ASIC
Australian Securities &
Investments Commission

Submission to Token Mapping Consultation Paper

March 2023

Contents

Executive summary

1 ASIC welcomes Treasury's Token Mapping Consultation Paper ('Consultation Paper') and supports the Government's multi-stage reform agenda that commits to developing appropriate regulatory settings in Australia for the crypto ecosystem.

2 ASIC looks forward to supporting the Government and Treasury on the next steps set out in the Consultation Paper, including the proposed licensing and custody framework for crypto-asset service providers.

3 As noted in the Consultation Paper, most consumers interact with, or gain exposure to, the crypto ecosystem through a service provider. Because of this, we think it is appropriate to develop a framework for the regulation of service providers and intermediated token systems first.

4 In ASIC's view, there is a need for Government to provide greater certainty about the regulatory treatment of crypto-assets.

5 Determining whether a particular crypto-asset is a financial product currently requires complex legal analysis. Different conclusions may be reached for different products, even where they operate in a similar way or perform a similar economic function. A number of recent enforcement actions that ASIC has taken against crypto-asset service providers illustrate that this exercise is not straightforward, and that there are challenges in applying the existing financial services framework.

6 In our view, this uncertainty is better addressed through legislative reform rather than being resolved solely through enforcement actions to determine whether particular offerings involve financial products or services, and if so, what type.

7 One way in which this could occur is for Government to legislate that certain services or activities performed in relation to crypto-assets, which are similar to services performed in traditional finance, should be regulated.

8 By clearly bringing crypto-assets and services within the regulatory perimeter, regulatory effort can be directed towards safeguarding consumers and addressing instances of consumer harm, rather than trying to determine whether particular products are or are not within the regulatory perimeter.

9 Some overseas jurisdictions have signalled that they intend to adopt this activities-based approach.

10 Section A of this submission sets out some overarching comments on the token mapping exercise, and how the outcomes from the Consultation Paper

can be taken forward in developing the licensing and custody framework, and can be used as a basis for regulating activities performed in relation to crypto-assets. We then set out responses to specific consultation questions in the Appendix.

A Activities based approach to regulating crypto-asset service providers

Key points

- ASIC supports the development of a custody and licensing framework for intermediated crypto products and services first, as the majority of retail activity in the ecosystem involves intermediation to some degree.
- Determining whether a particular crypto-asset is a financial product requires complex legal analysis, is resource intensive and can detract from our ability to make timely interventions to protect consumers from harm.
- To address this uncertainty, we propose a framework that would regulate activities performed in relation to a broad range of crypto-assets. The activities we are proposing to regulate in relation to crypto-assets are those that are similar to traditional financial activities, and have the potential to cause harm to consumers and markets. Regulating these activities will help ensure the same risks have the same regulatory outcome.
- As we move to the next phase of policy development, we encourage Treasury to consider measures to reduce the likelihood of consumer harm, resulting from how consumers interact with crypto-assets.

Clear policy and regulatory objectives are important

11 We support the intended outcomes of the token-mapping based strategy which Treasury set out at paragraph 14 of the Consultation Paper.

12 In addition, we consider that it would be desirable to articulate clear objectives for the development of a policy and regulatory framework for crypto-assets. We suggest that these objectives should include:

(a) *Addressing risks of harm to consumers and markets* including by providing appropriate levels of protection for consumers.

(b) *Providing greater clarity and certainty to regulators, industry and consumers about activities within the regulatory perimeter.* Clarity about what activities are regulated and the content of any regulation will better facilitate both consumer protection and business efficiency. Currently, determining whether a specific crypto offering is within the regulatory framework is complex and time consuming and can lead to uncertain outcomes.

(c) *Being flexible and adaptable to respond to market and technological developments.* The crypto ecosystem is constantly evolving, and any

regime must have in-built flexibility mechanisms to accommodate these developments, whilst still providing certainty and protecting consumers.

(d) *Ensuring regulatory alignment and consistency with overseas approaches, where appropriate.* The crypto ecosystem, and associated risks, extend across borders and Australian consumers are likely to be dealing with businesses with a substantial presence outside of Australia. Australian businesses will also be dealing with consumers outside Australia. In general, it will be more efficient for both industry and regulators if regulation is broadly aligned internationally to reduce regulatory arbitrage. Additionally, overseas peers can provide valuable insights based on their experiences to date.

