



SUBMISSION

Crypto asset secondary service providers: Licensing and custody requirements

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The Treasury
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Digital Law Association Submission:
Crypto asset secondary service providers: Licensing and custody requirements

The Digital Law Association (the **DLA**) welcomes the opportunity to engage with the important issues surrounding the regulation of crypto assets and digital activities through Treasury's consultation (the **Consultation**) in respect of licensing and custody requirements for crypto asset secondary service providers (**CASSPr**).

The DLA is an organisation dedicated to the promotion of a fairer, more inclusive, and democratic voice at the intersection of law and technology. Our mission is to encourage leadership, innovation, and diversity in the areas of technology and law by:

- bringing together the brightest legal minds in the profession and in academia to collaborate; and
- developing a network that promotes digital law, and particularly female leaders in digital law.

The DLA's global membership includes over 1,000 lawyers, academics, industry participants and community members who are interested in the intersection of law and technology.

The DLA is accordingly able to leverage a powerful network of people with wide and diverse expertise, who can provide valuable views and input into the Consultation process. To do so, we will bring our members together to review, comment upon and discuss many of the submissions lodged as part of this Consultation. During the month of June 2022, we will facilitate a virtual discussion forum open to all DLA members to canvas global industry views on matters outlined in the various submissions, and to collate feedback. The DLA welcomes the opportunity to share the findings of this process with Treasury in due course.

In the interim, we have set out the DLA's foundational, principles-based recommendations for the next phases of the Consultation in this submission below.

Recommendation #1 – Adhere to clear, overarching principles for the regulation of technology like crypto assets and digital activities

The DLA agrees with Treasury's foundational principles for the regulation of crypto assets (and data activities): namely, to regulate according to risk, and that regulation should be technology neutral. In addition, the DLA strongly recommends that these foundational principles be supported by an overarching approach to the regulation of technology (including the technology considered as part of this Consultation) that:

- takes account of the wide range of stakeholders impacted by the adoption of, and increasing reliance on, technology (including data activities and crypto assets), in particular through a lens of diversity and inclusion and the protection of fundamental human rights;
- promotes as far as possible principles of technology neutrality;
- adopts a principles-based approach to the assessment of whether regulation is required, and if so, the appropriate form of that regulation, having regard to potential overlap with existing and relevant legislative frameworks;
- supports that assessment with a risk-based approach to any regulatory measures and responses that are adopted, which is founded in a clear understanding of the technology, and seeks to adopt proportionate means that minimise unintended consequences;
- provides clarity and certainty to industry participants, which allows for and scalability and innovation; and
- pays recognition to, and promotes where appropriate, the benefits of international harmonisation and global interoperability.

Recommendation #2 – Develop a multi-agency working taxonomy of ‘Digital Assets’ and ‘Digital Activities’

Consistent with our submission to the Third Issues Paper (Senate Select Committee on Australia as a Technology and Financial Centre) dated July 2021, the DLA reiterates its recommendation that, as an important first step and necessary measure as part of legislating a digital asset policy framework, Treasury should lead the preparation and release of a multi-agency working taxonomy of crypto assets within the broader category of ‘data structure’ and ‘data activities’. This taxonomy would set out the Australian legal and tax implications of crypto asset businesses and transactions, with input from multiple Australian regulators.

The DLA believes that this step is critical to understanding the important nuances that arise in relation to crypto assets, digital assets and in particular the role of data activities in relation to these data structures in any regulatory solution. There is no globally agreed taxonomy or set of definitions for digital assets and the activities associated with them. This creates confusion for policy-makers, regulators, investors and consumers. A multi-agency working taxonomy will allow for prompt guidance from regulators, attraction of business and investment to Australia, and result in a clear delineation of what matters require involvement from policy-makers.

This collaborative taxonomy would also provide the following benefits to all stakeholders:

- signal clarity and certainty from regulators to Australians and Australian businesses to operate with the benefit of guidance whilst a policy is being formulated;
- provide a working, ‘living’ document to stakeholders, which allows for ease of updating to reflect the fast pace of developments in emerging technology;

- develop a common language and understanding to facilitate discussions among and between industry and government; and
- make a clear distinction between the activities that may or may not create risks for investors or consumers in dealing with digital assets and data structures, and the information required to access and deal with the same (i.e. the private keys).

The DLA appreciates this opportunity to contribute to the Consultation, and would be pleased to discuss these comments and the outcomes of its member discussions with Treasury as the Consultation proceeds.

Please contact info@digitallawassociation.com for further information.

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