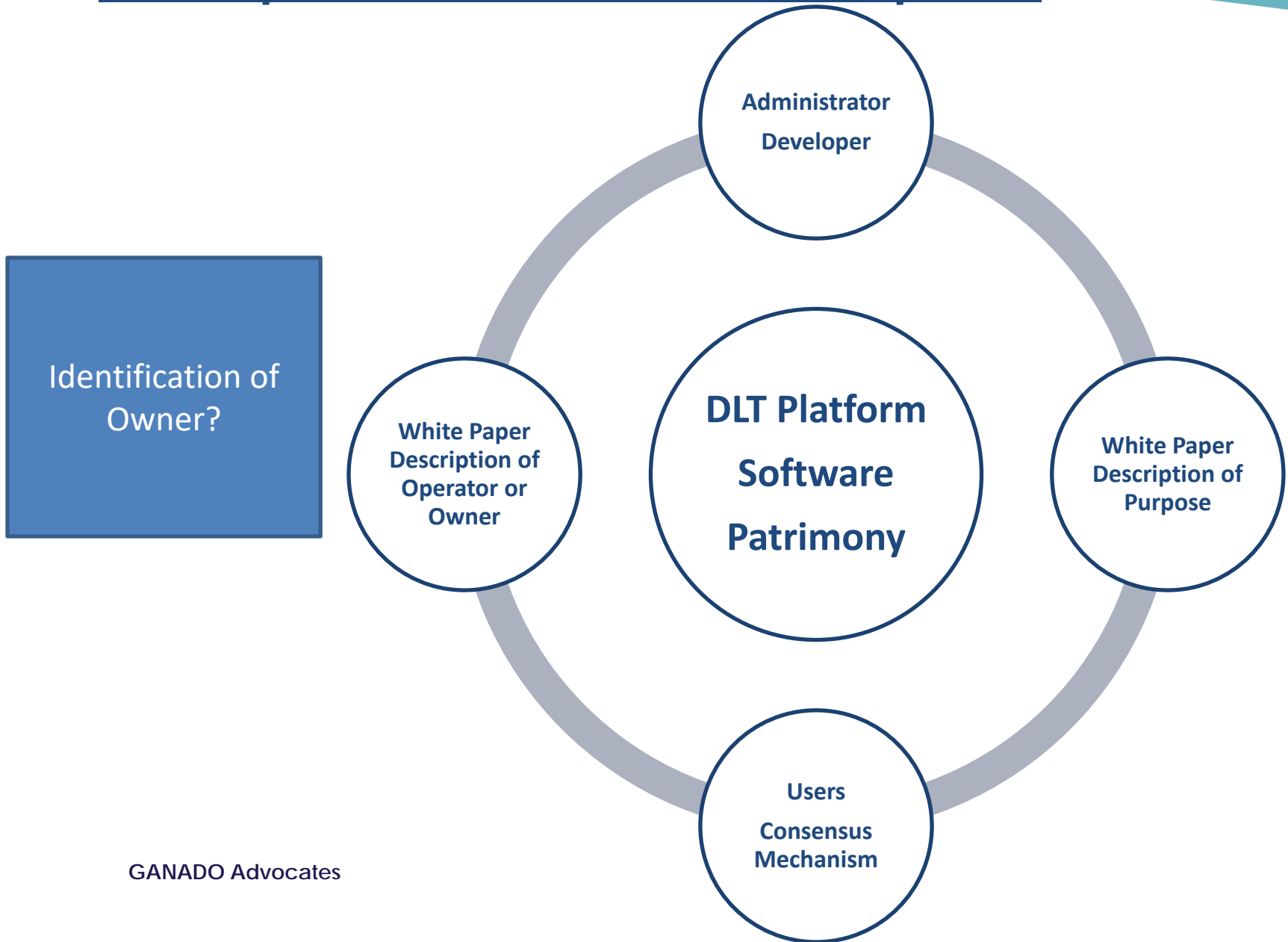
# Legal Organisations and Technology Arrangements

