

03 March 2023

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

Dear Crypto Policy Unit

**Token Mapping Consultation Paper.**

QUT School of Law appreciates the opportunity to make a submission in relation to the Treasury's Token Mapping process, as released on 03 February 2023.

Queensland University of Technology (QUT) is a major Australian university with a global reputation and a 'real world' focus. The QUT School of Law has been ranked in the top universities, under 50 years, in the world offering law. The School attracts high quality learners from diverse backgrounds and is a global leader in transformative research delivering innovative, sustainable and equitable solutions to real world challenges with a focus on technology, environment, and health.

Lachlan Robb is an academic in the Queensland University of Technology School of Law, focusing on the socio-legal dimensions of technology. Lachlan's PhD is an investigation into a blockchain start-up and how the technology potentially disrupts legal and normative orders, his current research looks to the adoption of blockchain and the effect of this upon the legal profession, including work into the tribal taxonomies of blockchain and nature of digital assets as property. Lauren Bellamy and Olivia Sewell are researchers in the QUT School of Law assisting with this research.

Whilst the token mapping consultation paper offers important discussions generally, our submission focuses on questions 4 and 5, as well as the information presented in Annexure 1, as they relate to the definitions of property and taxonomies.

**Consultation Question 4 and Annexure 1**

1. Consultation Question 4 provides broad definitions of crypto tokens as they relate to networks and data records. The mere concept of 'exclusive use or control' is insufficient to effectively define the differences between crypto tokens, crypto networks and other forms of digital assets/data records. The extent of the differences between crypto and non-crypto assets highlights the need for a clearer definition of 'property' (discussed below). We strongly encourage additional legislative action in providing certainty with the definition of 'property' within digital assets.

**Property and Digital Assets**

2. The common law recognises two forms of personal property, choses in possession (bundle of rights attached to tangible things) and choses in action (intangible bundle of rights).<sup>1</sup> The former is a subset of the latter, in the sense that the law will vindicate rights to possession of physical things, usually through the law of tort.

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<sup>1</sup> Blackstone, *Commentaries on the Laws of England* book 2, c. 25, p. 389; *Fulwood's Case* 4 Rep. 65a; 76 E.R. 1031 (1591) (Coke); *Colonial Bank v Whinney* (1885) 30 ChD 261, 285 (Fry LJ), approved in House of Lords (1886) 11 App. Cas. 42

3. Various statutes have also created property in intangible things (such as copyright and patents), and some other public concessions of social utility, not recognised as property at common law.
4. Due to the strictly delineated nature of chose in possession and chose in action,<sup>2</sup> it is unclear whether cryptocurrencies and blockchain assets such as NFTs constitute property at common law.
5. It should be noted that "assets" do not need to be proprietary in order to be regulated. For example, already the Commissioner of Taxation claims to be empowered to tax the profits of crypto trading activities, AUSTRAC has extant rights to obtain reports of large crypto transactions, and corporations and financial services legislation may require licensing of some exchange and investment activities. However, classification of crypto assets as property is necessary to attract certain rights, including enforcement of ownership against the world at large.
6. "Property" lacks a single static definition in Australia,<sup>3</sup> current academic literature, legislation, and case law can help to elucidate a greater picture of property law before it can be determined if aspects of blockchain can be classifiable as "property". Property as a concept has long since been easy to recognise, but hard to define.<sup>4</sup> It is something capable of being owned, sold, created, or taken. It can be tangible property such as land, fixtures, chattels, or physical cash—or intangible property such as intellectual property rights, company shares, or digital objects.
7. We mostly agree with your descriptions and explanation of property in Annexure 1. We note that of importance to the law is not the physicality or movement of property, but instead the bundle of rights that attach to the object or asset—did that person have the right to move, sell, create, or take the object or asset? Can they defend that right against others? In *Yanner v Eaton*<sup>5</sup> the High Court of Australia recognised property as a bundle of rights, that 'refers to a degree of power recognised in law as power permissibly exercised over a thing.'<sup>6</sup> This decision drew upon statements from Professor Gray who expressed property not as a thing, but as 'a socially approved power-relationship in respect of socially valued assets,'<sup>7</sup> and that 'property' consists 'primarily in control over access'.<sup>8</sup> If property is being interfered with, or if there is a belief that the power relationship between owner and property is being threatened, then there is often a need to seek legal intervention to have these rights asserted.