13 The Consultation Paper traverses a broad range of what are described as 'intermediated' and 'public network' crypto-asset products and services. We would support the development of regulatory obligations focusing on intermediated products and services first, as the majority of retail activity in the crypto ecosystem involves intermediation to some degree. However, it is also important that momentum is maintained for designing appropriate regulation for the disintermediated segment, to avoid pockets of risk or unregulated offerings emerging.

Addressing the harms posed by crypto

14 ASIC supports the development of a regulatory framework with a focus on consumer protection and market integrity.

15 ASIC agrees with the observation in the Consultation Paper that crypto-assets are very often used primarily for speculative trading. This poses significant risks to consumers due to the risky, volatile and complex nature of crypto.

16 Consistent with the objectives set out above, ASIC proposes a framework that operates as clearly as possible in its application to crypto-related services and activities which have the potential to cause significant risk of harm to consumers and markets. At a high level, relevant activities could include:

- Safeguarding and/or administration (custody and depository) activities
- Issuance activities
- Distribution activities
- Dealing activities
- Market making activities
- Exchange activities
- Investment and risk management activities

- Lending, borrowing and leverage activities
- Payment activities
- Advice activities
- Operating a market or clearing and settlement activities

17 All of these activities also exist in traditional finance, and the existing financial services regime in Chapter 7 imposes obligations directed at regulating each of these different services and activities. In ASIC's view, the regulation that would apply to each type of activity in the crypto ecosystem should be based on, or aligned with, the obligations that currently apply to similar activities performed in relation to financial products. This is consistent with the 'same risk, same regulatory outcome' principle that the UK's *Future financial services regulatory regime for cryptoassets: Consultation and call for evidence* paper ('UK Proposal') is based on.

18 As an example, a fundamental aspect of financial regulatory frameworks globally is the inclusion of obligations to ensure the safeguarding of clients' money, including the segregation of such money from the service provider's own funds. These obligations are intended to ensure that funds received from a client for the purposes of investment are held for the benefit of that client and are not misappropriated or used in a manner that is not intended by the client. ASIC considers it a priority that these protections should apply to funds deposited by clients for the purposes of acquiring crypto-asset products and services, regardless of whether the offerings are currently financial products and services or not.

19 Another example is that financial services and products exist within a system of mandatory disclosures. Firms that provide services or products are liable for any incorrect or misleading information in those documents. Crypto-assets and services do not currently exist within a system of mandatory disclosures. Information about how crypto-assets or services operate may be set out across various white papers, online forums, financial publications, websites or marketing material. These communications are often of poor quality. It is frequently unclear which of these materials may be authoritative or are intended to definitively set out the rights of holders of the assets. Whilst our view is that disclosure in and of itself is not a sufficient tool to mitigate consumer harm, ensuring that liability follows from the provision of incorrect information places the onus on the issuer and other service providers to conduct appropriate due diligence and ensure information is accurate.

20 Where appropriate, the obligations in the financial services framework can also be appropriately tailored to any specific risks or features of crypto-assets. For example, safeguarding private keys from cyber hacks and the other specific risks of providing custody of crypto-assets (as distinct from custody of other financial products such as securities).

21 The Consultation Paper expresses the view that the possible functions of intermediated token systems are effectively as broad as the possible functions of any contractual or social arrangement. Financial regulation could be more relevant to some activities or functions than others, and our list above could act as a starting point for consideration of this.

22 In relation to payment activities, we understand Treasury will have to coordinate a number of policy streams for payment activities including (i) crypto ecosystem policy; (ii) stablecoins and stored value facilities policy; and (iii) broader payments system policy. It is important that this is done comprehensively to ensure there is no ambiguity as to which obligations apply, particularly where the obligations may differ and open up opportunities for regulatory arbitrage.

Adapting the existing financial services regulatory regime for crypto and providing further clarity

23 As we submitted previously,[1] ASIC considers that crypto-asset services should, in general, be licensed under Chapter 7 (Financial Services and Markets) of the Corporations Act ('Chapter 7'). Many of the risks associated with crypto-asset services are similar to those presented by traditional financial services. One way that this could be achieved is to introduce a broad definition for crypto-assets within Chapter 7 to support this licensing outcome.

