

Swyftx Pty Ltd (ACN 623 556 730)
Level 3, 135 Coronation Drive
Milton QLD 4064



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Director – Crypto Policy Unit
Financial System Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: crypto@treasury.gov.au

Dear Treasury

Token Mapping Consultation Paper – Swyftx Submission

We welcome the opportunity to assist Treasury with a submission to its Token Mapping Consultation Paper (the **Consultation Paper**). The rate of crypto adoption by Australian consumers is one of the highest in the developed world.¹ Multiple jurisdictions, including the UK and Singapore, have expressed a desire to become “crypto hubs” to secure their portion of the growing Web 3 economy.² At the same time, 2022 saw several high-profile crypto businesses collapse, leading to consumer harm and shaking confidence in the sector. In this context, determining appropriate regulatory settings for the crypto industry should be a priority for policy makers. As a leader within the Australian crypto industry, Swyftx provides this submission, along with our commitment to lend our voice to the important discussions ahead. We do so in the hope that Australia will become a global leader in growing and regulating crypto businesses.

I Who is Swyftx?

Swyftx Pty Ltd (**Swyftx**) is an Australian-born, Brisbane headquartered cryptocurrency trading platform. Established in 2018 by Alex Harper and Angus Goldman, Swyftx has grown to become a clear leader in a crowded industry. With a present customer base of around 650,000, and over 115 Australian based employees, we are one of the largest Australian crypto businesses of any kind.

II Swyftx’s contributions to the regulatory discourse

Considering our position in the Australian crypto industry, we believe that we have a responsibility to contribute thoughtfully to the regulatory discourse, and an important perspective to provide as we work towards appropriate policy settings. In this vein, we previously made submissions on:

- 30 June 2021, to the Senate Select Committee on Australia as a Technology and Financial Centre ([Submission 21](#)) (the **Senate Select Committee**);

¹ Swyftx, [Annual Australian Crypto Survey](#), September 2022.

² We use Web 3 in this submission as a catch-all term for the next iteration of the internet, based on decentralised, permissionless, blockchain technology that can facilitate a form of ownership for users.

- 27 May 2022, to Treasury's Crypto Asset Secondary Service Providers: Licensing and Custody Requirements Consultation Paper ([Swyftx Submission](#)) (the **CASSPr Paper**); and
- 30 September 2022, to the Board of Taxation's Review of the Tax Treatment of Digital Assets and Transactions in Australia (yet to be published).

Additionally, we assisted the Senate as a witness:

- on 6 August 2021, before the Select Committee on Australia as a Technology and Financial Centre ([Hansard Transcript](#)); and
- on 21 February 2023, before the Economics Legislation Committee's public hearing on Treasury Laws Amendment (2022 Measures No. 4) Bill 2022 ([Hansard Transcript](#)).

In all these efforts, our aim is to ensure that Australian crypto consumers receive world class safeguards, and that the innovative business models that have attracted numerous Australians to the crypto asset space continue in a manner which inspires a high degree of public confidence.

III Responses to consultation questions

We appreciate the intellectual rigour behind Treasury's Consultation Paper, and echo the sentiments of the Oxford Blockchain Association who stated that, "[t]he approach is significantly different compared to other jurisdictions, makes a lot of sense, and is rather thoughtful". We see Treasury's approach as being in the spirit of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation (the **ALRC Review**), in that it seeks to facilitate an "adaptive, efficient and navigable framework of legislation". Further, it is an approach that acknowledges and considers the progress of other jurisdictions, but is unafraid to make conscious alterations more suited to the Australian regulatory landscape.

With the collapse of several high-profile crypto businesses in 2022, there may have been a temptation to take a punitive or overly restrictive approach to crypto regulation. We support Treasury's approach of avoiding this temptation, and instead seeking to understand the numerous technological intricacies of our industry, to provide workable regulation for both Australian consumers and businesses. Against this backdrop, we provide the following:

- a summary of key issues in our responses; and
- detailed responses to the questions in the Consultation Paper.