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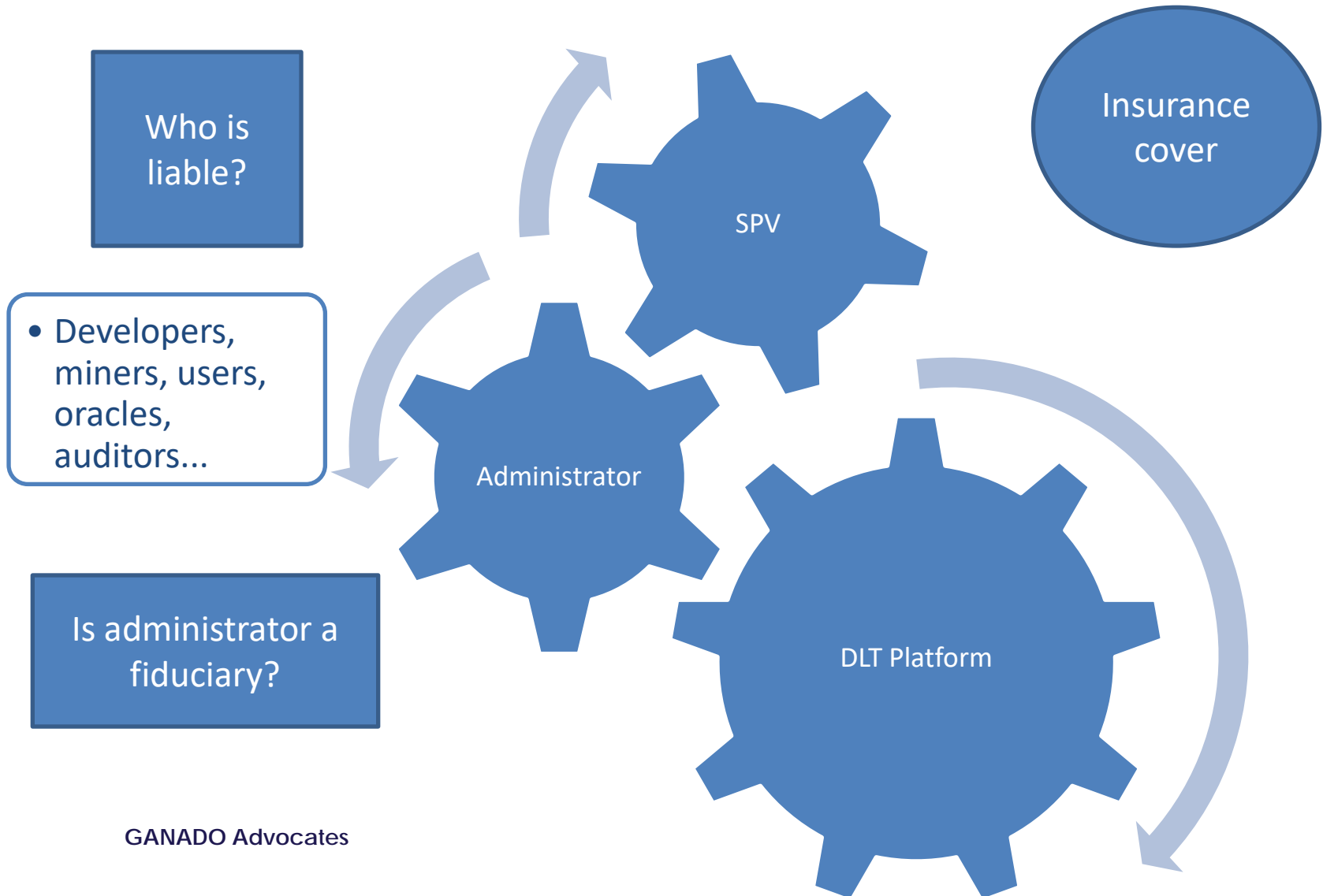
# A Legal Organisation – A Factual Description of a Body Corporate



