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Via email: crypto@treasury.gov.au

To Whom It May Concern,

RE: Token Mapping Consultation Paper

The Financial Services Council (FSC) welcomes the opportunity to provide comment in relation to Treasury's Token Mapping Consultation Paper.

The FSC believes there are crypto products that are functionally financial products and is supportive of the principle of incorporating these assets into the existing financial services regime and not creating a specific regime for crypto assets.

The FSC submits that although this has long been the intent of the functional perimeter of the "facility" definition, it has not previously been wide enough to capture emerging digital tokens. As such, careful review is required to ensure that these tokens can be captured within the scheme without crafting a whole new taxonomy.

For this reason, the FSC is also not supportive of other measures that may create a distinct regulatory scheme for crypto assets such as creating specific marketing rules for digital tokens.

The best consumer outcomes are achieved with a regulatory scheme that is simple to navigate and in which products that have similar or identical features are regulated in the same way.

About the FSC

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, and financial advice licensees. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing more than \$3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is one of the largest pools of managed funds in the world.

Crypto in the Financial Services in Australia

Cryptocurrency is a growing investment class in Australia. Research by ASIC in 2022 showed that 44 per cent of retail investors aged 18 held cryptocurrency assets¹ with total Australian crypto asset ownership valued at \$21.6 billion dollars.² This makes it the second most owned asset by Australian investors after Australian shares.³

Overwhelmingly, crypto assets were more likely to be owned by recent or moderately experienced investors over the most experienced investors,⁴ and the majority of crypto investors are under the age of 35.⁵ This emphasises the importance of getting the regulatory settings correct because they will impact the youngest and least experienced Australian investors.

As crypto matures as an asset class, a growing number of investment funds continue to explore exposure to digital assets for retail investors with crypto exchange traded funds already appearing on the ASX. The primary aim of any changes to the financial regulatory regime should be to provide good outcomes to consumers and an equitable operating landscape for services providers by delivering certainty.

Protecting Consumers

Question 3

Crypto assets may place Australians at risk of scams in two ways. In 2021 Australians had combined losses to investment scams of \$701 million, whilst crypto simultaneously became the preferred method of payment for all scam types.⁶ Cryptocurrency losses in 2021 were \$84 million, an increase of 216% year on year.⁷

FSC members take their responsibilities to protect their customers from fraud and scams very seriously and advocate for increased collaboration across industry and between government and regulators to share information about fraud and scam activities that are occurring. This process is made difficult by privacy considerations and data governance. The FSC submits that government should do more to allow for this cross-industry collaboration whilst balancing any potential privacy risks.

Further, the FSC submits that any regulatory interventions on scams and fraud should be evidence-based and risk appropriate. Investments are a time-sensitive matter, and interventions that place friction between a consumer and the potential buying or selling of an investment product should be carefully considered within the context of the risks associated. To be clear, the FSC is not advocating for no frictions to be placed, only that they be proportional to risk and carefully consulted on.

Mapping the Crypto Ecosystem

Question 5

The FSC submits that there are certain crypto tokens that are functionally financial products and is therefore supportive of the core principle of technical neutrality which underpins the functional

¹ ASIC. (2022). *Report 735: Retail Investor Research*. [Link](#). p. 14

² Roy Morgan Research. (2022). Article No. 8929. Roy Morgan. [Link](#). p. 2

³ ASIC. (2022). *Report 735: Retail Investor Research*. [Link](#). p. 14

⁴ Ibid

⁵ Roy Morgan Research. (2022). Article No. 8929. Roy Morgan. [Link](#). p. 1

⁶ ACCC. (2022). *Targeting Scams: Report of the ACCC on Scams Activity 2022*. [Link](#). p. 1

⁷ Ibid

approach to financial services regulation in Australia. As noted by the Consultation Paper, the functional approach removes barriers to technological innovations and the broad functional definition, in theory, means that the functional perimeter adequately captures any “facility” through which a person makes a financial investment, manages a financial risk, or makes a non-cash payment.⁸

A clear regulatory framework will encourage benefits from the continued innovation and evolution in the uses of digital assets and blockchain technology. For this reason, the FSC is supportive of incorporating crypto assets that are financial products into the existing regime and is not supportive of creating an entirely new scheme specifically for crypto assets. There is a risk that the creation of a new crypto licensing regime could leave retail consumers without the benefit of protections, built overtime under the financial services regulatory framework.