In responding, we emphasise the issues most relevant to Swyftx's business and we group certain questions thematically.

IIIA Summary of key issues in responses

- Principles – While many of the principles that should guide our approach to crypto regulation have been repeated since the 2021 Senate Select Committee, and are impliedly acknowledged by aspects of this Consultation Paper, we think they should be kept front of mind. These principles include: a technologically neutral approach that looks to function over form; a balance of protecting consumers and Australian innovation; prioritising legislative clarity and navigability in the spirit of the ALRC Review; leveraging existing regulation to the extent possible, to maximise certainty while reducing the potential for regulatory arbitrage; and intentional coordination between various regulatory regimes and regulators.
- Guidance body – We appreciate that this Consultation Paper aims to provide clarity on how the state of existing regulation may interact with crypto, and a key mechanism for doing so is proposing a sensible vocabulary to bridge the gap between crypto concepts and existing regulatory concepts. While a proposed vocabulary is an important step, we think it should be supplemented with a

guidance body that can digest advancements in this technology-heavy sector and provide forward-looking guidance with input from experts, industry participants and international best practice. We discuss this in our response to **Q1** below.

- Applying the appropriate regime – While the question of licensing is to be covered more directly in the next consultation paper, we think it is important not to assume that a single existing license will be appropriate for crypto. In particular, we think that Treasury should seek to understand the various business models of Australian crypto businesses, and ensure that any license framework will not stifle certain models. For example, we have been part of discussions around the application of a modified markets licence to Digital Currency Exchanges (**DCEs**), but we think this is unlikely to be appropriate for businesses, such as Swyftx, with a broker model.
- Updating existing regimes – Accepting that certain aspects of crypto should be regulated under the functional perimeter and broader financial services framework, we think certain elements of that framework should be adapted, such that they are workable in the crypto context. We discuss this in our responses to **Q2, Q5 and Q6** below.
- Precision of language – We think that the suite of concepts and definitions proposed in this Consultation Paper are a valiant attempt to navigate complexity. That being said, we suggest some tweaks to the proposed nomenclature to make it more workable in practice and better aligned with industry parlance. We also argue for in depth consideration of certain definitional concepts such as “exclusive use” and “exclusive control”, given that the application of these concepts may have flow on consequences for key issues such as custody. We discuss this in our responses to **Q2, Q4, Q5 and Q6** below.
- Caution against regulatory creep – We caution against the creation of new regulation where existing regulation is already applicable. For example, we think that Australia’s robust consumer protection laws should be sufficient to regulate crypto assets that are not financial products. Separately, we also think that existing obligations around the marketing and promotion of both financial products and non-financial products are sufficient. The creation of new obligations in these areas, simply because crypto is involved, would not only flout a technologically neutral approach to regulation, it would also foster regulatory uncertainty since there would be a question of which regulatory regime should apply to a given product. We discuss this in our responses to **Q5, Q6 and Q11** below.

IIIB Responses

Role of Government

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

In principle, we think that Government should protect both consumers and the significant economic opportunities of Web 3 by providing clear and certain regulatory guardrails. We have expressed this principled approach consistently over the course of our regulatory engagements.

- In our submission to the CASSPr Paper, we were one of the only DCEs to argue for modified Australian Financial Services Licence (**AFSL**) obligations to apply to crypto businesses. We stated that, “Swyftx is in favour of CASSPrs being regulated under the current financial services licensing regime in a manner that accounts for their idiosyncrasies and various use cases. We think this is the best way to minimise regulatory duplication, maximise certainty for CASSPrs and provide a signal of confidence to the Australian investing public”. We stand by this approach for the reasons discussed at page 3 of our [published submission](#).
- In our statement to assist the Senate Select Committee, we discussed the rapid pace of crypto adoption by Australian consumers, and the competition between countries seeking to become “crypto hubs”. We also emphasised that, “[c]ountries are realising that because crypto is borderless,

you can't cage it to force it to stay in the country; you can only encourage it with sensible regulation". The full transcript of that statement can be found in [Hansard](#).