# A DLT platform and related aspects



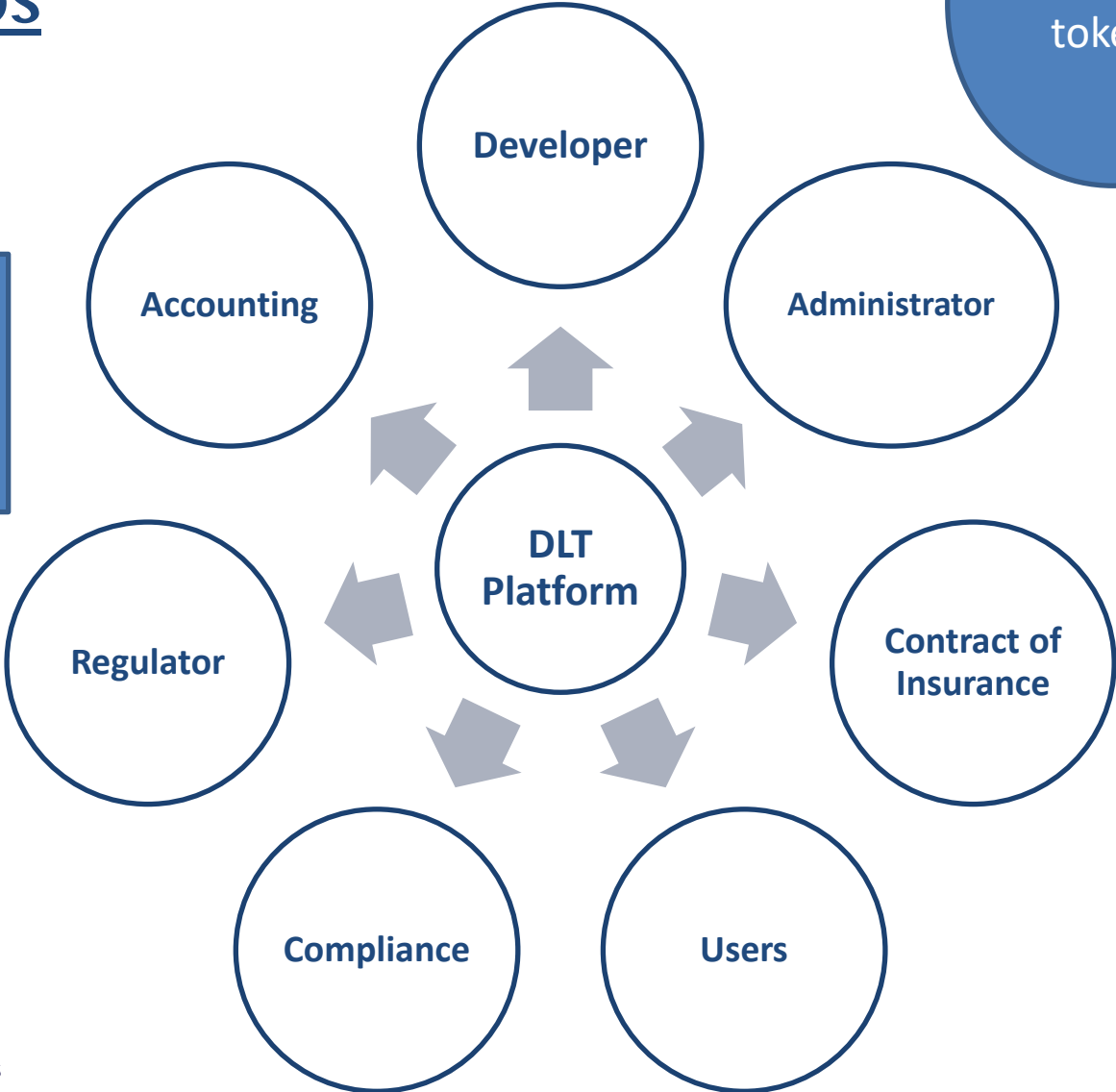
# A DLT Platform in Operation



# A Set of Contractual and Other Relationships

SPV issues tokens

Can the arrangement be considered a body corporate, a legal organisation?



# What can we do to increase legal certainty ?

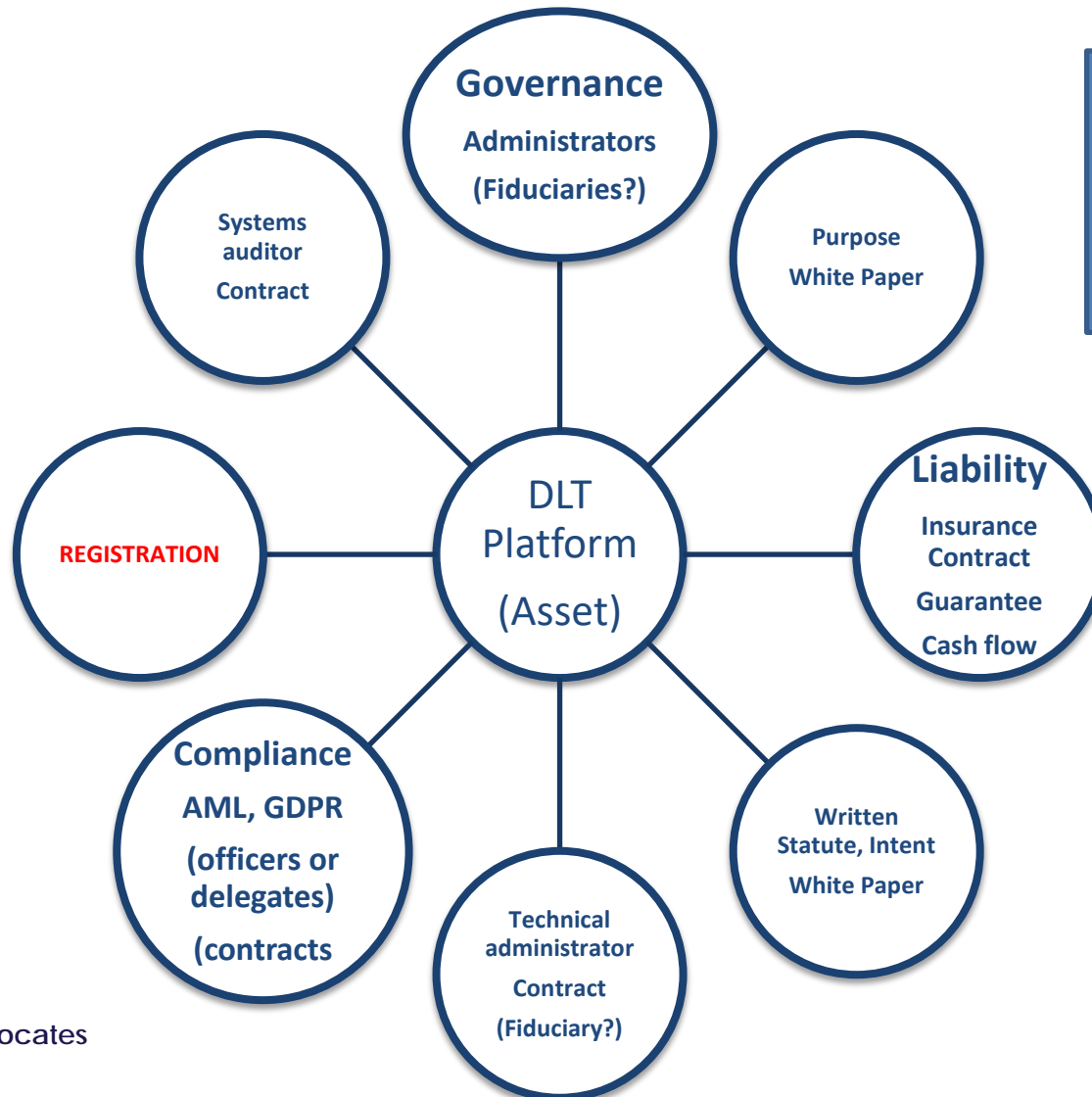
- We can **INCREASE** the disclosures
- We can **tighten up the contracts**
- We can **impose terms and conditions** excluding liability for different parties
- We can **place DLT platform within an existing type of legal organisation** and build in checks and balances
- We can **lobby to clarify the laws** applicable to the context - but what can we assume about the owners, contractual arrangements and liability?

