

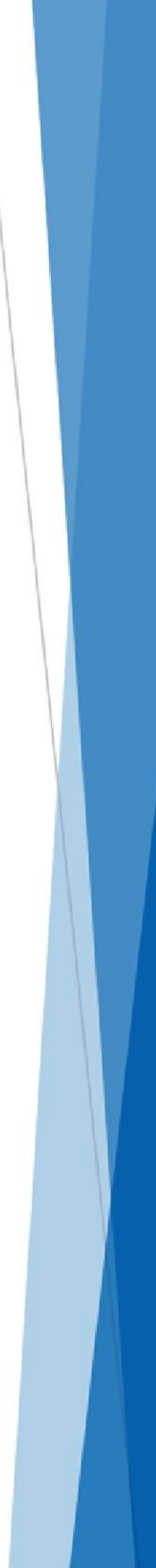


Australian Banking  
Association



## ASIC Consultation Paper 381

*Response by the Australian Banking Association*



## Introduction

The Australian Banking Association (ABA) appreciates the opportunity to provide feedback on ASIC's Consultation Paper 381 (CP 381) concerning updates to Information Sheet 225 (INFO 225) on digital assets. While the consultation paper covers a broad range of examples related to digital assets, our submission is limited to a few issues where we believe further guidance or consideration by ASIC would enhance the regulatory environment.

## Key issues

### Token features and taxonomy

The ABA recommends further clarity, and consideration is given to the complexities of token taxonomy and the challenges decentralised systems face in complying with existing laws. As much as possible, this should include a clear taxonomy of definitions and concepts to ensure a consistent framework is applied to digital assets.

Internationally, the lack of standardised definitions has led to regulatory fragmentation. For example, the OECD highlights that authorities use varying terms and classifications for crypto-assets, which can lead to inconsistencies in regulatory approaches.<sup>1</sup> It's accepted that an in-principle approach is often used, reflecting the rapidly changing technology and business environments underpinning digital assets. However, some further regulatory clarity may be beneficial when considering the global, cross-border nature of DLT-based markets, and the potential for regulatory arbitrage.<sup>2</sup> Establishing a comprehensive taxonomy would provide clarity and facilitate compliance across jurisdictions.

### Coins outside scope

The exclusion of meme coins and in-game NFTs from the current financial services laws is notable, especially given their recent surge in popularity. While these assets may not traditionally fall under financial products, their speculative nature and potential impact on consumers warrants closer examination – particularly where consumers may be investing with the expectation of a return. A few recent examples from the United States have been outlined below to demonstrate these risks:

#### *Pump-and-Dump schemes: The 'Squid Game' token (2021)*

- Investors lost millions when the Squid Game Token (SQUID) – a coin marketed as inspired by the Netflix show – soared over 230,000% before it was drained of liquidity and disappeared.
- The token had no regulatory oversight, and its developers exploited the hype cycle, leaving investors with worthless holdings.

#### *Elon Musk-inspired meme coins (2023-Present)*

- Several Dogecoin-inspired meme coins surged due to social media hype but collapsed when developers cashed out, leading to millions in losses. E.g. in 2023, a token named

<sup>1</sup> See section 5 of OECD (2021). Regulatory Approaches to the Tokenisation of Assets. OECD Blockchain Policy Series. [online] [www.oecd.org/finance/Regulatory-Approaches-to-the-Tokenisation-of-Assets.htm](http://www.oecd.org/finance/Regulatory-Approaches-to-the-Tokenisation-of-Assets.htm)

<sup>2</sup> OECD (2020). The Tokenisation of Assets and Potential Implications for Financial Markets. [online] <http://www.oecd.org/finance/The-Tokenisation-of-Assets-and-Potential-Implications-for-Financial-Markets.htm>

‘\$ElonDoge’ gained traction after Musk tweeted about Dogecoin, only for insiders to dump their holdings, leaving retail investors with the losses.

- The SEC has warned investors about the dangers of low-liquidity, hype-driven tokens that are not registered or backed by assets.

Other jurisdictions have taken steps to address these risks; for instance, the European Union's Markets in Crypto-Assets (MiCA) regulation aims to cover a broad spectrum of crypto-assets to ensure consumer protection and market integrity, noting the risks of taking a narrow approach to scope:

*‘The absence of such rules leaves holders of those crypto-assets exposed to risks, in particular in fields not covered by consumer protection rules.’<sup>3</sup>*

## Digital wallets

Example 13 in the draft updated INFO 225 suggests that digital asset wallets, particularly non-custodial ones, may be considered non-cash payment facilities under financial services regulation where they allow for payments to be made by an issuer. This guidance may create some ambiguity as non-custodial wallets, where users control their private keys, typically function as personal storage rather than payment facilities. For example, it’s possible that a company offering staking or other products directly from self-custodial wallets could find themselves in regulatory uncertainty as the service they offer might facilitate the transfer of stablecoins without ever taking ownership. The ABA recommends additional clarity is given to this guidance – specifically whether it is ASIC’s intention that the non-custodial wallet element, in isolation, is included or excluded.