In practice, along with our thinking in this submission, we make two actionable recommendations:

- First, Government should continue to facilitate proactive thinking about key issues in the crypto regulation space, so that when these issues are before the legislature and the courts, key decision makers are well informed and empowered to make appropriate decisions. One example of this working well overseas is the [UK Government directing the UK Law Commission](#) to "make recommendations for reform to ensure that the law is capable of accommodating both crypto-tokens and other digital assets in a way which allows the possibilities of this type of technology to flourish". The UK Law Commission was able to coordinate with an array of leading experts to produce its [Digital Assets Consultation Paper](#), in which it proposed "data objects" as a third kind of personal property.

We note that the status of crypto as property in various circumstances is still a live question under Australian law.³ This Consultation Paper acknowledges the issue in Annexure 1 but does not propose a resolution or raise it as a consultation question. We think that this issue is one that should be addressed during the course of the broader regulatory discussion around crypto in Australia, though it is not a precondition that should slow the progress of this Consultation Paper or the custody / licensing consultation to come. This is consistent with the UK's approach, where the Law Commission has yet to produce its final report on crypto as property – but the UK's Treasury has commenced consultation on the [Future Financial Services Regulatory Regime for Cryptoassets](#).

- Second, Government should create a body to provide forward-looking guidance and foster healthy discourse with industry participants. The crypto sector, by nature, involves complex technology advancing quickly (by way of illustration, in the last year alone we saw the evolution of: crypto payments; proof of stake; the metaverse; play-to-earn; and NFTs). Practical regulation of such a sector should be informed by technical experts who can digest such advancements, and make sensible recommendations for the latest applications and use cases. There is a chilling effect from regulation that evolves purely by enforcement, with no clear path to workable and facilitative legislation (as we have seen in the US). Conversely, there is a virtuous cycle from open discourse, that is forward-thinking in relation to legislative reform, and inclusive of industry participants (as we have seen from the Monetary Authority of Singapore's **(MAS)** FinTech Regulatory Sandbox). Functions of this proposed guidance body could include:
 - maintaining a constructive discourse with industry participants on appropriate classification and treatment of the latest use cases, including by considering consumer behaviour and trends;
 - participating in the international discourse with similar bodies overseas, as global standards emerge in this nascent industry, to ensure Australia is in-line with international best practice;
 - conducting interdisciplinary research and analysis on key issues in the sector that should be unpacked, such that legislators and the courts may be informed by robust thinking; and
 - drawing on the above to provide public facing guidance to industry participants and consumers on best practice and regulatory treatment of popular use cases (eg, appropriate touchstones for assessing the legitimacy of crypto tokens; and safeguards / red flags for certain retail facing intermediated token systems).

Safeguards, proposed taxonomy, and wrapped real world assets

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

³ As set out in [Gadens' submission](#) of 31 January 2023 to the Senate Inquiry into Treasury Laws Amendment (2022 Measures No. 4) Bill 2022 [Provisions].

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?

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?

Appropriate safeguards

We welcome appropriate safeguards for consumers and investors. As we determine the appropriate settings for these safeguards though, we should take care that they are not an overcorrection in light of recent bad actors such as FTX. As John Ray III, FTX's CEO in bankruptcy, put it, that was largely an instance of "old-fashioned embezzlement" and "fraud". We support the implementation of sensible risk management and controls in the crypto industry (and note that many industry participants have implemented such controls of their own accord), but these measures should not go above and beyond what we see in existing financial regulation simply because the technology is new.

