# Treasury Consultation Paper on Token Mapping February 2023 (TMCP)

Submission
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## Q1) What do you think the role of Government should be in the regulation of the crypto ecosystem?

The role of the Government in the regulation of the crypto ecosystem should be to facilitate legal certainty, which contains two related elements:

(1) Maximising the predictability of legal outcomes associated with the regulation; and
(2) Maximising the transparency of the policy goals that underpin the regulation.

The TMCP admirably "cuts to the chase" with a token mapping framework, with the aim of potentially not requiring the wholesale creation and adoption of a standalone policy that may overlap or conflict with existing policy. But in doing so it needs to "take a step back" and examine the two components above in great depth. Otherwise it may increase the risk of misunderstandings down the track by the legislature, administrators and enforcers of the law (eg. ASIC), and the Courts. Any such misunderstandings will hamper innovation and investment in the crypto ecosystem.

*Facility*

The application of a new lexicon of *token systems* to the existing financial services law term of *facility* is an elegant idea and, at first blush, efficient, at least in relation to the law reform process. However, for the idea to be successful we need to be very sure of what the key legal terms mean.

In particular, the term *facility* as inserted by the parliamentary draftsperson in 2001 into what became section 763A of the Corporations Act needs intensive examination before we apply it to the concept of *token systems*. The term can be understood in the context of the aftermath of the 1987 crash, the floating of the Australian dollar, and the opening up of Australia's financial services. Those were indeed different times, so we cannot be sure that the statutory context is the same.

*Token systems* is part of a new lexicon[2] and it seems apt for the mapping exercise. But when *token systems* are combined with *facility,* this <u>multiplies</u> the uncertainties of legislative interpretation. That brew of {token systems x facility} is likely to have significant unintended consequences if not examined exhaustively and contained within precise parameters – for reasons explained below.

Having said that, the comments below are focused on *public token systems*. The token mapping framework seems quite well suited to *intermediated token systems* because they align with the

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[2] For example it is used by the Law Commission in the UK.

statutory context of promises, intermediaries and agents, and because their crypto offerings are sometimes similar in function to traditional finance offerings, from an investor's point of view.

The inclusive definition of *facility* in section 762C of the Corporations Act is deliberately wide in its drafting. It promises a lifetime of flexible application as long as the functions of investment and managing risk are at play (via section 763A). However, it is useful to more closely examine the operative meaning of *facility* and its statutory context in Part 7.1 of the Corporations Act, to better understand how the functional perimeter can apply to *token systems*.

What is a *facility* and how certain is its meaning?

The TMCP builds its framework around the functional perimeter. One of the building blocks of the functional perimeter is *facility*, a term in section 763A that is defined in section 762C. The section 762C definition is broad, as noted in paragraph 138 of the TMCP, because it is an inclusive definition. It relies on the "ordinary meaning" of *facility* as used in the community and in commerce.[3]

Arguably we have a limited body of judicial interpretation of *facility* because historically section 763A has been a catch-all to pick up less obvious financial products at the periphery, and in each of those instances an identified party has provided certain services to a person who arguably uses the service to make investments or manage risk. The scenarios that have come to the Courts have recently included the use of a bank account, or a scheme under which participants deposited funds into certain bank accounts which would be pooled and used by the provider to trade on offshore trading platforms.

Overdraft facilities, loan facilities or similar credit services provided by banks are a facility in ordinary parlance but are not per se a *facility* within the meaning of section 763A and Part 7.1 of the Corporations Act[4] because a bank, under its usual contractual terms, neither itself uses loaned or deposited funds to generate a financial return (or other benefit) for the investors, nor intends the funds be used to generate a financial return (or other benefit) for the investors[5].

Therefore, we need to look elsewhere for its ordinary meaning.

In this section 763A context, *facility* really means facilitation, which is another noun meaning an act of facilitating, or a means of facilitating[6].

Section 763A focuses on the recipient, or the facilitatee – that is, the investor who commonly acquires such a facility for the specified function. The assessment is made from their point of view.

But who is the *facilitator?* We know by definition that they are the party who makes a facility available to the investor for the specified function of financial investing or risk management.

Division 3 is understandably drafted from the point of view of the investor. But that leaves us with a passive voice for the term *facility* which makes legislative interpretation harder. It is silent from the facilitator- or facility provider's point of view. *Facilitator* is not mentioned in sections 762C or 763A, but a facilitator must obviously exist to make the facilitating available for the investor.

