THE UNIVERSITY of ADELAIDE

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Crypto Policy Unit
Financial System Division
Treasury
Langton Cres
PARKES ACT 2600

2 March 2023

Dear Sir/Madam

Submission to Token Mapping Consultation

We are legal academics tenured at the University of Adelaide Law School. Our research specialisation is private law; specifically, contract and property law. The University of Adelaide is a member institution of the esteemed 'Group of Eight' research intensive universities in Australia. It is ranked 88th in the world on the 2023 Times Higher Education World University Rankings. The Law School is the second oldest in Australia and is ranked 109th in the world on the 2023 QS World University Rankings.

We wish to thank the Federal Government and the Treasury for inviting submissions to its consultation on 'Token Mapping', opened on 3 February 2023. This submission is our own and does not necessarily reflect the views of the Adelaide Law School or the University of Adelaide. We provide below some responses to a selection of the Treasury's various proposals and questions outlined in its 'Token Mapping' Consultation paper (February 2023) ('Consultation Paper').

Consultation Question 1

What do you think the role of Government should be in the regulation of the crypto ecosystem?

We consider that the Government should have a substantial and leading role in the regulation of the crypto ecosystem. The lack of firm and consolidated regulatory guidance from the legislature in this space has seen various regulatory bodies generate 'ad hoc' materials to answer critical and urgent questions affecting crypto-related commercial transactions. For example, the Australian Taxation Office ('ATO') has issued commentary and determinations confirming that disposals of cryptocurrency and resulting in profit are subject to capital gains tax.[1] There may also be fringe benefit tax implications where cryptocurrency is offered by employers to workers,[2] and cryptocurrency can in certain circumstances also be classified as 'trading stock' for the purposes of the *Income Tax Assessment Act 1997* (Cth) and consequently fall within the ambit of trading stock rules.[3] Remuneration for employment in cryptocurrency is a vexed issue and is seemingly only permissible where the employee concerned has a valid salary sacrifice arrangement in place.[4]

[1] Australian Taxation Office, 'Transacting with Cryptocurrency' (30 March 2020) https://www.ato.gov.au/general/gen/tax-treatment-of-crypto-currencies-in-australia---specifically-bitcoin/?anchor=Transactingwithcryptocurrency#Transactingwithcryptocurrency; Australian Taxation Office, TD 2014/26 (17 December 2014).
[2] Australian Taxation Office, TD 2014/28 (17 December 2014).
[3] Australian Taxation Office, TD 2014/27 (17 December 2014).
[4] Australian Taxation Office, 'Transacting with Cryptocurrency' (n 1). It is highly doubtful that ordinary wages can be paid in cryptocurrency under current laws: see Craig Cameron, 'The Regulation of Cryptocurrency to Remunerate Employees in Australia' (2020) 33 *Australian Journal of Labour Law* 157.

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The Australian Securities and Investments Commission ('ASIC') has also responded to the regulatory void in the Australian crypto ecosystem by issuing loose guidance documents for financial industry participants. For example, ASIC has analogised certain types of cryptocurrency with common financial instruments, such as shares and derivatives, and accordingly issued rules governing their use.[5]

In our view, this piecemeal approach to regulation from the various regulatory bodies in the Australian commercial landscape is inefficient and prone to inconsistency. Having the Federal Government lead regulation would ensure that all participants in the economy are subject to the same rules and that those rules are conveniently packaged in one instrument which is consistently applied and enforced. It also avoids the need for the courts to endeavour to resolve disputes concerning crypto-related transactions without any authoritative body of principle upon which to draw guidance.

Consultation Question 2

What are your views on potential safeguards for consumers and investors?

We believe that firmer regulatory guidance is arguably one of the strongest safeguards for consumers and investors. It would not only promote confidence in consumers by clarifying the current raft of critically important crypto-related questions which remain unanswered, but also encourage investment into our economy due to the transparency, precision, and strength of our regulatory framework.

One particular safeguard that would be especially helpful, and one which is inherently linked to the idea of regulation of cryptocurrency, is an affirmative statement (preferably in some instrument carrying statutory or other legal force) confirming that cryptocurrency has inherent legal value. At present, the question of whether cryptocurrency has any inherent legal value is hotly disputed. The Reserve Bank of Australia has previously suggested that cryptocurrencies 'have no intrinsic value' and are effectively dependent on user trust,[6] a view with which many academics agree.[7]

One of the authors of this submission has published a peer-reviewed journal article (**attached** to this submission for convenience) on this point and considers that established principles of Anglo-Australian contract law do not comfortably recognise value in cryptocurrency, meaning it cannot technically constitute consideration to support a contract for its sale.[8] This would mean any transaction to buy or sell cryptocurrency would theoretically be illusory and legally unenforceable. An easy way to clarify this legal uncertainty would be either to recognise cryptocurrency as a fiat currency[9] or to otherwise express through legal decree of some form that it has legal value. This would ensure that consumers and investors alike are sure of their position when transacting with cryptocurrencies.