Crypto regulation in the context of general financial regulation

We are conscious of the rich history of financial regulation and consumer protection in Australia, and do not think crypto is divorced from that steady development. By way of illustration, we note:

- the [Terms of Reference to the Financial System Inquiry \(1996\)](#), which included aims to, "best promote the most efficient and cost effective service for users..." and simultaneously to "ensure that financial system providers are well placed to develop technology, services and markets and that the financial system regulatory regime is adaptable to such innovation"; and
- the [Terms of Reference to the ALRC Review](#), which included the aim of providing "an effective framework for conveying how the law applies to consumers and regulated entities and sectors".

We see crypto regulation as another phase in the evolution of Australian financial regulation, with its own unique considerations, challenges and opportunities. Still, in tackling this phase, it would be prudent to keep in mind the above aims.

The proposed taxonomy

Wholesale adoption of the existing regulatory framework is ill-suited to the needs of consumers and industry participants alike. Treasury's attempt to capture, with precision, the workings of the crypto ecosystem in language amenable to financial regulation is a valiant one.

As we understand it, a key basis for this new taxonomy is the observation that, if a token system "involves intermediaries or agents performing functions pursuant to promises or other arrangements", it is an "intermediated token system" amenable to assessment under the functional perimeter and broader financial services framework (**Existing Financial Regulation**). We agree that this demonstrates Existing Financial Regulation *can* attach to intermediated token systems. However, it leaves open the critical questions of: *ought* Existing Financial Regulation attach; *how* should it attach; and *would* it attach sensibly in current form?

- Ought Existing Financial Regulation attach?

The bare fact that intermediaries and promises relating to intermediated token systems are usable hooks for Existing Financial Regulation to attach, does not mean it will always be positive for that Regulation to attach. By way of example, a few areas where it may not be desirable to impose Existing Financial Regulation (and where appropriate exemptions or exclusions could be recognised) are set out below.

- o First, there could be structural reasons for Existing Financial Regulation not to apply. For example, a decentralised autonomous organisation (**DAO**) may be classified as an intermediated token system and, applying the categories of financial products under Chapter 7 of the Corporations Act (**Chapter 7**) may lead one to argue that holding governance tokens of a DAO constitutes holding “shares in a body”.⁴ The statutory definition of “body” is a broad one, and includes “... for example, a society or association”.⁵ That being said, the technological and structural characteristics of a DAO are novel (DAO’s rules are programmed, function autonomously, and are coordinated through a consensual protocol) and, unlike corporations, DAOs rarely share similar structures and operating models (ie, the programmed rules may differ significantly between different DAOs). We note that an aspect of this difficulty is discussed in the Consultation Paper at paragraph 180, which observes that governance tokens do not necessarily entitle holders to legal ownership of DAO controlled funds.
- o Second, there could be operational reasons for Existing Financial Regulation not to apply. One illustration of this is that Existing Financial Regulation is not tailored to accommodate near instantaneous, or T+0 settlement, though this is industry standard in crypto trading. The ruleset built around T+2 settlement in the equities market, if applied to crypto trading in Australia without accommodation, would render our market uncompetitive.
- o Third, there could be technological neutrality reasons for Existing Financial Regulation not to apply. Taking the example of stablecoins backed 1:1 with fiat, the Consultation Paper states these are “wrapped real-world assets” and a kind of intermediated crypto asset. Applying the Chapter 7 categories of financial product, one might argue that these stablecoins are derivatives or non-cash payment facilities.⁶ However, the function of these 1:1 backed stablecoins is merely to be a representation of fiat in the crypto ecosystem – and technologically neutral regulation should not regulate uses of fiat differently merely because they are in a new technological context (that being said, we accept that certain obligations may attach to intermediaries for certain use cases of stablecoins – much like obligations attach to intermediaries for certain use cases of fiat).

- How should Existing Financial Regulation attach?

The proposed taxonomy alludes to at least two attachment points for Existing Financial Regulation, but we think further clarification is required here.