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[3] Australian Securities and Investments Commission v One Tech Media Ltd [2020] FCA 46 paragraph 145.
[4] Note also that in Parts 7.2 and/or 7.3 of the Corporations Act it may have a slightly different meaning.
[5] Davies J in *One Tech Media*, footnote 3 above, paragraph 146.
[6] Shorter Oxford English Dictionary, 6th Ed defines *facilitation* in this way, but interestingly not *facility*.

When a *facility* is an arrangement, it is easier because the facilitator is a party to the arrangement, and the investor is the other party to the arrangement, being facilitated by the facilitator to make a financial investment or manage a financial risk. This is the more common case.

When a *facility* is intangible property, it is less clear who the facilitator is. Historically it would still be an intermediary or agent since they would be likely to be providing the facilitating function or service *through which* the investor makes the investment or manages the risk.

The facilitation provided by the intermediary or agent does not in itself endure beyond the single purpose of satisfying the general definition of financial product in section 763A. Once the facilitating is provided for the functional purpose from the investor's point of view, the product is a financial product. Once that test is satisfied, the legislative role of the facilitation arguably fades, it seems.

The determination of whether a financial service has been provided is a separate exercise made under Division 4.

In the absence of an arrangement, it isn't easy to identify a party who may have facilitated a person to invest (a facilitator), and it isn't easy to know when a *facility* has been used by the investor.

For example, is the issuer of a share *facilitating* the financial investment? Or are they merely providing the object of the financial investment?

It is tempting to look at section 766C and answer that the issuer *is* a facilitator because issuing is specifically included as a financial service, within *dealing*. However, that is not the correct approach since the Division 4 functions are separate to the functions of a *facility* for the purposes of s. 763A.

If you attempt to link the service-provider point of view functions described in Division 4 with the investor point of view functions described in Division 3, an issuer may or may not have been interpreted as being a facilitator, but it will not have mattered. The inclusion of *issuing* in Division 4 can be understood within the specific statutory context of Division 4, as a distinct and separate exercise to the analysis of a *facility* within Division 3 (sections 763a and 762C).

The term *facility* requires a function of facilitating, which is distinct and separate from the specific services that are explicitly set out in Division 4 for the purposes of defining *financial services*.

As hinted above, section 763A is typically invoked in factual situations where section 764A inclusions may not apply but where a counterparty has provided a service to an investor/risk manager, particularly when the service goes bad and the protections of the financial services laws are sought.

Without having conducted a comprehensive review, recent cases that have considered section 763A usually involve arrangements where a facilitator is a contractual counterparty who provides a functional service to the presumed investor/risk manager[7].

But the position is unclear, given the infrequent historical usage of section 763A, and is even less clear in the absence of an arrangement.

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[7] Cases such as Wang v Australian Securities and Investments Commission [2019] FCA 1178, Australian Securities and Investments Commission v Munro [2016] QSC 9, Australian Securities and Investments Commission v One Tech Media Ltd [2020] FCA 46.

We don't know for sure whether a share issuer is a facilitator of a *facility* under section 762C, so it will be difficult to know whether a Layer 1 Protocol is a facilitator and whether the mere issuing of a token that is part of a token system will be issuing a *facility* that will be a financial product if it meets the functional purpose within section 763A.

If it is a *facility* via that reasoning, it will be difficult to counter a tempting implication in Division 4 that the *issuing* of the token is a financial service, if the primary reason the token is a financial product is that the issuance was a facilitation or *facility*.

We will need to understand if a Layer 1 Protocol minting tokens constitutes *issuing* under Division 4. There are arguments to suggest that it may constitute *issuing* in the context of a fund-raising such as an ICO, but in many other scenarios it may not constitute *issuing.*

*Does the facility need to involve a contractual nexus?*

If an arrangement is in place there will be an identifiable facilitator and contracts. The facility may combine with some intangible property, but the arrangement makes it clearer to identify.

Many *token systems* will not involve arrangements, other than certain intermediated token systems.

Other than referring to arrangements, section 762C does not contain an explicit contractual requirement for a *facility*, but the act of facilitating, or providing a means of facilitating, must be inherently contractual because a facilitator cannot facilitate unless it is providing some facilitation for the functional purpose **to** the person. Whether or not an arrangement is in place, the facilitation to the investor requires some direct connection. There might not always be a valid contract at law (eg. no consideration) but usually there *would* be a contract associated with the facilitating.