### The Tests

8. In Australia, there is no single test nor a single determinative factor for identifying the nature of property or proprietary rights. There are two common law tests taken from the UK that are drawn upon when trying to define property, and Australian courts have emphasised different characteristics in different circumstances.<sup>9</sup> The Whinney Test (from Fry LJ in 1885), and the Ainsworth Test (from Wilberforce LJ in 1965). The Whinney Test sets out the categories of a chose in action and a chose in possession, whilst Ainsworth elaborates on the qualities of property. In Lord Wilberforce's 1965 UK House of Lords judgement in *National Provincial Bank v Ainsworth*<sup>10</sup> it was stated that property:

"must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."<sup>11</sup>

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<sup>2</sup> Law Commission, *Digital Assets: Consultation Paper* (Consultation Paper 256, 28 July 2022) 51.

<sup>3</sup> The Australian Law Reform Commission ('ALRC'), among others, has argued that notions of "property" and "property rights" are complex and multi-faceted, see, 'Definitions of Property', *Australian Law Reform Commission* (Web Page, 13 January 2016) <<https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/18-property-rights/definitions-of-property-3/>>; James Edelman, 'Property Rights to Our Bodies and Their Products' (2015) 39 *University of Western Australia Law Review* 47, 52; Bill Dixon, *Commercial & Personal Property Law: Selected Issues* (Thomson Reuters, 3rd ed, 2019) 4–5.

<sup>4</sup> Property can very much be a matter of 'I will know it when I see it' akin to the famous US obscenity case of *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

<sup>5</sup> *Yanner v Eaton* (1999) 201 CLR 351.

<sup>6</sup> *Ibid* [17].

<sup>7</sup> *Ibid* [38].

<sup>8</sup> *Ibid* [18]; see also, Kevin Gray, "Property in Thin Air", (1991) 50 *Cambridge Law Journal* 252, 299.

<sup>9</sup> See, eg, Lyria Bennett Moses, 'The Applicability of Property Law in New Contexts: From Cells to Cyberspace' (2008) 30 *Sydney Law Review* 639 at 647-652.

<sup>10</sup> *National Provincial Bank v. Ainsworth* [1965] 1 AC 1175, 1248 (Lord Wilberforce)

<sup>11</sup> *Ibid*.

9. The Australian courts have also been seen to discuss the nature of property as containing other qualities, such as the ability to exclude others from the right,<sup>12</sup> the ability to enforce rights against third parties,<sup>13</sup> or if something is seen as being of commercial value.<sup>14</sup> This indicates that the nature of property is not a definitive test, but rather requires courts to weigh up a range of factors, with mere satisfaction of the Ainsworth criteria not resulting in a definitive finding that something is property. This evaluation of factors is seen in the attempts to expand the definitions of property into confidential information<sup>15</sup> and statutory property rights,<sup>16</sup> in which the courts found the Ainsworth test to be satisfied, and yet still did not categorise it as a form of property.
10. Ultimately the *Ainsworth* criteria is viewed as a 'negative threshold test'; insofar that it is not determinative of all things that will attract property rights, but nor does it mean that the thing will attract property rights just because it does satisfy the criteria.<sup>17</sup>

### The UK Approach

11. The UK Law Reform Commission has suggested a third type of property known as "data objects" be created.<sup>18</sup> This method proposes that data objects are not choses in action (which remains debated)<sup>19</sup> and creates a technology-specific category. Whilst technology-specific laws are sometimes desirable,<sup>20</sup> such approaches consider property from a superficial position of ownership and control, rather than addressing the purpose and rights attached to such property. The creation of this third type of property does not appear to directly address the problems identified in the consultation paper regarding the bundle of rights. It merely splits the conversation into digital/non digital assets and still requires an identification of the rights attached to the data object. Thus, regulators and the courts will likely face issues in determining the extent to which property rights apply and the relevant "bundle of rights".