24 Under the current law, determining whether crypto-assets, or related products and services, involve financial products and services, and therefore require an AFS licence, often requires complex legal analysis. Different conclusions may be reached on whether and how a product is regulated even where it functions in a similar way or presents similar risks to a financial product. Technical differences in crypto products performing the same general, high level function may mean that they are different financial products – e.g. one stablecoin may be a derivative and another may be a non-cash payment facility. This may result in different obligations applying. Whether this is an appropriate outcome needs to be considered in the design of the regulatory framework.

25 Australia's regulatory architecture places the onus on businesses to determine the nature of their product offering and to comply with the law. It is not within ASIC's powers to provide legal advice to firms or formal opinions or rulings on whether a particular offering is within scope. This is

[1] Australian Securities & Investments Commission - Submission in response to: Crypto asset secondary service providers: Licensing and custody requirements (treasury.gov.au)

the same for all financial product or service offerings, regardless of whether they involve crypto-assets.

26 ASIC has taken a range of enforcement actions in relation to crypto-asset financial products to protect consumers. These recent enforcement actions should not be seen as supportive of the proposition that the current regulatory framework is sufficient. Our experience is that, in order to determine whether specific crypto products fall within ASIC's jurisdiction, we need to undertake detailed evidence gathering and consider complex legal issues, in circumstances where providers of the products have often obtained legal advice that the offering does not involve financial products and where the terms of these arrangements may change over time. It is also possible that entities are intentionally structuring their offerings to fall outside the current framework, when, in substance, the offering resembles activity that would otherwise be regulated and/or poses the same risk as a comparable offering which falls within the framework.

27 Determining whether an offering falls within the framework is resource intensive and time consuming for ASIC and detracts from our ability to make timely interventions to protect consumers from harm. This means that consumers may suffer significant harm while ASIC takes the necessary urgent steps (such as obtaining legal advice) to determine if we can intervene. Whilst this risk could be said to apply to other forms of unlicenced conduct, the challenges are greater in relation to crypto-assets because of their technical complexity and the rapid pace of change. There presently exists an opportunity to develop a framework to draw clear lines around what is in and what is out to avoid this lack of clarity up front.

28 Finally, and most importantly, in addition to the time taken for ASIC to intervene, it is ultimately a matter for the Court to determine whether a product does fall within ASIC's jurisdiction. It takes time before legal clarity can be obtained through a judicial determination, which may turn on facts which are specific to the case and may not achieve broader impact in clarifying the law for consumers and other participants in the market. If ASIC is unsuccessful in a particular case, some may take this as a blanket endorsement for similar products to continue to be offered outside the regulatory framework.

29 We understand that the application of Chapter 7 to the crypto ecosystem may require some customisation. Particular crypto products or services may also need more tailored treatment, or modifications. We hope to assist Treasury in working through these issues as the process of developing a regulatory framework for licensing and custody arrangements for crypto-asset service providers advances.

Case study – Crypto-asset platform providers

There are currently a number of Australian and overseas operated integrated platforms where consumers can get access to a range of crypto products and services. The services offered may include:

- buying or selling cryptocurrencies, like bitcoin, other crypto-assets or 'stablecoins' (some of which may be fiat-pegged);
- buying or selling derivatives over crypto-assets
- issuing yield-earning products, which offer a return to the customer in exchange for staking or lending crypto; or
- custodial services.

While some of the products involved in these services may clearly be financial products (such as derivatives over crypto-assets), others are not (such as bitcoin), or it may be highly unclear or fact-dependent if they are a financial product (such as for other crypto-assets). By extension, it is similarly uncertain whether the services provided by these platforms are regulated under the financial services regime, or what products or services are regulated.

An AFSL, market licence and/or clearing and settlement licence may be required for the financial services part of the offerings, depending on whether the platform is the counterparty to every trade, or it matches, clears and/or settles third party orders via the platform.

Determining the status of all crypto-assets or tokens offered through the platform, or in the market, would be resource intensive for platform operators and ASIC. In contrast, a regulatory approach which focusses on services being offered in relation to crypto-assets, rather than the characteristics of the crypto-assets themselves, would provide certainty that the offerings are regulated.