- o In respect of the taxonomy of “intermediated token systems” and “public token systems”, we understand the contention is that intermediated token systems may be more amenable to Existing Financial Regulation, but the legal implications of this are unsubstantiated by the Consultation Paper. Are we to assume that it is more likely for an intermediated token system to be a financial product under Chapter 7? Is there a suggestion of a presumption that intermediated token systems are financial products, and a presumption to the contrary for public token systems? If these new terms are not accompanied by any such legal implications, and the usual course of analysis under Existing Financial Regulation should be carried out for each

⁴ Corporations Act s 764A(1)(a); ASIC Act s 12BAA(7)(a).

⁵ Corporations Act s 9.

⁶ Corporations Act ss 761D and 763A; Corporations Regulations r 7.1.04.

crypto asset in any event, we query the usefulness of this taxonomy (no matter how thoughtfully conceived it may be). This goes to the purpose of the taxonomy and whether it is designed simply as an aid for conceptual understanding or whether it is incorporated into the regulatory framework.

- o In respect of the taxonomy of “tokens, token systems and functions”, the Consultation Paper suggests at paragraph 45 that the functional perimeter should apply to “token systems”. We note that it is common for tokens (eg, ETH) to be accompanied by numerous token systems (eg, staking, minting NFTs, payments etc). Assuming that the functional perimeter applies to each token system, it may be that some token systems are classified as financial products while others are not. This could lead to the imposition of unfair obligations on token holders, whether they be consumers using the tokens or DCEs listing them. For example, it would be difficult, or even unworkable, for the applicable obligations to be met given that:
 - existing token systems may change over time (eg, a proof of work token moves to proof of stake);
 - new token systems may be added over time (eg, payments functionality is added); and
 - these changes and additions may happen without control or warning to the token holder, lister, or even the original issuer (eg, the payments functionality is added by a third party via creation of a “layer 2” protocol).

Accordingly, it is important for regulatory reform to recognise the hybrid, flexible nature of token systems and to be tailored accordingly.

- o If these questions relating to the proposed taxonomy are not clarified, we fear that the taxonomy will only add further regulatory uncertainty to the crypto sector. This was a primary reason for our position in the CASSPr Paper submission that Existing Financial Regulation, modified appropriately, would bring more certainty than a fresh legislative regime. The worst outcome for regulatory certainty would be a convoluted system where consumers and industry participants are unsure of whether the Corporations Act, bespoke crypto legislation or some other regime should apply in each instance. Furthermore, this would run contrary to the current clarificatory work being undertaken by the ALRC Review and would lead to the risk of regulatory arbitrage.
- Would Existing Financial Regulation attach sensibly in current form?

Assuming Chapter 7 obligations apply to certain intermediated token systems, many of these obligations would be awkward or unworkable in their current form. We set out two examples below, along with suggestions for how they might be adapted so as to be workable.

- o Disclosure – existing disclosure and continuous disclosure obligations may be unworkable for DCEs to comply with in respect of the crypto assets they list. DCEs are rarely the token issuers, and have no control over token systems changing over time or new token systems being added. One way around this is to impose minimum disclosure standards on the issuer of any new intermediated token system. For example, the Ethereum Foundation would have been obliged to provide disclosure about the ERC-20 protocol and, later, the Beacon Chain and the merge. A DCE that lists ETH, and in doing so creates a token system for on ramping fiat and purchasing ETH (and the reverse), would be obliged to provide disclosure about that token system. Any third-party that creates a new ETH token system (eg, developers that create a process for liquid staking of ETH), would provide disclosure about that system.

The standard of disclosure expected should be aimed at meeting a base standard for the likely users of the token system (eg, details about the function of smart contracts in a clear, concise and effective manner, a list of the practical risks and benefits of the token system etc). We think

that such an approach would be flexible enough to account for token systems of varying complexity (eg, DCEs that only facilitate fiat on ramping to buy crypto on the spot market, versus DCEs that also facilitate derivatives and payments).