There can be multiple investors being facilitated at the same time – that is fine – but each of them is being bilaterally or contractually facilitated, and that makes it easy to identify the *facility*.

That contractual nexus seems important in the statutory context. Consider section 763A(3):

> (3) A facility does not cease to be a financial product merely because:
>
> (a) the facility has been acquired by a person other than the person to whom it was originally issued; and
>
> (b) that person, in acquiring the product, was not making a financial investment or managing a financial risk.

Section 763A(3) was added because, in a secondary sale, the contractual nexus of facilitating may be lost and could throw a product **out** of the 763A definition, so it was **added back in** by 763A(3).

As an aside, section 763A(3) is problematic for secondary sales of tokens in the same way as it as it problematic in the United States. The analogous problem in the United States arises where the Howey definition of securities makes sense for primary offerings but judicially has not been historically attached to the "object" of an investment contract, particularly when the object is a commodity like oranges[8] and not an established category of security such as shares.

It is no accident that in relevant examples[9] of a *facility* set out in the Revised Explanatory Memorandum for the Financial Services Reform Act 2001 (EM), the facilitators mentioned in the examples in the EM are contractual counterparties who look a lot like the very same intermediaries and agents discussed in the Wallis Inquiry and contemplated explicitly in the TMCP including in the section on *intermediary token systems* in Part C of the TMCP. There are arrangements in place too.

In other words, the exercise of identifying a *facility* is obvious when an intermediary or agent is providing a crypto asset service or an intermediated crypto asset under an arrangement.

It is materially harder to identify a *facility* or facilitator party, or a facilitating arrangement, when a network token or public smart contract is made available by a *public token system*.

As the TMCP says in paragraph 127, a crypto token itself is not like intangible property because its inherent characteristics are not created or controllable by law. It is not valued on the basis of representing a chose in action or bundle of rights enforceable against the token issuer. So how could a token issuer be said to be facilitating and how could the token be a *facility*, in the absence of an intermediating arrangement?

*Division 4 of the Corporations Act*

Division 4 lays out the categories of specific service providers, with its own differentiated definitions of service functions: *issuing*, *dealing*, *advising*, etc. These functions are independent to the upstream act of functionally facilitating – that was required to capture a financial product within the general definition of section 763A.

The Division 4 service definitions of course apply to financial products that are specifically included in other sections of Division 3, so this independence is not surprising.

So, given these specific categories of services with their own defined functions in Division 4, does it matter who the facilitator was, upstream, for a *facility*?

As hinted above with the example of a Layer 1 Protocol, it seems important to answer this with certainty for the token mapping framework, because the framework is proposing to put a lot more traffic through the s. 763A general definition than ever before.

One argument to support an affirmative answer that it <u>does</u> matter who the facilitator was, upstream, for a *facility* is found in the exclusion of telecom providers in paragraph 6.54 of the EM. A telecom provider was not a facilitator within the statutory context of the financial services laws, even though their service did assist in the facilitating for the investor.

More mainstream support for an affirmative answer is found from a composite reading of section 762C with section 763A, which can be shown as:

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[8] Cohen, Lewis and Strong, Greg and Lewin, Freeman and Chen, Sarah, The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities (November 10, 2022). Available at SSRN: https://ssrn.com/abstract=4282385 or http://dx.doi.org/10.2139/ssrn.4282385

[9] Refer to the Appendix.

> A *facility* is a service provided (by a facilitator) to a person for the functional purpose of the person making a financial investment or managing a financial risk.

If the *facility* is intangible property, the facilitator is the counterparty who provides the service *through which* the person makes a financial investment or manages a financial risk.

In each case, the service of facilitating the person for the functional benefit of the person suggests a contractual counterparty under an arrangement where the facilitator performs an active role of facilitating financial investment or risk management, as distinct from assisting in the facilitation (the telecom provider).

*Intermediated token systems*

The general definition of financial product, including the concept of *facility* used in section 763A, can and should be extended to apply to *intermediated token systems*, because those functions or services and related promises are exactly what the Wallis Inquiry targeted and what the Parliament intended to cover within the financial services laws, as evidenced extensively in the EM.

In that sense the policy goals align with legal certainty for *intermediated token systems.* This is because the flexibility of the words was intended and can be corroborated by the statutory context.

The general catch-all purpose of section 763A is appropriately applied to intermediaries and agents facilitating crypto investment.