Specific measures to reduce consumer harm

30 The complexity of crypto, combined with powerful social factors and strong sales strategies competing for consumer attention, limit the effectiveness of information-based interventions such as warnings, disclosure and education in protecting consumers.

31 ASIC encourages Treasury to consider options for introducing appropriate frictions in the system for retail clients. An example of a friction we observed overseas is the placing of limits on the amounts that customers can transfer to a crypto-asset exchange per transaction and over a rolling 30-day period. Policy measures and settings need to play a leading role if the private sector is to implement such frictions consistently. In addition, Treasury could also evaluate whether service providers should be limiting the frequency of trading by retail users.

International approaches

32 Developments occurring overseas may help inform the Government's consideration of appropriate regulatory settings in Australia.

UK future financial services regulatory regime for crypto-assets

33 The proposed framework in the UK Proposal, at a high-level, provides one option for progressing the policy objectives set out at paragraph 12.

- The framework focuses on regulating a range of financial services activities rather than the crypto-assets themselves. Distinctions between different types of tokens would generally not determine whether regulation applies to an activity, which would potentially reduce inefficient disputes over some technical distinctions between tokens.
- The regulatory approach for each crypto activity is based on respective analogous traditional financial activities, but obligations are adapted for the crypto context.
- The approach can be applied coherently with the existing authorisation framework (Part 4A of the Financial Services & Markets Act 2000), including opportunity for a business with an existing permission to apply for a variation.

34 The UK is also moving to bring qualifying crypto-assets within the scope of their financial promotions regime.

EU MiCA

35 ASIC's submission to Treasury's Crypto-asset Secondary Service Provider (CASSPr) consultation identified that the EU's proposed Markets in Crypto-Assets (MiCA) Regulation includes a regulatory framework for crypto-asset service providers. The submission expressed a view that, consistent with the proposed MiCA Regulation, it may be appropriate to have some tailored obligations which specifically address the risks of each service.

36 A feature of the current version of MiCA is that some firms subject to EU legislation on financial services could be allowed to provide crypto-asset services without a separate MiCA authorisation as a crypto-asset service provider. This is another example of building in coherence with an existing authorisation framework.

Other jurisdictions

37 We note the following additional international examples, which illustrate the general direction on regulating crypto service providers:

- Japan's regulation of crypto-asset exchange service providers, including measures around protection of user assets.

- Canada's regulation of crypto-asset trading platforms, including use of pre-registration undertakings.
- Singapore's proposals for digital payment token service providers.
- Hong Kong's proposals for virtual asset trading platform operators, including responsibilities before admitting a token for trading.

Appendix: Responses to Consultation Questions

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

We support the Government developing appropriate regulatory settings for the crypto ecosystem. We consider those reforms should address the risk of harm to consumers and markets, provide regulatory certainty and, where appropriate, align with international best practice.

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

Many of the safeguards which would apply as a result of regulating crypto-assets through Chapter 7 are directed to protecting consumers. We consider that these safeguards should apply to crypto-assets because many of the risks that consumers face in the crypto ecosystem are similar to those faced in the traditional financial system. Furthermore, these risks can often be exacerbated by the volatility and complexity of crypto-assets. Examples of consumer harms in relation to crypto-assets and possible regulatory responses to those harms are set out in Section A of our submission to Treasury's CASSPr Consultation Paper.

As part of the upcoming consultation on licensing and custody, Treasury should consider how to include frictions, as discussed at paragraphs 30-31 in addition to those that apply to other forms of financial products.

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?

ASIC strongly supports measures that are designed to protect consumers from scam activity involving crypto-assets. We are committed to working with Government and Treasury to design appropriate protections, particularly as the Government moves to design its framework for licensing and custody of crypto-asset service providers. We are also committed to working with the Government, and other agencies, on scam prevention and detection.

As noted in our response to question 2 above, the regulation of crypto-assets through Chapter 7 of the Corporations Act would result in existing safeguards applying to the crypto ecosystem. These would include a requirement that crypto-asset service providers are licensed, and subject to conduct obligations and have dispute resolution procedures in place for dealing with complaints. We consider these to be essential first steps.

Currently, there is no public register of licensed or authorised crypto-asset service providers, which can make it difficult for other businesses and consumers to know or verify if they are dealing with a legitimate business. Especially for financial institutions, a register of licensed or authorised providers would assist them in detecting and blocking transactions on a customer's behalf, where the transaction would be to an illegitimate platform. Information to be included on a register could include websites and contact details. However, it is important to note that just because an entity appears on a register does not guarantee that it will not engage in misconduct.