- o 1:1 stablecoins – it is, perhaps, trite to note that “wrapped real-world assets” take different forms (particularly under Treasury’s broad definition of this term). In general, we think that the risks arising from: the structure of the crypto asset; the nature of the underlying real-world asset; and how both of these interact – should all be considered in the regulatory treatment of wrapped real-world assets.

We think it is worth starting by considering stablecoins backed 1:1 with fiat, given how vital they are to the crypto economy. These stablecoins act as the lifeblood of the crypto economy by facilitating the most liquid trading pairs. Consumers do not purchase these stablecoins expecting them to increase in value relative to the fiat that backs them (indeed, that would be anathema to their function). If such stablecoins were regulated as financial products, this would stifle the flow of funds in Web 3 – just as regulating fiat as a financial product would stifle the flow of funds in traditional finance.

Considering this, our response to Q6(a) on whether reforms are necessary to ensure wrapped real-world assets get the same regulatory treatment as the asset backing them – is “yes” in the case of 1:1 fiat backed stablecoins, unless the particular method of their tokenisation gives rise to significant, novel risks. Our response to Q6(b) on whether reforms are necessary to ensure the issuers of wrapped real-world assets can meet their obligations of redemption – is “no”, assuming that our robust consumer protection regime (including the prohibition against misleading and deceptive conduct) would already apply to ensure those obligations can be met.

Regulatory certainty for non-financial crypto assets and networks

To respond specifically to Q5(c), we think an effective way to provide regulatory certainty to individuals and businesses using crypto networks and crypto assets in a non-financial manner, is to regulate them at the point of interaction with the end user. This seems to us to be the technologically neutral approach. For example, if a business uses NFT technology to support their ticketing system for events, the usual obligations that would apply when those tickets are sold to customers should apply (eg, the Australian Consumer Law, the Privacy Act etc). We think that Australia’s framework of consumer protection is robust and should suffice. That said, guidance from a specialised body on the application of existing law to crypto assets (as we propose in our response to Q1 above) would provide the benefit of additional certainty for consumers and industry participants alike.

Nomenclature

The importance of precision in language cannot be overstated when dealing with the interaction between technical products and Existing Financial Regulation. Correspondingly, we suggest that certain terms proposed by the Consultation Paper are reconsidered.

- Crypto asset – paragraph 42 of the Consultation Paper states that “the term ‘crypto asset’ is effectively an umbrella term for a crypto token and each of the benefits provided by its token systems”. We agree with this statement. However, we take issue with the statement in the same paragraph that a crypto asset “is a ‘token system’ that is intrinsically linked to a specific crypto token” - and the diagram that highlights only the token system (not the crypto token) as the crypto asset.

We think that “crypto asset” should refer to the crypto token (ie, the crypto asset is ETH, noting that ETH is intrinsically linked to various token systems). It does not make sense to us to say that the crypto asset is the token system that facilitates ETH staking. This would imply that each holder of ETH holds multiple crypto assets by virtue of holding that ETH. It would also be inconsistent with the approach of other jurisdictions (eg, the EU’s Markets in Crypto-Assets legislation defines crypto

asset as “a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology” - the ETH token is that digital representation of value, not the token system of ETH staking).

- Token, token system and function – we understand that “token system” refers to the “collection of steps involved in performing a function”, and “function” refers to “any benefit ensured or facilitated by the token system”. As we digested this Consultation Paper, it seemed more natural to us, as a matter of plain English, to refer to the “token system” as the “token function”, and to the “function” as a “benefit”.
- Wrapped real-world assets – in typical Web 3 parlance, “wrapped assets” are existing crypto tokens that are tokenised again via smart contracts to facilitate additional features including interoperability. For example, wrapped ETH, or WETH, is used on the popular NFT platform OpenSea to make pre-authorised bids. We appreciate the distinction of referring to “wrapped *real-world* assets”, but this still seems likely to cause a degree of confusion because of the similarity to “wrapped assets”. We propose replacing “wrapped real-world assets” with “backed assets”.