### Concerns of Regulatory Uncertainty

12. Whilst the Crypto Policy Unit has commenced important discussions of property in Annexure 1 of the Token Mapping paper, more open regulatory discussions on this topic are required. Simply relying on the concept of 'exclusive use or control' to define tokens and networks is insufficient to foster regulatory certainty in this area. In the absence of regulatory certainty, those in this space will be unable to effectively navigate their regulatory requirements. This increases the challenge of lawyers in advising clients and may increase poor behaviour as the attitude of 'underregulation' persists.
13. Through our research (consultations with blockchain startups, and the legal profession) there has been a resounding disconnection in legal understanding. There is a persistent myth that this space is the 'wild west' and that tokens are completely unregulated. Similarly, there is a common misunderstanding in entrepreneurs who simply observe a binary of 'legal and illegal' – insofar that if something is not illegal it must be legal. This meshes together beliefs of legality and 'alegality' and ultimately creates confusion and mistaken beliefs in the general public who wish to operate in this space.

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<sup>12</sup> See, eg, *Milirrup v. Nabalco Pty Ltd* (1971) 17 FLR 141, 272; see also, *Potter v. Commissioners of Inland Revenue* (1854) 156 ER 392, 396.

<sup>13</sup> See, eg, *Wily v. St George Partnership Banking Ltd* (1999) 84 FCR 423, 426.

<sup>14</sup> See, eg, *Halwood Corporation Ltd v. Chief Commissioner of Stamp Duties* (1992) 33 NSWLR 395 at 403. See also, C M Rose, 'Crystals and Mud in Property Law' (1988) 40 *Stanford L Rev* 577 in which Rose highlights commercial value as an important justification for classifying something as property; Emilie McDonnell, *Proprietary rights in the online world: Is a digital footprint property?* (2016) 25 *APLJ* 69

<sup>15</sup> See, eg, *Smith Kline & French Laboratories (Australia) Ltd & AlphaPharm Pty Ltd v Department of Community Services* (1990) 17 IPR 545 which Concerned confidential information and the definition of "property" in s 51(xxxi) in the Australian Constitution; see also the statement: 'In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear. The true test is to determine in what circumstances the information has been acquired'; *Phipps v Boardman* [1967] 2 AC 46, 127 per Upjohn L

<sup>16</sup> In which only statutory property rights that create rights in action satisfy the test.

<sup>17</sup> This is a point raised in reaction to the recent UK taskforce on blockchain property, see, eg, Tatiana Cutts, *Crypto-Property: Response to Public Consultation by the UK Jurisdiction Taskforce of the LawTech Delivery Panel* (LSE Policy Briefing Paper No. 36, June 2019) 4.

<sup>18</sup> Law Commission (n 2).

<sup>19</sup> *Ibid* 53.

<sup>20</sup> Chris Reed, 'Taking Sides on Technology Neutrality' (2007) 4(3) *SCRIPT-ed* 263.

14. By not directly engaging with the nature of blockchain assets as property, this has the disadvantage of perpetuating these myths and compounding problems.

#### **Further Research**

15. Our submissions here relating to property law and digital assets is informed by ongoing academic research. We are happy to be contacted further about this and can provide additional information and research details as required. Publication of this research is forthcoming.

#### **Consultation Question 5**

16. Consultation question 5 relates to the Crypto Policy Unit's 'bespoke crypto asset taxonomy'. Your position is that a bespoke taxonomy would have minimal regulatory value. We agree with the policy unit on this position, but caution that there are broader problems being created by the lack of taxonomy and agreed definitions in the broader digital asset communities.
17. As part of ongoing research, we have been observing and analysing a series of taxonomies and glossaries that have been published by institutions and communities around the world. We are in the process of analysing this list for insights into the semiotics of blockchain communities and how this language is evolving. This involves looking at words that are defined within these lists.