We are supportive of measures which could assist to ensure that any deposits are made to genuine, identified crypto-asset service providers. We would also support safeguards that would help to ensure that assets that are held by a crypto-asset service provider (whether fiat currency or crypto-assets) are only moved or dealt with at the customer's direction.

The measures referred to above should not unduly place the onus on consumers to mitigate or manage risks. As we set out in Part C of our submission to Treasury's CASSPr Consultation Paper, ASIC would also support a requirement that crypto-asset service providers take all reasonable steps to ensure that their customers are not exposed to scams, and that they do not offer scam tokens through their business. We consider that this would be justified due to the current extent of scam activity involving crypto-assets. We think that such obligations should be explicitly considered as part of the Government designing a framework for licensing and custody of service providers.

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?

ASIC is open to Government drafting definitions of crypto tokens and networks that use the concept of 'exclusive use or control' of data. We are

able to support Treasury and comment on any specific definitions or concepts, as they are developed.

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?

ASIC agrees a bespoke crypto-asset taxonomy may have minimal regulatory value. In our view, a policy and regulatory framework that applies to certain activities performed in relation to crypto-assets is most appropriate, and will provide greater certainty and consistency of regulatory outcomes than an entirely standalone regime that relies on a bespoke taxonomy.

We previously submitted that a standalone regulatory framework is not suitable or appropriate. Rather, ASIC considers that entities carrying on a business providing crypto-asset activities and services should be licensed under the Chapter 7 framework. In our view, this approach better aligns with the policy outcomes discussed earlier in our submission. A framework can accommodate differences between a crypto-asset activity and analogous traditional financial activities by tailoring some of the more specific requirements. Consistency with an existing framework likely creates less overlap, conflict and gaming of boundaries, when compared to an entirely standalone regulatory framework.

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?

These questions raise complex considerations about whether the tokenisation of a good or asset is itself a distinct set of rights from the real-world asset, or whether it is something more akin to a registry entry.

This depends on the tokenisation arrangement. Some complexities in considering these arrangements include:

- What are the terms of the arrangement?
- Can a token holder redeem the token for the real-world asset?
- Is the holder of the real-world asset in control of the asset and/or able to use it?
- Does the token holder have a claim against a pool of assets, or a specific asset?
- Is the asset held for the benefit of the token holder?
- Is the issuer of the token associated with the owner, operator or holder of the real-world asset?
- Does the token represent a fractional share of the asset?
- Can the token itself be traded in fractions?

Depending on these factors and any rights created, the tokenisation arrangement may be, or have similarities to, a derivative, an interest in a managed investment scheme, or be an element of a broader arrangement, such as a non-cash payment facility. As we have set out elsewhere, the process of determining whether these arrangements meet the legal definitions of these products can be complex and time consuming.

In relation to question (a) ASIC considers that there are circumstances where it is clearly not appropriate for a tokenised asset to be regulated in the same manner as the underlying asset. The example of a stablecoin given in paragraph 70 of the consultation paper involves a bundle of rights that entitles the holder of a token to redeem it for an Australian dollar from the issuer. There are a series of arrangements that are put in place to support this entitlement. In our view, reforms that would seek to always treat the fictional wAUD as an Australian dollar deposit (the underlying asset) would not be desirable. This is because Australian dollar deposits entail a different set of rights and risks to a stablecoin that is redeemable with an issuer who backs the stablecoin with the deposit. Australian dollar deposits are liabilities of an Authorised Deposit-Taking Institution (ADI) that is prudentially regulated. In contrast, even if the stablecoin is backed (in whole or in part) by Australian dollar deposits held by an ADI, there are risks around whether the token issuer can meet their obligation of redemption of the assets through the arrangement.

ASIC does not consider that regulating tokenised assets similarly to the underlying asset will always be the best policy outcome, particularly where a new set of rights are created and distinct risks are introduced. In our view, the risks around these distinct sets of rights should be regulated in the same way as other financial products. Legislative reform to clarify the legal treatment of tokenised assets should be considered.