In terms of other safeguards for consumers and investors, ASIC is, in our view, already well-equipped to oversee cryptocurrency transactions and the crypto-finance sector. It is already the nation's integrated corporate, markets, financial services and consumer credit regulator, and arguably better positioned and resourced to administer any regulations concerning cryptocurrency. Cryptocurrency is supposedly an alternative form of currency and has already been recognised by the common law courts as a form of chattel commodity.[10] It is therefore logical for ASIC to have dominion over such matters.

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[5] See Michael Bacina and Sina Kassra, 'ASIC Guidance on Cryptocurrency Sales: A Ban or Sensible Regulation?' (2017) 39 *Banking and Technology Law* 86. See also Australian Securities and Investments Commission, 'Initial Coin Offerings and Crypto Assets', Information Sheet 225 (May 2019).

[6] Reserve Bank of Australia, Submission No 37 to Senate Select Committee on Australia as a Technology and Financial Centre. Cited in Senate Select Committee on Australia as a Technology and Financial Centre, Parliament of Australia, *Final Report* (October 2021) 4 [2.8].

[7] See for example, Kent Anderson, 'Can Blockchain Withstand Criticism? An Inquiry' (2018) 38 *Information Services and Use* 153, 156.

[8] Mark Giancaspro, 'Cryptocurrency and the Consideration Conundrum: Does Crypto Have Legal Value under Contract Law?' (2022) 33(1) *Journal of Banking and Finance: Law and Practice* 3.

[9] At the time of writing, cryptocurrency is only legal tender in two countries: El Salvador and the Central African Republic.

[10] For example, in New Zealand (*Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728), Singapore (*B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03), and England (*AA v Persons Unknown, Re Bitcoin* [2019] EWHC 3556 (Comm)).

If ASIC were to have regulatory responsibility over the national crypto ecosystem, it would be important for it to appropriately enforce existing provisions of the statutory consumer protection framework to ensure that consumers and investors are appropriately protected. For example, the unfair contract terms provisions contained in Part 2, Division 2, Subdivision BA of the *Australian Securities and Investments Commission Act 2001* (Cth) should be rigorously enforced so that cryptocurrency trading platforms or other intermediaries or organisations utilising unfair terms in their contracts with consumers and investors are pursued and penalised through enforcement actions.

Consultation Question 3(b)

> *Scams can be difficult for some consumers to identify. … What policy or regulatory levers could be used to ensure crypto token exchanges do not offer scam tokens or more broadly, prevent consumers from being exposed to scams involving crypto assets?*

One potential regulatory solution would be to require issuing organisations to attain clearance from ASIC or another existing or purpose-established regulatory agency in order to make authorised initial coin offerings (ICOs) or other distributions of new crypto tokens. There should be a mandatory 'waiting period' similar to that imposed in most jurisdictions prior to the purchase of firearms under licence. Such periods would enable the relevant agency to perform appropriate 'background checks' of the issuing organisation and to mitigate the risk of authorising scam tokens (which are often time-sensitive due to the need to swiftly proliferate a coin and entice as many consumers as possible prior to detection). In addition, a register of all approved tokens should be kept and maintained by the authorising agency.

Consultation Question 5(b)

> *What are your views on the creation of a standalone regulatory framework that relies on a bespoke taxonomy?*

The proposed taxonomy in the Consultation Paper is, in our view, markedly narrow. We acknowledge that it is intentionally 'high-level' and understand the rationale for this. However, the taxonomy does not suggest critical sub-categorisations relevant to the classification of crypto assets. For example, it would be helpful to separately distinguish between DeFi tokens, NFTs and asset-backed tokens, and between utility tokens, payment tokens, security tokens, and stablecoins. To these sub-categorisations, one could also add transactional tokens and governance tokens.

We fully acknowledge that capturing all forms of crypto asset neatly in one overarching taxonomy is extremely difficult and perhaps even impossible. However, the Treasury should be cautious of being *too* narrow in its admirable efforts to maintain simplicity when generating regulatory frameworks.

In generating a regulatory framework for crypto assets, we note that the UK Law Commission on 28 July 2022 published a consultation paper entitled 'Digital Assets'. This paper recommended, among other things, the explicit recognition of a new category of personal property, known as 'data objects', to be distinguished from the well-established choses in possession and choses in action.[11] We have previously expressed elsewhere[12] our reservations about this concept and respectfully advise against any reform agenda which disproportionately accommodates crypto assets at the expense of coherence and harmony in the established legal order.

Consultation Question 6(a)

> *Some intermediated crypto assets are 'backed' by existing items, goods, or assets. These crypto assets can be broadly described as 'wrapped' real world assets. Are reforms necessary*

[11] Law Commission (UK), Digital Assets: Consultation paper (Consultation Paper 256, 28 July 2022) at [1.15], [4.4] <https://www.lawcom.gov.uk/project/digital-assets/>

[12] See Mark Giancaspro and Paul Babie, 'Cryptocurrency, Crypto-Tokens and Crypto-Assets as "Data Objects": A Novel Form of Property' (2022) 127(3) *Penn State Law Review Penn Statim* (forthcoming).

to ensure a wrapped real-world asset gets the same regulatory treatment as that of the asset backing it? Why? What reforms are needed?

