

One Eagle – Waterfront Brisbane  
Level 28, 1 Eagle Street  
Brisbane QLD 4000 Australia

GPO Box 169 Brisbane QLD 4001

T +61 7 3338 7500  
F +61 7 3338 7599

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Digital Assets Team  
Australian Securities and Investments Commission  
GPO Box 9827  
Melbourne VIC 3001

Email: [digital.assets@asic.gov.au](mailto:digital.assets@asic.gov.au)

## **Submission on Consultation Paper CP 381: Updates to INFO 225**

Thomson Geer welcomes the opportunity to provide a submission in response to ASIC's Consultation Paper CP 381 (*Consultation Paper*).

### **Thomson Geer**

With more than 700 people, including over 150 partners, operating out of our offices in Sydney, Melbourne, Brisbane, Perth, Adelaide and Canberra, Thomson Geer is one of the 10 largest firms operating in Australia.

Many of the firm's 150 partners are acknowledged as leading lawyers in their fields, including within our financial services regulatory team. They have deep experience in advising the world's largest digital asset exchanges, major stablecoin issuers, governments and investment funds on the intersection of digital assets and regulation. Their contributions to academia, policy development and media in this space is unrivalled.

### **Overview**

We appreciate ASIC's efforts to provide greater clarity on the application of the *Corporations Act 2001* (Cth) to digital assets, particularly given the complexity and evolving nature of this market. It is clear that a large amount of work has gone into the Consultation Paper, for which ASIC is to be commended.

ASIC – and all global regulators – face challenges in regulating an emerging sector, overlayed as it is over complex financial services laws. Adding to the challenge is the global nature of the market, limited regulatory precedents, fluidity of the assets (given they are code-based), scarcity of tested advisers and ideology in some sectors of the market. Blockchain technology was developed in the wake of the GFC, and scepticism of centralised control mechanisms – that scepticism persists in some corners of the market today.

The substantive regulation is critical. Overarchingly through, and consistent with Liam Hennessy, Partner's past submissions / oral evidence to Parliament, we suggest there be a focus on the resourcing and additive governance to assist ASIC in maintaining its capabilities.

### Binding Guidance

1. ASIC's reliance on hypothetical worked examples in INFO 225 is of value, and tacitly acknowledges the abovementioned challenges in the market and thinness of judicial guidance given the novelty of the market. To support ASIC and the market, we suggest formation of a formal non-judicial guidance mechanism, similar to the Takeovers Panel, to issue binding interpretations.
2. This mechanism will offer businesses pre-emptive regulatory certainty, ensuring that assets that may not be financial products are not subject to unnecessary compliance burdens. It will offer ASIC additional support in fulfilling its mandate in responding to a dynamic and complex market, and picking enforcement cases of maximum deterrent value. It should be efficient, and staffed with sufficient technical expertise e.g. blockchain developers, regulators, industry experts and academics.
3. The establishment of a Takeovers Panel-style entity to:
  - provide binding regulatory guidance;
  - ensure technological expertise is embedded in decision-making;
  - respond to the markets' dynamism, and support industry and consumers; and
  - reduce reliance on judicial determinations to resolve regulatory uncertainty,ensures there is a responsive governance mechanism which responds to the uniqueness of the market for ASIC, industry and consumers.

### Resourcing

4. ASIC's capability is critical to the success of the digital assets market.
5. Our sense is that Parliament needs to ensure there is sufficient resources for ASIC's supervisory, licensing and enforcement teams (as adjudged by the regulator itself, and then scrutinised in Parliament) – both internal capability and budgets – to ensure its success.

### Stablecoin Classification

6. Our sense is that ASIC's proposal to classify stablecoins as non-cash payment facilities (NCPFs) could benefit from more defined criteria, particularly given the diversity of stablecoin structures, including: fiat-backed stablecoins; algorithmic stablecoins; and, overcollateralised stablecoins.
7. There is a question to our mind as to whether a fiat-backed stablecoin—without accompanying payments infrastructure—neatly fits within the definition of an NCPF on its own. This could result in regulatory arbitrage or misclassification of financial products. Additionally, there is a broader question as to whether ASIC's classification could apply to any token, not just stablecoins. While the incidental exemption may mitigate this risk, further clarification is necessary to prevent overly broad interpretations.
8. ASIC's statement that "*whether or not a facility involving digital assets is a non-cash payment facility will depend on the terms and features of the arrangement*" would benefit from additional specificity. It would be useful for ASIC to clarify what specific "*terms and features*" would render a token an NCP, in alignment with Treasury's payments reforms, which outline:
  - promise of redeemability against the issuer;
  - issuer generally maintains reserves; and
  - stability mechanism relative to a fiat currency.
9. Importantly, it would be useful to see an outline of the ancillary infrastructure which converts something of value which can be used for transactions e.g. stablecoin or other token, into a payments facility. For example, payments gateways, merchant accounts, payment marketing, etc.

Additional potentially helpful detail is contained in this briefing, from the author (at a past firm): [Non-cash payment facilities & crypto – a technical overview](#).

10. There is useful material in EU's MiCA framework (which we have undertaken a comparative analysis of, together with other advanced jurisdictions and can share if it is helpful), which establishes specific rules for stablecoin issuers which is a good starting point.

#### Licensing Transitional Periods

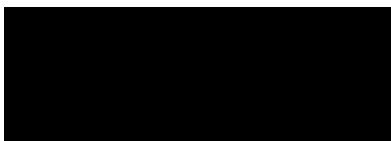
11. The proposed class no-action position allows businesses actively applying for an AFS licence to continue operating. It is relatively novel, in our experience, and commendable.
12. Given the complexity of digital asset classifications, resourcing demands, and forthcoming legislation, the proposed six-month transition period may be insufficient. The availability of external providers necessary for obtaining an AFSL is also a perennial issue e.g. PI insurance, custodians and – commercially – banking accounts and payment rails.
13. We respectfully suggest a 12-month period is more appropriate, together with potential guidance from ASIC as to experience it will deem acceptable for responsible managers in this context (noting many in the digital assets market will not have dealt with financial products sufficient for RG 105, though have deep experience with stable-coins, wrapped tokens, etc).

#### Custody Rules

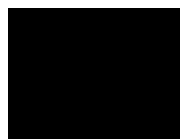
14. INFO 225 proposes extending traditional custodial requirements to digital assets. However, crypto-assets present unique custody challenges, including: self-custody solutions (e.g., hardware wallets); smart contract-based custody (e.g., decentralised exchanges); and, multi-signature and multi-party computation custody models.
15. Existing financial custody frameworks are not fully applicable to these models. Additionally, there is only one registered Australian custodian for digital assets to our knowledge, creating a concentrated market with potential barriers to entry. Treasury's previous consultation paper on custody suggests a broader approach than that applied in traditional finance.
16. We suggest that additional guidance be developed on what is / is not attractive of custody rules, if not a dedicated digital asset custody framework as proposed by Treasury.

Thank you again for the opportunity to contribute to this consultation, and the considered effort that has gone into it – we would be delighted to discuss any aspects of our submission with ASIC.

Yours sincerely



**Liam Hennessy**  
Partner



**Joseph Williamson**  
Lawyer