*Public token systems*

Conversely, legal uncertainty arises from the application of *facility* to *public token systems*. This is because the statutory context of the financial services laws, as evolved from the Wallis Inquiry, does not fit at all into a system of computer code in the absence of promises, intermediaries and agents.

*Staged approach, for legal certainty while avoiding delays*

The protection of crypto investors and the process of law reform will be significantly delayed for crypto assets if Parliament attempts to bottom out those complexities for *public token systems.*

Treasury should proceed with the token mapping framework and its next steps in relation to *intermediated token systems (including crypto asset services and intermediated crypto assets)*, and should formally provide for a staged implementation that allows for further analysis and detailed legal opinions for *public token systems.* Rome wasn't built in a day.

Importantly, to my knowledge crypto asset investors in Australia primarily invest via the shopfronts of crypto asset exchanges (which are essentially market makers) and asset managers. They should be regulated as soon as possible, to address the overwhelming bulk of the unregulated risk currently faced by Australian investors, particularly retail investors.

If a staged approach is not adopted and *public token systems* are regulated at the same time as *intermediated token systems*, it is foreseeable that, at a minimum, a large number of exemptive applications will be lodged, as well as significant reliance on section 763E of the Corporations Act. This will, at a minimum, result in far from "efficient"[10] outcomes as well as great legal uncertainty, given how unsuitable the current financial services laws are for mapping to *public token systems.*

[10] ALRC Report 137, November 2021, paragraphs 2.13 and 2.18.

A staged approach also aligns with recent experience. The FTX collapse was directly attributable to failures associated with unregulated *intermediated token systems*.

*Alignment to other laws*

Other elements of the rule of law which could be clarified in a second stage include, for example, whether there is any legislative policy intent to align the crypto regulation with the lexicon of existing personal property securities laws, or existing bankruptcy laws, or with Part 4 of the Payment Systems and Netting Act?

If not, why not, as these alignments may be beneficial for consumer protection. Such alignments will be a complex exercise and could delay crypto regulation even further, however they could materially help institutional investors invest more safely in crypto with far greater legal certainty.

*Policy goals*

The token mapping exercise tests the functional equivalence of the crypto ecosystem versus existing regulatory frameworks.

The TMCP hints at policy goals from chapter 5 of the Wallis Report, however it could more explicitly articulate what is intended to be achieved by applying the existing regulations to crypto, and why. For example, we could spell out the IOSCO principles or modify these words to help define our policy goals for the crypto ecosystem:

> (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
>
> (b) promote the confident and informed participation of investors and consumers in the financial system…[11]

## Q2) What are your views on potential safeguards for consumers and investors?

Existing safeguards are contained in the financial services laws, including disclosure, client money rules, capital requirements for financial service providers, and sanctions against market misconduct.

## Q3) Scams can be difficult for some consumers to identify.
## a) Are there solutions (e.g., disclosure, code auditing or other requirements) that could be applied to safeguard consumers that choose to use crypto assets?
## b) 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?

Scams should be addressed as part of a standalone exercise that covers both financial products and non-financial products and which draws from the collective experience of both ASIC and ACCC.

[11] Australian Securities and Investments Commission Act, s.1(2).

Q4) The concept of 'exclusive use or control' of public data is a key distinguishing feature between crypto tokens/crypto networks and other data records.
a) How do you think the concepts could be used in a general definition of crypto token and crypto network for the purposes of future legislation?
b) What are the benefits and disadvantages of adopting this approach to define crypto tokens and crypto networks?

This is an interesting topic that could be re-examined in the next steps in the law reform process.

Q5) This paper sets out some reasons for why a bespoke 'crypto asset' taxonomy may have minimal regulatory value.
a) What are additional supporting reasons or alternative views on the value of a bespoke taxonomy?
b) What are your views on the creation of a standalone regulatory framework that relies on a bespoke taxonomy?
c) In the absence of a bespoke taxonomy, what are your views on how to provide regulatory certainty to individuals and businesses using crypto networks and crypto assets in a non-financial manner?

A bespoke taxonomy might create less legal certainty, unless it is accompanied by extensive explicit examples of legislative intent. Those examples should demonstrate a detailed understanding of the legal application of every key functional definition and operative provision in the financial services laws as they are proposed to be applied to the *token systems*.