# DLT deemed to be a legal organisation!

Are users members?  
Are they owners and liable? Are users partners or co-owners and liable as such?

Are issuers of white paper founders

Are users or token holders owners?



# Risk of being deemed a Legal Organisation

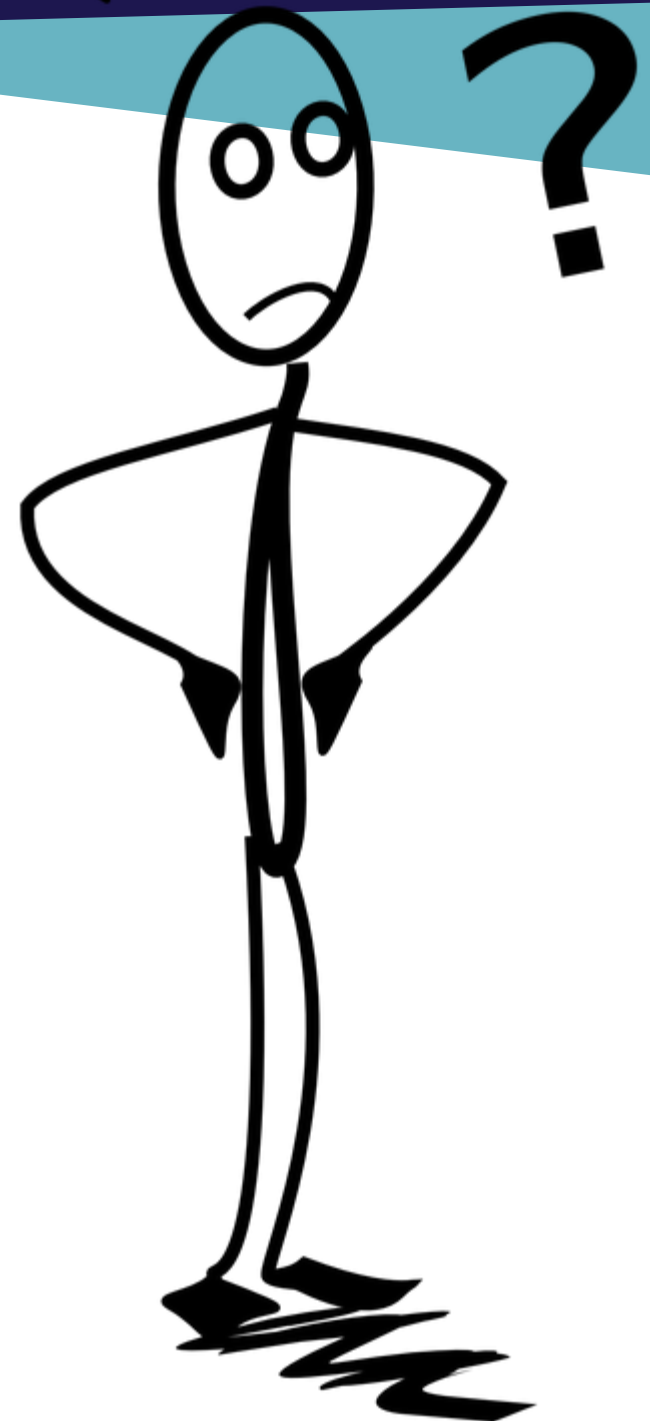
See Hacker "Corporate Governance for Complex Cryptocurrencies? A framework for Stability and Decision Making in Blockchain-Based Organisations" (November 22, 2017) <https://ssrn.com/abstract=2998830> where he states the following when he compares a blockchain with voting and profit participating tokens to traditional companies and other forms of legal organisations:

" ....it has even been suggested that blockchain-based networks might, in themselves, be partnerships in a legal sense, particularly if users follow a joint purpose and share profits;" and

cross refers to Zetsche et al. "The Distributed Liability of Distributed Ledgers: Legal risks of the Blockchain", U. Illinois L. Review [https://papers.ssrn.com/so13/papers.cfm?abstract\\_id=3018214](https://papers.ssrn.com/so13/papers.cfm?abstract_id=3018214), at 36 which is an even more robust articulation on how these arrangements can give rise to classification as a partnerships;



If we don't deal  
with this issue it's  
a world of **legal  
uncertainty**



# Proposal : Consider Legal Personality for DLT platforms

Philipp Hacker: *"Corporate Governance for Complex Cryptocurrencies? A framework for Stability and Decision Making in Blockchain-Based Organisations "*

(November 22, 2017) <https://ssrn.com/abstract=2998830> who argues for the adoption of a corporate governance framework to blockchain based organisations as a means **of reducing uncertainty**.

*"The Distributed Liability of Distributed Ledgers: Legal Risk of Blockchain"* by Dirk **Zetzsche et al.**, 2017, EBI Working Paper Series 2017 no. 14., in particular the conclusion:

*"Part of the thrill of blockchain to date has been its disregard of the law. With law in the picture, data are less attractively housed in distributed ledgers. This does not mean liability will exist in all cases. However liability matters, and distributed ledgers may, in time, most often be legally structured (particularly in permissioned systems) **as a joint venture where all servers are owned and operated – ironically – by one entity**, or a small number of specified entities, rather than as a cooperation among multiple entities."*

Naturally the challenge becomes even more compelling when considering autonomous artefacts on public, permissionless artefacts.

# Lets consider Legal Personality

**Option 1** – use existing legal forms

**Option 2** – vary some rules in existing forms

**Option 3** – design a completely new legal form

- Do you go for an Association or a foundation, or none, as a model?
- What variations to existing statutory requirements?

# Types of Legal Organisations

## Foundations

- Universality or pool of **Things**
- Purpose achieved through **Assets**
- May be established for:
  - a private interest;
  - a lawful purpose.

## Associations

- Universality or group of **Persons**
- Purpose achieved through **Collaboration of Efforts**
- May be established for:
  - a private interest;
  - a lawful purpose.

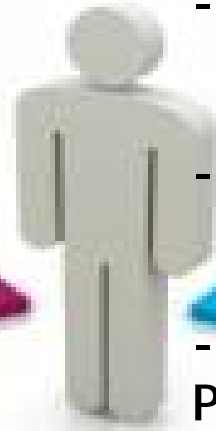
# Legal persons vs Legal Organisations

## Corporate

- Commercial Partnerships;
- Co-operatives;
- Unions and Employer Associations;
- Schools;
- Foundations;
- Registered associations;

## Non-Corporate

- Unregistered Organisations;
- Unregistered Associations;
- Unregistered Civil Partnerships;
- Condominium Associations;
- Voluntary Organisations not in corporate form.



# Legal Organisation -Qualities

	Legal Person	Blockchain
<b>Activities</b>	Centralised administration	Decentralised – no central counterparty or point of reference
<b>Governance</b>	Governing Body (Board / General Meeting)	May have governance embedded in it
<b>Accounting and Auditability</b>	Governed by applicable law	May have accounting and auditability embedded in it
<b>Legal Personality ?</b>	Depends on Legal Form chosen + Registration	Just a piece of software!