Scams and automated market makers

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?

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?

Practically, we think that appropriately regulated, responsible, centralised exchanges are the best defence against scams for average retail consumers. Centralised exchanges are capable of following regulatory guidance, and have access to the resources necessary to implement safeguards such as smart contract audits and transaction monitoring. Centralised exchanges also have natural incentives to act as filters against scams. Listing scam tokens would damage the reputation of the exchange and damage its ability to maintain a customer base. This is why responsible exchanges have, of their own accord, dedicated resources to listing procedures for their tokens (which may examine: the technology behind the tokens; liquidity in the market; robustness of the ecosystem etc).

Additionally, we note that scam tokens are only one aspect of the risk faced by consumers. In attempting to protect our users from scams, we come across everything from attempts to coax customers to withdraw into scam DeFi protocols, to more traditional scams where bad actors attempt to compromise customer information. Again, vigilant centralised exchanges with security teams, AML/CTF controls, fraud prevention systems and customer support, are the most effective line of defence for consumers in this regard.

At present, centralised exchanges are the on ramp into crypto for the majority of retail users. However decentralised actors including AMMs are expanding their user bases. If Australian regulatory settings lead to a decrease in usability and competitiveness of its centralised exchanges, a greater portion of consumers will gravitate towards AMMs which are far more difficult to regulate.

Exclusive use or control

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?

We think there is a meaningful distinction between “exclusive use” and “exclusive control”, and that considering these terms separately will assist with tackling the definitional process with greater precision. By way of illustration:

- exclusive control does not necessitate exclusive use (eg, if you own a tool such as a hammer, you may permit others to use it at your discretion so long as they promise to return it. In this way you maintain exclusive control but not exclusive use); and
- assuming a temporal limit on use, exclusive control need not be accompanied by exclusive use except at the time of use (eg, there may be a scenario where you can use the hammer whenever you wish, but another can use it when you are not using it. In this way, you have both exclusive control and use when you are using the hammer, but you do not have exclusive use of the hammer when you are not using it).

Borrowing from property law theory, another useful concept to consider here is that of rivalrousness. A thing is rivalrous, “if use or consumption by one person, or a specific group of persons, inhibits use or consumption by one or more other persons”.⁷ “The act of using a rivalrous thing necessarily excludes others from it. Or, at least, prejudices the ability of others to make equivalent use of the thing at the same time”.⁸ The hammer in our above examples was rivalrous, a piece of information that can be known by anyone is not rivalrous.

With these concepts clarified, we think that:

- exclusive control is the appropriate touchstone for defining crypto tokens. If you have the private key for your wallet which includes ETH, you have exclusive control of the ETH in that wallet; and
- rivalrousness, not exclusive use, is the appropriate touchstone for defining crypto networks. To process your transaction on the Ethereum network you pay “gas fees” in the form of ETH.⁹ Use of the Ethereum network is limited, so you may pay higher gas fees at times of heightened activity to ensure your transaction is processed. This is consistent with rivalrousness (ie, you pay higher gas fees, and this inhibits the use of those unwilling to pay those fees at that time), but it is not consistent with exclusive use (ie, many people can still use the Ethereum network at once).

We acknowledge the robust discussion of concepts including control and rivalrousness in the [UK Law Commission’s Digital Assets Consultation Paper](#), and note that the Commission concluded that rivalrousness should be a criterion of “data objects” as a third kind of personal property.

We think that these foundational concepts are important to consider as we approach Treasury’s next consultation paper on custody and licensing. For example, understanding what it means to exclusively control a crypto wallet by virtue of holding its private key, informs our understanding of what it means to stake the tokens in that wallet by delegating them to a validator node while retaining control. Further, this may inform the legal basis of appropriate custody obligations for crypto. While one might assume that Corporations Act custody obligations based on trustee / beneficiary relationships should apply, it would be prudent to consider alternative bases such as the relationship between bailor and bailee. For example, the US state of Wyoming has enacted laws which provide that digital assets held by qualified

⁷ T Cutts, “Possessable Digital Assets: Response to the Electronic Trade Documents Law Commission Consultation Paper No 254 and Call for Evidence on Digital Assets 2021” (2021) LSE Law Policy Briefing Paper no.47 p 1.