Q6) Some intermediated crypto assets are 'backed' by existing items, goods, or assets. These crypto assets can be broadly described as 'wrapped' real world assets.
a) Are reforms necessary to ensure a wrapped real-world asset gets the same regulatory treatment as that of the asset backing it? Why? What reforms are needed?
b) Are reforms necessary to ensure issuers of wrapped real-world assets can meet their obligations to redeem the relevant crypto tokens for the underlying good, product, or asset?

The lexicon of intermediated crypto assets is potentially confusing. Wrapped crypto tokens or stablecoins should be explicitly mentioned as examples, to help clarify the intent of the lexicon.

Certain real-world assets such as gold, real estate are not financial products, as the TMCP notes.

A crypto asset that is backed by, or referenced to, a real-world asset in a manner that is identical to a derivative or other specifically included category of financial product could well be required to meet the equivalent requirements of the derivative or other financial product.

A token that wraps a share that is listed on the ASX, for example, should meet the same requirements under the financial services laws as the share. This could possibly be made subject to an "if not, why not" obligation whereby the intermediaries, issuer, or other relevant parties associated with that crypto asset could apply for exemptive relief in certain limited circumstances.

This is where functional equivalence makes total sense.

Q7) It can be difficult to identify the arrangements that constitute an intermediated token system.
a) Should crypto asset service providers be required to ensure their users are able to access information that allows them to identify arrangements underpinning crypto tokens? How might this be achieved?
b) What are some other initiatives that crypto asset service providers could take to promote good consumer outcomes?

Crypto asset exchanges and asset managers and custodians can lead the way in this regard in Australia. We should specifically develop guidelines and standards with their input. Some good inputs and design work that began with the CASSPRs consultation should be drawn upon.

Q8) In addition to the functional perimeter, the *Corporations Act* lists specific products that are financial products. The inclusion of specific financial products is intended to both: (i) provide guidance on the functional perimeter; (ii) add products that do not fall within the general financial functions.
a) Are there any kinds of intermediated crypto assets that ought to be specifically defined as financial products? Why?
b) Are there any kinds of crypto asset services that ought to be specifically defined as financial products? Why?

a) Section 763A is a reasonable fit for *intermediated token systems*, as they can, and should be, naturally interpreted as a *facility* in most cases.

Any intermediated *crypto asset* that is offered to retail investors on an Australian crypto asset exchange could arguably be specifically defined as a financial product, subject to any necessary conditions and qualifications.

b) Any share or managed investment scheme offered to retail investors by an Australian asset manager that uses subscription moneys to invest in *crypto assets* could arguably be specifically defined as a financial product, subject to any necessary conditions and qualifications.

Q9) Some regulatory frameworks in other jurisdictions have placed restrictions on the issuance of intermediated crypto assets to specific public crypto networks. What (if any) are appropriate measures for assessing the suitability of a specific public crypto network to host wrapped real world assets?

Wrapping real world assets warrants a specific stream of consultation and debate.

Q10) Intermediated crypto assets involve crypto tokens linked to intangible property or other arrangements. Should there be limits, restrictions or frictions on the investment by consumers in relation to any arrangements not covered already by the financial services framework? Why?

Not necessary, if the application of the financial services laws to *intermediated token systems* is designed and implemented effectively.

Q11) Some jurisdictions have implemented regulatory frameworks that address the marketing and promotion of products within the crypto ecosystem (including network tokens and public smart contracts). Would a similar solution be suitable for Australia? If so, how might this be implemented?

Some guidance would be useful for participants, but it would draw upon existing guidance.

Q12) 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?

Regardless of the authors, the policy intent should be that smart contracts that are designed predominantly to attract and facilitate financial investment should be restricted from being accessed by Australian retail investors, unless they comply with minimum standards or applicable financial services laws. The enforcement challenges of this should be considered carefully.

To my understanding there are relatively few smart contracts that would meet that test attract material interest from Australian retail investors at present. In this regard, a risk-based approach could be applied to this area for the time being.

Q13) Some smart contract applications assist users to connect to smart contracts that implement a pawn-broker style of collateralised lending (i.e., only recourse in the event of default is the collateral).
a) What are the key risk differences between smart-contract and conventional pawn-broker lending?
b) Is there quantifiable data on the consumer outcomes in conventional pawn-broker lending compared with user outcomes for analogous services provided through smart contract applications?

No comment.

Q14) Some smart contract applications assist users to connect to automated market makers (AMM).
a) What are the key differences in risk between using an AMM and using the services of a crypto asset exchange?
b) Is there quantifiable data on consumer outcomes in trading on conventional crypto asset exchanges compared with user outcomes in trading on AMMs?