There is potential for legal issues and disputes to arise where a 'real world asset', such as an automobile, is wrapped and title to the same is transferred to an unwitting purchaser without knowledge of its status as 'security' for a crypto token. For example, A may transfer a crypto token to B, with the token's value 'tied' to the market value of A's automobile. A then sells the automobile to C without notifying B. Title to the automobile therefore changes hands, and the security underlying the crypto token sold from A to B is now lost and the token is, in practical terms, worthless.

Two possible reforms that may assist in preventing or discouraging such unauthorised transfers are:

1. **A mandatory disclosure requirement for vendors to disclose if the assets they are selling are subject to any crypto interests**. In some other contexts, such disclosures are required, including prior to the transfer of title over real estate (in which case the vendor has a statutory duty to disclose any encumbrances on the title). There are indirect statutory protections for general non-disclosures in the sale of assets, such as consumer protection provisions (misleading or deceptive conduct under s 18 of the *Australian Consumer Law* ('ACL'), a consumer guarantee mandating disclosure of securities or charges attached to goods under s 53 of the ACL, implied conditions as to free title under the Sale of Goods legislation in each Australian state and territory etc.). However, the unique, novel, and uncommon nature of crypto assets may justify specific requirements of the kind suggested. Most laypeople would think to ask, for example, whether there are any other interests in an automobile being purchased. They would not, however, think to ask if such interests are in the nature of crypto token holders whose tokens are tied to the automobile being purchased.

2. **Express identification of the precise proprietary status of cryptocurrency and subsequent utilisation of the appropriate existing provisions of the *Personal Property Securities Act 2009* (Cth) ('PPSA')**. While it is clear that cryptocurrencies are not chattels but rather a form of intangible property, it is not clear what kind of intangible property they are. This has consequences under the PPSA, because 'intangible property' as defined in s 10 of that Act excludes both 'financial property' and 'intermediated securities'. It is plausible that cryptocurrency could be classified as either of these latter forms of intangible property.

   One difficulty in respect of the notion of classifying cryptocurrency as 'currency' under the PPSA is that the definition of the same in s 10 of the Act refers to 'currency authorised as a medium of exchange by the law of Australia or of any other country'. This would result in obvious problems for exchange within Australia and for the overwhelming majority of cross-border exchanges, because it will not be authorised by a government. Moreover, leading High Court of Australia authority defining 'currency' speaks of notes or coins of denominations expressed in units of account of a given country and issued under that country's laws as a medium of exchange of wealth.[13] Taxation cases have also queried the capacity for cryptocurrency to constitute currency for tax deduction purposes under federal income tax legislation.[14] Again, this body of authority and principle casts doubt as to whether cryptocurrency could suffice as 'currency' under the PPSA.

   Section 10 of the PPSA could be amended to expressly capture *digital* currencies, perhaps by reference to the definition of 'digital currency' in s 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). This provision states: 'digital currency means: (a) a digital representation of value that: (i) functions as a medium of exchange, a store of economic value, or a unit of account; and (ii) is not issued by or under the authority of a government body; and (iii) is interchangeable with money (including through the crediting of an account) and may be used as consideration for the supply of goods or services; and (iv) is generally available to members of the public without any restriction on its use as consideration …'. If it were currency,

[13] See for example, *Leask v Commonwealth* (1996) 187 CLR 579.
[14] See *Seribu Pty Ltd and Commissioner of Taxation (Taxation)* [2020] AATA 1840.

the 'taking free' rules[15] could theoretically apply and avoid the burden of innumerable register searches. Alternatively, cryptocurrency could be expressly classified as an example in an additional inclusive definition of 'intangible property' in PPSA s 10 or in a standalone definition. This would permit its registration on the Personal Property Securities Register and enable consumers to search the register for any interests registered against the crypto token being purchased.

A major drawback in respect of the second of these ideas, however, is that there are literally billions of tokens in circulation within the crypto market. Having to search for interests in each would be an enormously time-consuming task, even for a small number of tokens. Some form of register of individually secured tokens could be created, but again, maintenance of the same would be a monumental task. Regardless, express identification of the precise proprietary status of cryptocurrency would serve multiple ends and clear up the considerable confusion that surrounds this question.

Consultation Question 12

> *Smart contracts are commonly developed as 'free open-source software'. They are often published and republished by entities other than their original authors. a) What are the regulatory and policy levers available to encourage the development of smart contracts that comply with existing regulatory frameworks? b) What are the regulatory and policy levers available to ensure smart contract applications comply with existing regulatory frameworks?*

We consider the simple answer to this question to be that a comprehensive suite of regulations tailored specifically to blockchain infrastructure and embedded smart contract technology would be the most effective means of encouraging the development of smart contracts and smart contract applications that comply with existing regulatory frameworks. Currently, smart contract drafters/developers can largely do as they please given the lack of extensive regulation. The current rules that exist are piecemeal and context-specific, such as those under financial services rules (discussed above). This means there can be no realistic incentive to develop smart contracts which comply with existing rules.

If you had any questions concerning our submission or any other matters relevant to this consultation, please feel free to contact us. Our contact details are below.

[15] See PPSA pt 2.5.