Although certain existing crypto assets should meet the definition of a financial product, the FSC notes that ASIC has previously determined that the current broad definition of financial product does not to capture crypto tokens such as Bitcoin.⁹ For this reason, investment money has been diverted from traditional investment products into crypto tokens like Bitcoin. While Bitcoin was being used primarily as an investment, it was held to be not a financial product for regulatory purposes. Traditional investment products were subject to heavy regulation while Bitcoin competed regulation-free.

ASIC have also been clear that there are specific crypto activities that do not need a financial services licence such as trading in digital currency, holding digital currency on behalf of another person, or providing advice in relation to digital currency.

The FSC submits that the requirement for a token system to meet the definition of a ‘facility’ could be a barrier to functionally equivalent products being treated the same in a regulatory sense as was experienced when Bitcoin initially entered the market as was typified as an investment product only and not a financial product.

If the goal is to ensure that there is technological neutrality in relation to financial products and to protect consumers through the integration of crypto assets into the existing financial services regulatory regime, then careful consideration should be given to why cryptocurrencies are not currently considered to be captured by the current definition.

Recommendation

1. Consideration should be given to the current definition of facility under the functional perimeter principle to ensure that it does adequately capture crypto assets adequately as it has not in the past.

Intermediated Crypto Assets

Question 6 a)

The Consultation Paper suggests that where a crypto token represents a wrapped real-world asset, there may be regulatory considerations as to what consumer rights apply when that crypto token is sold in a secondary market.

⁸ Australian Government: The Treasury. (2023). Token Mapping: Consultation Paper. [Link](#). p. 8

⁹ ASIC. (2014). Senate Inquiry Into Digital Currency: Submission by the Australian Securities and Investments Commission. [Link](#). p.

The FSC submits that it is not appropriate that the wrapped token get the same regulatory treatment as that of the asset backing it as there is no precedent for this in the current financial services regulatory scheme. When a company is wrapped around a real-world asset, the shares in that company are not regulated the same as the underlying asset. Similarly, when a unit trust is wrapped around a real-world asset, a managed investment scheme is created, and this is regulated in its own way.

It may be argued that a real-world asset which is wrapped by a crypto token, could meet the definition of a derivative as per the Corporations Act. Under the Act, a derivative is defined as an arrangement where a party must provide some future consideration of a particular kind.¹⁰ Tokens that represent wrapped real-world assets could be incorporated into the existing regulatory scheme as such without the requirement to regulate the token the same way as the asset backing it.

Recommendation

2. There is no precedent for tokens that represent wrapped real-world assets to receive the same regulatory treatment as the asset backing them and therefore there should be no such specific consideration for crypto token system assets in the regulatory scheme.

Question 6 b)

The Consultation Paper suggests that issues of wrapped real-world asset products may need further regulatory interventions to assist with meeting their obligations to redeem a crypto token for an underlying asset. As noted above, the FSC does not believe there is warrant for further regulatory interventions of these asset types, and that they currently, or could, meet existing definitions. This would negate the need for any further regulatory interventions.

That said, there are no current examples of existing financial regulation that do enforce said obligations in such a way. The current regulatory arrangement for financial products places an emphasis on competent running of a product through the existing licensing scheme as well as restricting marketing and creating requirements for disclosure.

Financial products typically don't redeem for the underlying assets. The constitutions of managed investment schemes and super funds specifically provide that the investor has no right to the underlying assets. Even futures contracts and deferred purchase agreements that are drafted with delivery as an end point are, in practice, always closed out before the delivery date arrives.

Creating further regulatory interventions would have the effect of creating crypto specific taxonomies that would be at odds with the underlying principles of the consultation.

Recommendation

3. There is no need for further regulatory interventions that would help providers to meet their obligations to redeem a wrapped crypto token for the underlying asset. There is no precedent for this in the current financial regulatory scheme and would create specific rules for crypto which is at odds with the overarching principle of the consultation.