#### **Taxonomy Concerns**

18. There are two emerging issues of note. The proliferation of exception-driven-neologisms, and the particularly wide number of asset definitions.
19. At the time of writing, our database contains word lists from 20 different sources and contains 2024 unique words and terms. A typical word list contains 50-100 terms, larger lists have 150-400 terms, and the largest word list contains 1592 unique terms.
20. One of these lists, provided by Ethereum.org<sup>21</sup> contains 186 unique terms. Of note is that within these 186 terms, only 75 (40%) appeared in 4 or more other lists in the database, and 58 (31%) appeared only in the Ethereum list. This illustrates that while there are many attempts to try and create taxonomies and glossaries of terms, there are limited overlaps between what different communities decide to include, let alone in how the terms are defined.
21. The Token Mapping consultation paper, Annexure 5 Glossary contains 47 terms. Of these, only 15 (31%) appeared in 4 or more other lists in the database, and 25 (53%) appeared only in the Token Mapping glossary. These unique terms include, eg:
- a. Functional perimeter
  - b. Contentious fork
  - c. General financial function
  - d. Intermediated token system

22. There is value in being able to accurately describe the terms being used in the paper, but we urge caution around the overabundance of neologisms and consistent minor changes to terms.
23. Growing taxonomies/glossaries/lexicons that make small, nuanced changes can be important, but can also create additional confusion, decrease shared language, and increase the gaps. These gaps grow between different regulatory bodies in Australia who define terms differently, global regulatory institutions, and the divide between regulator and regulatory subjects.

#### **Taxonomy and Assets**

24. Of particular note are the wide range of 'asset definitions' within these taxonomies.

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<sup>21</sup> Ethereum, *Glossary*, <<https://ethereum.org/en/glossary/>> .

25. Related to broader attempts within the consultation paper to (or not to) define token assets, our database has revealed a number of key terms related to assets. These terms are once again challenged by the overlapping definitions and abundance of actors deciding to redefine terms to add their mark to this landscape.
26. By way of illustration, this is an abridged list of some of the terms being found across multiple sources in the database:
- a. Backed
  - b. Custodial
  - c. Fungible
  - d. Hybrid
  - e. On-ledger
  - f. Physical
  - g. Rights
  - h. Stable
  - i. Utility
  - j. Security
27. It is of our belief that while the Crypto Policy Unit wants to limit the scope of a bespoke crypto asset taxonomy, it is important to set clear definitions for token qualities. This has been partly addressed through the consultation paper, but more work needs to be done to ensure that these definitions are clear and not relying on nuanced terms that are created for this discrete purpose. We encourage engagement with the greater community and to see what terms are being used, how they are being used, and by who. Observing how the language is being used in these communities (both of regulators and the regulated) is important to increase adoption of whatever terminology is decided upon by the Australian Government.

#### **Further Research**

28. Our submissions here relating to taxonomy and semiotics of digital assets is informed by ongoing academic research. We are happy to be contacted further about this and can provide additional information and research details as required. Publication of this research is forthcoming.

The Token Mapping consultation paper provides some clarity on major concerns in the blockchain space. However further clarity around the legal status of digital currencies in Australia is long-overdue and needed as a matter of priority, particularly given the rapid growth of digital assets and currencies as a part of everyday life. It is simply insufficient for the current legal status to be left open, or to over-compartmentalise through the guise of 'functional perimeters'. To do so is to leave significant uncertainty in the industry, which leaves stakeholders looking to a non-crypto-savvy common law in order to resolve disputes.

We welcome considered legislation and regulation that provides Australians, including the growing 'crypto' industry, clarity, and certainty as to the treatment of digital assets going forward. We would be happy to discuss further and contribute to this discussion, including aiding with drafting and further discussions related to our ongoing research in this space.

Please do not hesitate to contact the writers to discuss the matters further.