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(submitted by email: crypto@treasury.gov.au extension granted)

Crypto asset secondary service providers: licensing and custody requirements

Justice Connect welcomes the opportunity to respond to the 'Crypto asset secondary service providers: Licensing and custody requirements' Consultation Paper.

About Justice Connect

In the face of huge unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and achieve social justice. We help those who would otherwise miss out on assistance, focusing on people disproportionately impacted by the law and the organisations that make our communities thrive.

We have been serving the community for more than 25 years. We are a registered charity.

Our expertise – our Not-for-profit Law program

This submission draws on the experience of our specialist, national Not-for-profit Law program which provides free and low-cost legal assistance to not-for-profit organisations and social enterprises, many of whom are registered charities.

We handle more than 1,600 enquiries annually from a diverse range of groups, primarily small-medium sized and mostly volunteer run. These enquiries include a broad range of questions about financial transactions, fundraising, governance, financial security, and management of organisational or charitable funds.

We have recently facilitated legal assistance for multiple novel crypto asset matters.

Our submission

We are making this submission because we:

- i. want to draw attention to the needs of the Australian not-for-profit sector; a sector that is significant economically and socially, but whose regulatory needs (including the implications raised in the Consultation Paper) can be different and more complex than for business

- ii. have been able to draw on assistance from our member firms who have expertise in this emerging legal space (and who have already provided pro bono assistance to those who have come to our service for help) and from our academic colleagues
- iii. are of the view that not-for-profits should be enabled to participate in the digital economy but are concerned that not-for-profits sometimes need bespoke policies and regulations (different to business), and
- iv. there is a higher level of risk posed to the not-for-profit sector and greater potential (flow-on) of public harm given the nature of the services they provide.

Needs of the not-for-profit sector in receiving and using crypto assets

It is our view that the proposed token mapping exercise must account for the uses of crypto assets by the not-for-profit sector.

As a starting point, we note the following (non-exhaustive) uses of crypto assets by the sector:

- i. receiving donations in crypto assets
- ii. being paid for services (e.g. training) in crypto assets
- iii. making payments, including to staff and contactors, or securing contractual obligations with crypto assets, and
- iv. using crypto assets as part of a strategic investment portfolio.

The not-for-profit sector's interaction with crypto assets is different from the business sector

Most of the not-for-profit sector will passively, rather than pro-actively, increasingly engage with crypto assets. This is because not-for-profits will more often find themselves being asked to accept donations or payments via crypto assets. Not-for-profits will not want to turn away new and valid sources of funds that can be used to further their purposes.

Lack of certainty could see not-for-profits needlessly reject valid sources of funds when funds are so often scarce. This will undermine their ability to deliver on their purposes and for their communities.

There are governance and risk management considerations for not-for-profits with crypto assets

An example of a governance issue faced by not-for-profits, and raised by the Consultation Paper, is the use of multi-factor authentication. Not-for-profits, consistent with best practice risk management, require multiple signatories to authorise financial transactions. Conventional single signatory approaches to access of crypto assets are contrary to this governance expectation.

We note the Consultation Paper's references to furtherance of a multi-signatory approach to crypto assets. We support this work and recommend that appropriate guidance is provided to not-for-profits to enable and facilitate multi-signatory authentication.

It is a related governance expectation that funds be held in the name of the charity or other not-for-profit entity, rather than in the names of individual directors. There are charitable trust law duties at

play here, and issues for the many organisations that are unincorporated associations (so without separate legal status). The use of crypto wallets held by individuals creates difficulties.

We recommend that further guidance be provided to the sector outlining best practice for the securing and maintaining crypto wallets and crypto assets consistent with other duties imposed on charity directors and trustees.

There is also concern about requirements to identify donors and to issue receipts – who is the donor and what value is ascribed to the donation. Crypto assets pose unique challenges here.

Case study

Through our enquiry service we have seen many of the issues raised above.

Most recently, we had an urgent query following a donation to a charity which was facilitating emergency relief after the most recent 2022 floods. The charity sought legal advice about if it could accept a donation of crypto currency where the donor wanted to remain anonymous, how the donation should be classified from an accounting and tax perspective, its obligations about providing any receipt and generally how to manage any disclosure obligations to regulators. By facilitating a referral to a member law firm for pro bono advice, these questions were resolved and the donation, when divested, enabled more emergency relief to be provided in a regional community in a timely way.

This enquiry is emblematic of the increasing relevance of crypto assets to the not-for-profit sector, the urgent nature of related queries and the potential inability of charities to further their purposes if they cannot expeditiously resolve how to accept and manage donations of crypto assets.

Recommendations

- 1. The proposed token mapping exercise account for the uses of crypto assets by the not-for-profit sector, including those outlined above.**
- 2. Guidance, from regulators with which not-for-profits and charities already deal with (the ATO and Australian Charities and Not-for-profits Commission), be provided to ensure the sector has confidence to engage with crypto assets, assuredness as to the classification of assets and awareness as to related best practices, including multi-signatory authentication and how crypto wallets are held.**
- 3. Regulations be finalised to maximise the engagement of not-for-profits with crypto assets and the value, including via donations, that not-for-profits can attain from engagement with crypto assets. This should include regulation and associated guidance which facilitates the ability of not-for-profits (consistent with their purposes, organisational decisions and charity law) to either manage or divest crypto assets as appropriate.**

We note the questions raised by the Consultation Paper as to the regulatory approach to crypto assets. We are of the view that the involvement of regulators with which not-for-profits are familiar, and which themselves are familiar with the unique needs of not-for-profits, will be of benefit to the crypto asset and not-for-profit sector.

We would also like to flag our interest in any further discussion of Recommendation 4 of the Senate 'Select Committee on Australia as a Technology and Financial Centre' Final Report. Recommendation 4 states that "the committee recommends that the Australian Government establish a new Decentralised Autonomous Organisation company structure." We suggest that any proposed company structure take account of not-for-profit and charity organisations' particular needs in relation to legal structuring, Federal and State tax concessions and fundraising licence requirements.

We are available to clarify or speak further to the above.

Yours sincerely,



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