¹⁰ Corporations Act 2001 (Cth) s. 761D

Question 7

The Consultation Paper notes that it can be difficult to identify the arrangements that constitute an intermediated token system and seeks feedback as to whether there should be a requirement for service providers to identify those arrangements to their consumers. The FSC submits that this requirement does not currently exist elsewhere in the scheme of financial services legislation and would again create distinct rules for crypto token systems.

Essentially, financial products and services have never provided that level of transparency. Consumer protection is attained by having good arrangements in place, which is addressed by the licencing scheme in only granting licences to competent parties.

In regards to other initiatives that may promote good consumer outcomes, the FSC encourages Treasury to consider any proposed initiatives in the scheme of other reforms that are occurring in the financial services sector. In particular, the Quality of Advice Review which is looking at potential reforms to a fundamental component of the financial system.

Recommendation

4. If products that are functionally similar are to receive the same treatment under the financial services regulatory regime, there is no case for increased transparency of crypto assets specifically that are functionally similar to non-crypto assets. The existing consumer protections afforded through the licensing scheme should provide an appropriate cover.

Recommendation

5. Further changes to the financial services regulatory landscape are ongoing within the context of other reviews, such as the Quality of Advice review. Any proposed changes should be carefully considered in line with those reviews as well.

Question 8

As noted above, the goal in incorporating crypto token systems into the existing financial regime involves ensuring that the definition of financial product is suitably wide enough to capture any new innovations that may arise over the short to medium term. Therefore, it is the FSC's preference that rather than specifically carved out definitions, which would effectively create separate taxonomies for crypto assets, the definition of facility be sufficiently wide so as to ensure products with identical or similar features are regulated similarly.

Recommendation

6. Rather than creating specific product definitions, a better policy outcome would be to ensure that future innovations can be sufficiently captured by the functional perimeter and definition of facility.

Public Smart Tokens

Question 11

The FSC is not supportive of further regulatory interventions in relation to legitimate crypto advertising and marketing. As noted above, there are currently strict marketing guidelines in place for financial products. This includes a legislative duty not to disseminate information that is false or

misleading.¹¹

The ASIC Regulatory Guide 234 outlines good practice in relation to the advertising of financial products and services and applies to “any communication whose purpose is to inform consumers about or promote financial products, financial advice services, credit products or credit services”.¹²

The main purpose of the regulatory guide is to assist in meeting the legislative obligations with respect to advertising of financial products. Contravention of the duty may lead to severe consequences, including the cancelling of an AFS licence and criminal charges.¹³ The FSC does not believe a separate set of rules pertaining to the marketing of legitimate crypto assets is required.

The FSC does support, however, the Government doing more to stop illegitimate advertising of financial products, particularly crypto assets. This includes requiring digital platforms to act to reduce the risk to their consumers of this scam activity.¹⁴

Recommendation

7. There is already strict rules relating to the advertising and marketing of financial products. If crypto assets were to be incorporated into the financial services regulatory regime, they would be captured by these and there is no need for crypto specific rules in relation to marketing.

Recommendation

8. The FSC supports government action on quashing fake crypto and investment advertising including by requiring digital platform providers to do more to protect consumers from such advertising on their platforms.

Conclusion

The FSC supports a financial services regulatory regime that provides consumer and operator certainty through clear and consistent regulation. This means that financial products that are fundamentally similar should be regulated in the same way. The FSC also supports a regulatory scheme that encourages and welcomes innovation in a way that new products can easily be captured by the existing regulatory rules. In doing so, both consumers and financial services providers can be assured of regulatory certainty which in turn provides an equitable and safe financial services industry.

If you have any questions about this submission, please do not hesitate to contact me.

Yours sincerely,

¹¹ Corporations Act 2001 (Cth) s. 1041E

¹² ASIC. (2012). Regulatory Guide 234. [Link](#).

¹³ Ibid.

¹⁴ For more information please see FSC Submission to the Digital Platforms Consultation on ACCC Recommendations (Online Financial Scams). [Link](#).