# Challenging assumptions

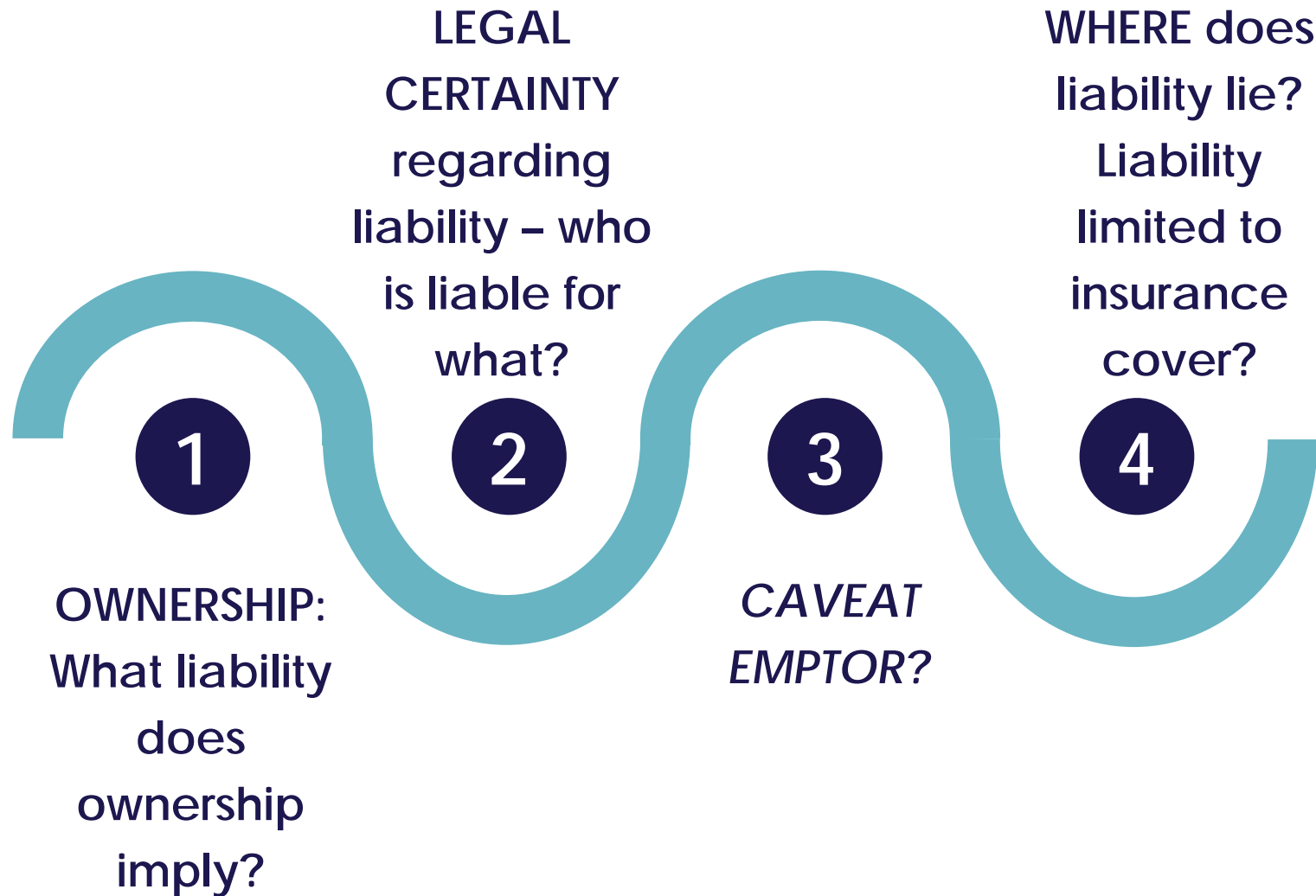
Decentralisation – What does this mean?

Ownership? Management and control? Decision making?

QUERIES.....

- ❖ Administration has to be very centralised for compliance purposes.
- ❖ Would not the same arise in a blockchain if it has to comply with filings or processes?
- ❖ Has anyone ever suggested that these functions should be carried out **by each token holder for himself**? Is the reality not still centralised?
- ❖ Is a general meeting of members ever centralised?
- ❖ Would a decentralised asset become centralised just because it is owned by many through one legal organisation?

# Impacts of Legal Personality – 1. Liability





## 2. Powers

Individuals are born with natural rights and obligations then apply in an ordered fashion as they get older

A legal organisation is a construct of the law and has A PURPOSE and logically all powers to achieve that purpose

These powers are principally patrimonial and contractual and cannot be equal to those of an individual

The powers can be limited by the statute and the special law applying to the legal form

Blockchains don't need powers but their deployment and operations clearly does need the power to contract services to comply with law, to protect users through insurance, for example ...

## 3. Regulation (1)

1. Legal organisations can be regulated the same way as individuals as through individuals they are presumed to ACT. Things, like ships or aircraft, are regulated for their design, composition and functionalities/behaviours;
2. Legal organisations and special classes of things can also break the criminal law;
3. Blockchains are the counterparty of certain acts but normally do not act themselves;
4. Smart contracts can carry out acts as programmed;

## 3. Regulation (2)

5. Things can act and can cause harm and we have principles of vicarious liability where SOMEONE (natural or legal person) bears liability for their actions;
6. Who will be responsible for actions on smart contracts on blockchains?
7. If the activity is regulated who will apply for a licence and comply with its conditions?
8. Is it possible to programme things to comply with the law through automation?