## Stablecoins

The consultation paper notes ASIC’s view that non-yield-bearing stablecoins pegged to fiat currencies may be classified as financial products (specifically non-cash payment facilities). Internationally, stablecoins have been a focal point for regulators and pose unique risks when compared to other DLT assets. For example, the International Monetary Fund (IMF) has highlighted the need for comprehensive regulation of stablecoins to address liquidity and stability risks.<sup>4</sup> The ABA agrees with these concerns and recommends a clear regulatory approach is provided to mitigate potential risks associated with stablecoins.

## Omnibus accounts

Financial services licensees are required to segregate client assets from their own. However, for any unregulated provider operating omnibus accounts, they may mix client funds with platform-owned assets, leading to potential misappropriation and client loss. For example, in the FTX collapse customer funds were not properly segregated, leading to massive losses.

The ABA strongly supports extending custody standard requirements to digital asset service provider. It is important that the regulation includes the use of omnibus accounts – particularly

<sup>3</sup> Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937

<sup>4</sup> See IMF (2022). Regulating the Crypto Ecosystem. The Case of Stablecoins and Arrangements in Fintech Notes No 2022/008. [online] <https://www.imf.org/en/Publications/fintech-notes/Issues/2022/09/26/Regulating-the-Crypto-Ecosystem-The-Case-of-Stablecoins-and-Arrangements-523724>

given the prevalence of financial products being held in omnibus accounts (e.g. securities, derivatives).

### Regulatory guidance

CP 381 raises important questions about whether digital assets (such as cryptocurrencies, stablecoins, and DeFi tokens) should be classified as financial products. This issue is particularly significant given recent litigation by regulators in both Australia and overseas setting precedents for defining certain digital assets. As has been noted earlier, the ABA recognises the nature of digital assets requires regulation to be sufficiently principles-based, allowing for adequate flexibility. To support this, we recommend ASIC consider providing reference to recent litigation and guidance on certain definitions to limit uncertainty.

To illustrate, it is unclear whether ASIC considers digital assets to be a property or not. The legal classification of digital assets as property has significant implications for taxation, inheritance, and contractual rights. For example, in *ASIC v Block Earner*, ASIC alleged that the ‘Earner’ product – which allowed users to deposit crypto and earn interest – was an unlicensed financial product under Australian law. The Federal Court agreed with ASIC, finding that Block Earner’s yield product was an unregistered financial product. This set a precedent that certain DeFi lending or staking services may be financial products. However, commentary by Ashurst highlights the unresolved ambiguity and its implications on financial product classification with reference to *ASIC v Block Earner*<sup>5</sup>:

***‘Potential difficulties in the application of the MIS Regime if crypto currency is property***

*The Court recognised that there were potential difficulties in the application of the MIS Regime to Earner if crypto currency was found to be a kind of property and that if it was, it might impact on the analysis of the Earner product as a MIS.*

*However, the parties accepted that it was not necessary for the Court to decide that question and therefore the Court did not do so. Accordingly, the question remains open as to whether cryptocurrency is property and if it is, whether there are insuperable difficulties in the application of the MIS Regime that would lead to the conclusion that products like Earner are not MISs.’*

We note that in similar jurisdictions, common law has made some progress towards recognising digital assets as property – e.g. the UK in *AA v Persons Unknown* [2019].<sup>6</sup> In Australia, a recent decision by the Supreme Court of Victoria determined that ‘interest in a crypto asset, in this case Bitcoin, can be a proprietary interest.’<sup>7</sup>

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<sup>5</sup> Source: <https://www.ashurst.com/en/insights/asic-v-block-earner-when-are-crypto-asset-based-products-regulated-financial-products/>

<sup>6</sup> *AA v Persons Unknown* [2019] EWHC 3556 (Comm) (17 January 2020). [online] <https://www.judiciary.uk/wp-content/uploads/2022/07/AA-v-Persons-Unknown-summary-case-note-SB-amended-1.pdf>

<sup>7</sup> See Ashurst commentary on *Re Block Tech Inc* (Blockchain): <https://www.ashurst.com/en/insights/digital-asset-update-australian-court-determines-bitcoin-is-property/>



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Policy contact:

Maxwell Pryor

Policy Director



### About the ABA

The Australian Banking Association advocates for a strong, competitive, and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.