⁸ UK Law Commission, Digital Assets Consultation Paper p 29.

⁹ Gas is the fee required to successfully conduct a transaction or execute a contract on the Ethereum blockchain platform. Fees are priced in fractions of the cryptocurrency ether (ETH)—denominations called gwei (10⁻⁹ ETH). Gas is used to pay validators for the resources needed to conduct transactions. [Gas and fees | ethereum.org](#).

custodian intermediaries are held in a bailment relationship.¹⁰ The UK Law Commission mooted alternative legal theories to support the custody of crypto assets, including bailment.¹¹

Assisting users to identify intermediated token systems

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 discussed in response to Q2, Q5 and Q6 above, we reiterate our support for workable disclosure obligations. This obligation could attach to all intermediated token system issuers, including crypto asset service providers. A base standard should be established for such disclosure and, in the case of intermediated token systems accessed primarily by retail consumers, should not be overly technical. Such disclosure could reflect the reasonable risks and benefits of the class of intermediated token system, along with unique characteristics of the particular token system. To facilitate this, it may be useful to agree a taxonomy of tokens categorised according to function. This is consistent with the approach of numerous other jurisdictions (eg, the EU's utility tokens, asset-referenced tokens, e-money tokens and other crypto-assets; the UK's security tokens, e-money tokens, exchange tokens and utility tokens; Switzerland's payment tokens, utility tokens and asset tokens).

As discussed at Q1 above, we reiterate our support for the creation of a guidance body for crypto assets. As acknowledged by this Consultation Paper, this sector is highly technical and dynamic. It does not serve consumers, industry participants or Government to have an industry so fearful of enforcement that participants are siloed from each other and from peak bodies. A guidance body, in discussion with leading industry participants, could assist with the identification of new intermediated token systems along with appropriate consumer facing explanations to accompany them.

Marketing and promotion

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?

In our view, the marketing and promotion of crypto assets should be subject to the existing regulatory frameworks under which those crypto assets are classified. That is to say that, if a crypto asset is a financial product then the relevant considerations under the Corporations Act and ASIC Act should apply. If a crypto asset is not a financial product, the existing obligations under the Competition and Consumer Act (in particular, those under the Australian Consumer Law) should apply.

We note that Singapore's MAS has [issued restrictive guidelines](#) prohibiting crypto asset service providers from promoting their services to the general public. We think that such a restrictive approach would be unjustified in Australia as it would single out crypto assets without a principled basis for doing so.

The UK's FCA has taken the approach of applying [certain financial promotions regime requirements](#) to all crypto assets, such that crypto asset communications must be made or approved by authorised persons. We think that mirroring this approach would be too heavy-handed in Australia for the following reasons:

¹⁰ Senate File 0125 § 29-104(d).

¹¹ UK Law Commission Report, paragraphs 17.86 and 17.100.

- first, it applies the financial promotions regime to crypto assets that are not classified as financial products in the UK (eg, Bitcoin and Ether).¹² This is not a technologically neutral approach to regulation as it imposes a higher level of regulation on those crypto assets by virtue of them being crypto assets;
- second, it classifies all crypto assets as “high-risk investments” without an assessment of the various categories of crypto assets. We think this does not account for the varying levels of risks between various crypto assets and related products (eg, a Bitcoin ETF would appear to be lower risk than an altcoin derivative); and
- third, it applies the UK’s existing financial promotions regime, which was operational before its application to crypto assets. Australia has its own, robust, consumer protection regimes which can apply sensibly to crypto assets.

¹² HM Treasury, Cryptoasset promotions: consultation response, paragraph 3.5.