## 4. Disclosure

1. Legal organisations are by definition more transparent than individuals because of statutory requirements;
2. Legal persons are even more transparent due to:
  - REGISTRATION which is required for personality
  - Filing of accounts in the register
  - Filing of changes in officers in the register
3. Public Blockchains are designed to be transparent
4. Blockchains can produce and make PUBLIC accounts in an automated manner
5. Blockchains are REGISTERS where all transactions – including changes - can be recorded as they happen

## 5. Legal Certainty

Legal personality is one element in legal certainty relating to:

The counterparty in contracts

The powers of the counterparty to carry out an act

The patrimonial effects of the transactions carried out

The compliance with obligations

The compliance with obligations

# Qualities of an Association of persons?

Principles in law	Context to Blockchain
<b>Collaborative Element</b> to achieve a common purpose	Are token holders “associating” when they buy the tokens? Is there a common purpose?
<b>Governance</b> <b>Level 1</b> - Administrators	Is there governance? Do we need administrators? Is this not always centralised?
Governance <b>Level 2</b> - General meeting of Associates - Democracy	Is there the equivalent?  Consensus mechanisms?

# Types of Associations

- ❖ **Companies** – limited by shares /limited by guarantee
- ❖ **Partnerships** –
  - CIVIL; OR
  - COMMERCIAL - en commandite, en nom collectif, EN PARTICIPATION;
- ❖ **Cooperatives and Mutuals**
- ❖ **PRIVATE interest associations** – professional firms, joint ventures
- ❖ **Social or public purpose** associations

# Testing Limited Liability Companies

Companies – a legal person with shareholders having limited liability

❖ Many technical rules on:

- Governance through **directors**;
- **General meetings** and **voting**;
- **Capital**, capital preservation;
- **Shares**;
- **Accounting**.

❖ How would we deal with this in a blockchain context? **Company owning the blockchain platform...**

❖ Can we **eliminate the Board of Directors**? Can we say **tokens are shares** and comply with the Companies Act? Can we have an **electronic general meeting** or eliminate it? Will the **Shareholder Rights Directive** apply? What is the **capital** and how should be account for it?

❖ **TAX** – non transparent. Company taxed and then imputed to members



# Testing Partnerships

Partners are unlimitedly liable – possibly some with limited liability

Partners are fiduciaries towards each other

❖ Many technical rules on:

- Governance through **managing partner**;
- **General meetings** and **voting**;
- **Capital**, capital preservation;
- Interests
- **Accounting**.

❖ How would we deal with this in a blockchain context? **Partnership owning the blockchain platform...**

❖ Can we **eliminate the managing partners**? Can we say **tokens are partnership interests** and comply with the Companies Act? Partnership contract more focused contract between partners – succession of status not as easy as with shares.

❖ **TAX – transparent. Partnership not taxed and partners declare income.**

# Testing Co-operatives/Mutuals

- ❖ Members who join in a common purpose or project and share outcomes
- ❖ Many detailed rules in the Co-operatives Act
- ❖ How would we deal with this in a blockchain context? **Co-operative owning the blockchain platform...**
- ❖ Can we **eliminate the participants?** Can we say **tokens are participating rights in the co-operative** and comply with the Co-operatives Act? Co-operative deed very focused on **purpose** and **co-operative dynamic**
- ❖ **TAX** – some incentives relating to tax

# Testing Private Interest Associations

❖ Private Interest Associations are very **similar to partnerships** - conceptually much **more flexible** and **closer to a decentralised structure**

❖ Governed by the Second Schedule to the Civil Code

❖ How would we deal with this in a blockchain context? How do we deal with the applicable rules and the provisions on associations and the association deed?

E.g.. The law requires a minimum of two persons who associate and a list of other requirements to be stated in the deed for it to be valid

# Testing Social Purpose Associations

❖ Social Purpose Associations are very similar to private interest associations except that **there is no private interest** – focused on:

- **purpose** and
- **fiduciary obligations** to purpose

-far **less prescriptive** on membership

-far **more flexible** and even **closer to a decentralised structure**

❖ How would we deal with this in a blockchain context? How do we deal with the applicable rules and the association deed?

# Testing Foundations

- ❖ **Universality or pools of things** are endowed to achieve a purpose. The endowment is a TRANSFER of the things which then helps generate a legal person ....
- ❖ Purpose may be for:
  - the **private benefit** (Beneficiary Foundations): are token holder beneficiaries; or
  - a **social purpose**: focused on purpose, there are no beneficiaries, very flexible and conceptually centralised as centrally administered
- ❖ **Fiduciary duties** towards beneficiaries/purpose
- ❖ Power centralised in a **Board of Administrators - one level of Governance** - (Reserved Matters/Supervisory Council)
- ❖ Public deed and notaries required by law for validity

# Co-ownership and Joint Ventures (1)

- Joint ventures can be legal associations.