In relation to question (b), a threshold consideration is whether an obligation of redemption will always exist in these arrangements or, indeed, whether it should be required. Where such an obligation does exist, we note that the obligation of redemption is generally placed on the counterparty to the arrangement (the issuer of the wrapped asset). It is often difficult for consumers to assess counterparty risk, and whether a token will be able to be redeemed, in practice at a future point in time.

We consider there is a strong rationale for regulating issuers to reduce the risk that an obligation of redemption is not able to be met. We note that, as part of the payments reforms, Government will be considering whether some payment-related stablecoins can be appropriately regulated under the proposed regulatory framework for stored value facilities (SVFs), which includes prudential regulation of providers of some major SVF providers.

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?

As set out in Part C of our submission to Treasury's CASSPr Consultation Paper, we think that service providers should be required to make information available about their service offerings or products, as is the case with entities offering traditional financial services. Often, it is not clear to consumers what type of service they are being provided, or what they are purchasing when they buy a token on a digital currency exchange. For example, a service provider which appears to operate as an exchange may, in reality, operate as a sort of broker and process trades through another exchange. In other circumstances, some customers may believe they have purchased a crypto-asset and that their ownership of tokens is recorded on a blockchain, which may not necessarily be the case. In our view, service providers should be transparent about their service model and customers' rights, and meet relevant, robust custody requirements where they control assets on behalf of customers.

It is also important that information that is relevant to a token is disclosed, particularly when making an offer or in the process of admitting a crypto-asset to a trading platform. An issuer may not always be as readily identifiable in the crypto context as in traditional finance. We are aware of a current proposal in the UK that a trading venue should take responsibility for the accuracy of information in these circumstances.

In any event, while information-based interventions are important, we stress that they can have limited effectiveness for the reasons set out earlier in our submission. As a result, these should be applied alongside other interventions and safeguards.

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?

We think it is important for the Government to regulate crypto-asset products and services in a manner that provides regulatory certainty and clarity to regulators, industry and consumers. How crypto-assets, products and services are defined is a critical foundational component in achieving this certainty and clarity.

ASIC supports a policy and regulatory framework that regulates certain services or activities that are performed in relation to crypto-assets. Similar obligations should apply to similar activities across crypto-asset products and services in a manner that is consistent with how such activities are regulated in respect of existing financial products under Chapter 7.

Our preference is for a regulatory design that minimises focus on complex and time-consuming disputes over the characterisation of individual crypto-asset products. Given the fast-evolving nature of the crypto-asset ecosystem and the complex arrangements which already exist (as illustrated by our response to Question 6 above), we have some hesitation as to the benefits of seeking to define specific types or sub-types of crypto-assets as financial products.

We see benefit in an 'activities-focused' approach to regulation, similar to how financial services are regulated in Australia. Under this approach, it may be appropriate to introduce a broad definition for crypto-assets within Chapter 7 (whether as a type of financial product or as a standalone definition). We acknowledge that an entity will need further clarity if it wants to conduct an activity in respect of a token, and that token falls under both an existing financial product category (e.g. a derivative) and also any new crypto-asset category. This issue will need to be addressed as the detail of any regulatory framework for crytpo is advanced.

In relation to (b), we note that under the Corporations Act, 'financial services' are defined as specific types of activities in relation to financial products. For consistency, we would suggest that 'crypto-asset services' be used to describe specified activities in respect of crypto-assets, rather than types of arrangements or facilities in respect of crypto-assets (which might be better described as 'crypto-asset products'). We would further suggest that crypto-asset services should be defined, to the extent possible, to be consistent with existing types of financial services (being activities such as 'issuing', 'dealing', 'making a market', 'custodial and depository' and 'advice') and other regulated activities like operating a market or a clearing and settlement facility, noting that there might be additional activities which are specific to crypto-assets, such as mining and validation, which might need to be specifically defined.

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?

In our view, it should be the responsibility of entities to ensure that they comply with their legal obligations, and do not expose their customers to unnecessary risks or illegal activities. Where the issuance of intermediated crypto-assets (whether involving a wrapped real-world asset or otherwise) to a specific public network that would host the asset would be contrary or inconsistent with the entity's legal obligations, that should not occur. This may occur, for example, if features of a public crypto network would make it impossible for the issuer to comply with their AML/CTF, or where the network operates in a way which is inconsistent with the financial services legal framework.