The liquidation processes by AMMs can differ materially from the margin call and risk management processes of crypto asset exchanges. While efficient, they can operate to the detriment of investors, however they also typically operate with consistency and transparency.

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## APPENDIX – LEGAL OBSERVATIONS

*Grafting new onto old*

Legal certainty is one of the pillars of the "rule of law"[12]. Rule of law helps investor confidence and helps Australia remain competitive in promoting innovation.

The ALRC[13] identified that legislative design "should promote meaningful compliance with the substance and intent of the law… The use of legislative definitions and legislative hierarchy [are] aspects of legislative design."

Grafting on new products onto old regulations requires maximum certainty and clarity of intent. If the legislature is clear on its policy goals, this should increase the predictability of legal outcomes. This seems essential when new and old merge; viz, new products and old regulatory frameworks.

Professor McCracken's article[14] on the lexicon of personal property securities legislation is worth mentioning as an example of how confusing things can get when old and new get mixed together. She cites an observation from the Supreme Court of Canada in the case of *Saulnier v Royal Bank of Canada*: "For particular purposes Parliament can and does create its own lexicon."[15]

*US Securities*

It is worth understanding that not all crypto related fraud should be regulated by shoehorning into the financial services laws via Chapter 7.

In the United States, Congress was very deliberate in legislating specifically for a category called "securities" because they believed that the 1929 Crash and ensuing Depression had been disproportionately caused by securities fraud and the ensuing lack of consumer confidence and related hoarding. That systemic impact was the impetus for enacting securities laws that were more prescriptive and onerous than laws for other commercial fraud.[16]

Professor FitzGibbon's seminal analysis on the historical context of the definition of "securities"[17] illustrates the point:

> "It seems most unlikely that the lawmakers thought that fraud, inadequate disclosure, market manipulation, or many of the other things prohibited by the securities laws were wrongful or undesirable only when securities were involved. Evidently, they decided to legislate as to only some of the conduct they believed wrongful-not an unusual procedure for lawmakers with the common law as a backstop, especially when they are federal lawmakers acting during a major crisis in an area that

[12] "The "rule of law" … requires… accountability to the law, fairness in the application of the law… legal certainty, avoidance of arbitrariness and procedural and legal transparency." International Law Association, Interim Report (2020) Rule of Law and International Investment Law [https://www.ila-hq.org/en_GB/committees/rule-of-law-and-international-investment-law](https://www.ila-hq.org/en_GB/committees/rule-of-law-and-international-investment-law)

[13] ALRC Report 139, September 2022, paragraph 4.70.

[14] McCracken, Sheelagh --- "Personal Property Securities Legislation: Analysing the New Lexicon" [2014] AdelLawRw 7; (2014) 35(1) Adelaide Law Review 71

[15] *Saulnier* [2008] 3 SCR 166, [16].

[16] Ibid.

[17] FitzGibbon, *What is a Security? – A Redefinition Based on Eligibility to Participate in the Financial Markets*, 64 Minn. L. Rev. 893 at 914 (1980)

is widely regulated at the state level. That explains why they did not undertake a general revision of the law of contracts or corporations. But why did they focus on securities?"

*Extracts from the EM*

> 6.48 What amounts to a financial product that enables a person to do one of the things specified in proposed subsection 763A(1) is defined broadly as a facility through which, or through the acquisition of which, the person does those things. A 'facility' is taken to include intangible property or an arrangement or term of an arrangement or both (proposed section 762C). For example, a share would be intangible property through the acquisition of which a person makes a financial investment.
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> 6.52 A facility will be regarded as one for making a financial investment, managing a financial risk or making a non-cash payment even if this is not the purpose for which it is acquired, if it is the purpose for which a product of that kind is commonly acquired (see proposed subsection 763A(2)). For example, a particular person may enter into a derivatives transaction with a speculative purpose in mind. Notwithstanding this, the transaction will be regarded as one for managing a financial risk since persons commonly **acquire such products** to manage financial risks.
>
> 6.53 Proposed subsection 763A(3) deals with the secondary sale of financial products and provides that a facility that was originally a financial product retains that character when it is on-sold notwithstanding that the person who is acquiring the product is not making a financial investment or managing a financial risk. This is intended to ensure, for example, that products such as securities, which on initial issue come within the concept of make a financial investment, retain that character when they are on-sold even though they would no longer come within that concept. The provision would apply similarly to a warrant, that on initial issue was a facility for managing a financial risk, but would not otherwise be on secondary sale.
>
> 6.67 Who is the issuer of a particular financial product, including a non-cash payment facility, is dealt with in proposed section 761E. In particular, proposed subsection 761E(4) makes it clear that the issuer of the product is the person who is responsible to the client or for the obligations owed under the terms of the product. In relation to non-cash payments such as direct debit facilities, the issuer of the facility (who is subject to certain obligations under proposed Chapter 7, including financial service provider licensing and product disclosure) is the financial institution with which the account to be debited is held, rather than the person to whom payments can be made using the facility. Similarly, in relation to Automated Teller Machines (ATMs) it would be the financial institution with which the account being credited or debited through the use of the machine that would be the provider of the facility, not the supplier of the ATM.