In the Companies Act we have the “*Association en participation*” but the focus there is more on the co-operation agreement on the achievement of a specific project rather than a long term structure with a purpose

- Co-ownership is **not** an association nor a pooling of assets. Each co-owner directly owns an undivided part of a single asset. Co-ownership does not create any risk of a legal organisation even if there is common administration agreed between the co-owners.

# Co-ownership and Joint Ventures (2)

One line of thought is that a blockchain creates co-ownership or some sort of joint venture among ALL the USERS or PARTICIPANTS and that can be garnered from cases when losses take place, eg. by distributing loss to all users pro rata.

This is evidence of the level of legal uncertainty in the field.

Evidently untenable if some users participate for verification purposes, compliance or a state entity participates for reg-tech goals

## An aside on Taxation....

**Company:** non-transparent, tax returns, audit

**Partnership:** transparent, no tax returns, no audit as partners personally liable to do these things

**Trust:** can choose tax regime (tick the box)

**Foundation:** can be taxed as company (non-transparent); can be taxed as a trust (transparent) – tick the box



# The process for legal personality

- ❖ A **written statute** is mandatory for a legal organisation to EXIST (all laws require this today)
  
- ❖ **Registration** in a public register is now mandatory to obtain legal personality for the legal organisation
  - There are special laws (companies, co-operatives, or Unions)
  - There is the default law – Second Schedule to the Civil Code
  
- ❖ Public registries require documentation, have bureaucratic processes and need human interface
- ❖ Public Registries provide authenticity and evidence of facts which produces a high level of transparency

# Proposed solution

- Create a **different type** of legal organisation;
- Can be **registered...** and **become a legal person**;
- A **variant of a foundation** ... the closest to the end result of what we need;
- We **already have many private law provisions and even detailed tax rules** so we will avoid the need of a new regime;
- How should we deal with other aspects such as governance, compliance, liability and registration?

# Governance

- ❖ Given that blockchain and smart contracts can provide for **automated governance solutions**, the challenge is **how to collapse the governance** level existing in current law through administrators into the technology itself and **have this permitted by the law** – what will the law require as a substitute?
- ❖ Evident need for some aspects to be carried out by humans e.g. representation:
  - technical administrator
  - resident agent
- ❖ What do we do in DAOs?

# Compliance (1)

- ❖ Technology can be very effective in relation to compliance reducing human error and even eliminating intentional evasion
- ❖ Open source software is becoming available for specific purposes in this sector
- ❖ Aspects like identification, prevention of money laundering compliance, data protection and consumer protection can therefore be process-driven

# Compliance (2)

- ❖ In case of breach due to technology failures, the technical administrator may be given powers to correct
- ❖ In case of breach due to change in law, the technical administrator can be given powers to address directly or through delegates/developers who can update the technology
- ❖ Regular reporting to the authorities can again be inbuilt
- ❖ The payment of tax can be automated

# Liability

- ❖ We are in a position to design who is liable for what in the formulation of a variant of existing PURPOSE foundations
- ❖ It is possible to create segregated cells who ring-fence assets and liabilities
- ❖ A cell could be designed to hold the blockchain platform as the principal endowment of the organisation with immunity from attachment for liabilities and also be bankruptcy-remote based on the underlying classification of the public blockchain platform being “public domain” (not owned by anyone or rather owned by the foundation under fiduciary obligations towards the purpose)
- ❖ Note: a different approach may be taken in private/permissioned blockchains

# Formalities and Registration (1)

❖ Allow for the registration of this kind of organisation on the basis of a declaratory statement signed by an applicant for certification under the proposed Innovative Technology Arrangements and Services Act (in progress)

❖ The declaratory statement will make public, in written form, the minimum connecting information to the blockchain platform which will then carry in a public and accessible manner all information required by the law relating to this new legal entity and its features – example the name of the foundation, the brand name of the blockchain and the public key

# Formalities and Registration (2)

- ❖ The blockchain will serve the purpose it is best suited for which is a public, accessible and immutable ledger ***for which we can easily read REGISTER***
- ❖ The blockchain functionalities can substitute for the traditional role of notaries public
- ❖ Easy access to the public can be provided through the public key without access to information which is non-public which can be limited to different groups (users, authorities etc.) on the basis of different access rights



# Conclusion :FORKING our Foundations

We are at a point where our existing foundation model **can be FORKED**

The new model will be:

- a **purpose foundation**

- with **segregated cells**

- issuing **tokens** which will provide users with **different rights of access or engagement or participation**

- some tokens could be **representative of unitised beneficial interests**

*The legal design is in our hands ....*

# Thank you.

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