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?

We set out our views on consumer safeguards in response to question 2. Paragraphs 31-31 discusses frictions more specifically with examples.

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?

As we raised earlier, the complexity of crypto, combined with powerful social factors and strong sales strategies competing for consumer attention, limit the effectiveness of information-based interventions. Consumer disclosure and warnings may not be enough to counter the powerful effects of marketing and can be crowded out by powerful advertising techniques.

Looking at examples of overseas approaches, ASIC's submission to the CASSPr consultation raised the application of the financial promotions framework in the UK to crypto-assets. ASIC is also aware of the Monetary Authority of Singapore's guidelines on the promotion of digital payment token services to the general public.

We think that there is merit in considering these approaches, and they would need to be assessed in the context of an overarching strategy and framework for regulating crypto-asset activities. Other mechanisms, such as design and distribution obligations, product intervention orders and possible frictions would also need to be considered and integrated into the overall regulatory strategy. We are ready to support Treasury and Government in considering a range of different policy responses.

We consider that questions 12, 13 and 14, raise similar considerations, so we have provided a response to those questions together, which includes some general comments in relation to regulatory issues relating to smart contracts.

In our view, entities that provide services should ultimately be accountable for ensuring that those services are provided in accordance with regulatory frameworks. As a general proposition, where a service provider chooses to automate aspects of their business activity through the use of smart contracts (whether they are the smart contract author or not), ensuring compliance with any relevant regulatory framework should remain the responsibility of that service provider.

This structure should incentivise the development of smart contracts that comply with regulatory frameworks, as service providers will not wish to use contracts that do not comply with regulatory frameworks, and may unduly expose them to compliance risks.

We generally agree with the proposition put in paragraph 111 of the Token Mapping Consultation Paper, that using smart contracts replaces the risks of performance by a counterparty with different risks, including:

- technology risks;
- model risks;
- compliance risks; and
- unknown risks.

An additional element of risk is that there may be limited possibility of a remedy for consumers in the event that a smart contract produces unintended outcomes, particularly where there is no service provider that the consumer has interacted with.

However, in instances where there is no service provider, and a person interacts directly with a public smart contract (i.e. there is a truly decentralised arrangement), that raises complex considerations about who is, or should be, responsible for ensuring that public smart contracts comply with legal frameworks. As has been noted by IOSCO in their report on DeFi, "there are no technological restrictions on developers, including no required professional or licensing qualifications that govern who may deploy, manage or engage with smart contracts". They also noted there are no code auditing requirements for ensuring smart contracts operate as intended, or in accordance with legal frameworks, and many smart contracts may launch having copied another developer's code (including any bugs or deficiencies, whether known or unknown).

These issues are currently being considered by the IOSCO Board-level Fintech Taskforce workstream on Decentralised Finance, who are aiming to publish high-level recommendations by the end of 2023. In our view, any action in relation to DeFi and how legal accountability is to be addressed should take into account these developments.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s 913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
Chapter 7	Chapter 7 (Financial Services and Markets) of the Corporations Act
Consultation Paper	Treasury, *Token Mapping Consultation Paper*, February 2023
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
crypto-asset	A digital representation of value or rights (including rights to property), the ownership of which is evidenced cryptographically and that is held and transferred electronically by: • a type of distributed ledger technology; or • another distributed cryptographically verifiable data structure
CASSPr	Crypto-asset Secondary Service Provider
DeFi	Decentralised Finance
derivative	Has the meaning given by section 761D of the Corporations Act
financial product	Generally, a facility through which, or through the acquisition of which, a person does one or more of the following: • makes a financial investment (s763B); • manages financial risk (s763C); • makes non-cash payments (s763D). Note: See Div 3 of Pt 7.1 of the Corporations Act for the exact definition. In addition to the general categories above, this specifies certain things as being included or excluded from the definition
IOSCO	International Organization of Securities Commissions
MiCA Regulation	The proposed Markets in Crypto-Assets Regulation (EU)
non-cash payment facility	A facility through which a person makes non-cash payments (within the meaning of s 763D).

Term	Meaning in this document
SVF	stored value facilities
UK	The United Kingdom
UK Proposal	HM Treasury, *Future financial services regulatory regime for cryptoassets: Consultation and call for evidence*, February 2023.