*Refresh of legislative interpretation*

In drafting legislation that connects the new token mapping framework to the financial services laws, we should be vigilant in avoiding unintended consequences. In this regard, we should set out the statutory context in exhaustive detail, to give industry, the regulators, and the Courts a much better chance of sustaining the legal certainty that we need to properly regulate crypto.

We can draw from many sources to confirm the importance of spelling out the statutory context. One example is Justice Kirby's helpful summary[18]:

> "During the past decade or so, the High Court of Australia has unanimously endorsed other principles as necessary to the accurate reading of legislation. Amongst the most important of these principles have been:

[18] Kirby, Michael --- "Statutory Interpretation: The Meaning of Meaning" [2011] MelbULawRw 3; (2011) 35(1) Melbourne University Law Review 113

> • that where the applicable law is expressed in legislation the correct starting point for analysis is the text of the legislation and not judicial statements of the common law or even judicial elaborations of the statute;[10]
>
> • that the overall objective of statutory construction is to give effect to the purpose of Parliament as expressed in the text of the statutory provisions;[11] and
>
> • that in deriving meaning from the text, so as to fulfil the purpose of Parliament, it is a mistake to consider statutory words in isolation. The proper approach demands the derivation of the meaning of words from the legislative context in which those words appear. Specifically, it requires the interpreter to examine at the very least the sentence, often the paragraph, and preferably the immediately surrounding provisions (if not a wider review of the entire statutory context) to identify the meaning of the words in the context in which they are used.[12]

*The mantra of "technology neutral"*

While it makes sense to suggest that the token mapping framework facilitates a technology neutral approach, we should be circumspect about the limits of that approach.

As Professor Bennett Moses says[19]:

> A technology-neutral approach is not always appropriate. Koops (2006) gives the example of traffic laws. Such laws commonly distinguish between pedestrians, cyclists and automobiles, thus distinguishing between road-users based on the technology of transportation employed. The need for *sui generis* treatment of bicycles and cars is obvious – the different size and speeds of different vehicles makes different treatment on the road necessary. While it is not necessary to use technology-specific language, it is desirable to do so.

As Brad Greenberg says[20]:

> When legal regimes adopt technology neutrality as a general principle, it leads to rules that are over-inclusive and speak poorly to unforeseen technologies. This makes technology neutrality socially undesirable. It also, in turn, results in inconsistent treatment of similar technologies and increases uncertainty about whether and how the law will be or should be applied. And that undermines neutrality's goals of promoting statutory longevity and adapting the law to new technologies.

For crypto assets we will inevitably land on a lexicon that is a "work in progress". Not all categories of *token system* outputs will be understood or anticipated. Substantial room should be left for innovation, and the framework should be realistic in its aims of achieving a comprehensive coverage.

A technology-neutral approach sounds like a good idea, but care should be taken to review the scholarship in this area and look honestly at the empirical evidence. It may be better to legislate with a risk-based approach and in stages, with the easiest and highest-risk area of *intermediated token systems* as stage one, and the more difficult areas of *public token systems* and certain non-core elements of *intermediated crypto assets* as stage two, and possibly also a stage three.

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[19] Bennett Moses, Lyria, Sui Generis Rules (December 18, 2009). UNSW Law Research Paper No. 2009-50, Available at SSRN: https://ssrn.com/abstract=1526023

[20] Greenberg, Brad A., Rethinking Technology Neutrality (March 16, 2016). Minnesota Law Review, Vol. 100, p. 1495, 2016, Available at SSRN: https://ssrn.com/abstract=2748932