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28 February 2025

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Re: Updates to INFO 225: Digital Assets: Financial Products and Services – Consultation Paper

Thank you for the opportunity to comment on the latest consultation paper on an update to Information Sheet 225 *Crypto-assets* (INFO 225).

About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech sector, representing over 450 fintech companies and startups across Australia. As part of this, we work with a range of businesses in Australia's fintech ecosystem, including fintechs engaging in the digital asset, blockchain and Web3 space, payments, consumer and SME lending, wealthtech and neobanking, and the consumer data right.

Our vision is to make Australia one of the world's leading markets for fintech innovation and investment. This submission has been compiled by FinTech Australia and its members in an effort to advance public debate and drive cultural, policy and regulatory change toward realising this vision, for the benefit of the Australian public.

About this Submission

This document was created by FinTech Australia in consultation with its members. In developing this Submission, interested members participated in roundtables and individual discussions to discuss key issues and provided feedback to inform our response to the consultation paper.

We set out below comments on behalf of FinTech Australia members in relation to the questions in the Consultation Paper.

General Comments

While FinTech Australia members are appreciative of ASIC's ongoing engagement with industry and welcome updates to INFO 225 to the extent that they intend to clarify ASIC's positions on areas of uncertainty within the current framework, our members have provided feedback that:

Lack of clear thresholds for determining financial product status

- INFO 225 does not sufficiently identify which particular factors ASIC considers will be determinative for the purpose of assessing whether any particular digital asset or arrangement will fall within any of the financial product or service categories addressed in draft INFO 225. This reduces the relative utility of draft INFO 225 for businesses that do not fall squarely within any of the worked examples.

  As an example of this, the discussion at page 5 of draft INFO 225 regarding the "facility for making a financial investment" component of the general financial product definition in section 763A[1] suggests that ASIC will generally consider a digital asset to be a financial product where the price or value of the asset is directly or indirectly linked to the success of a business or project, apparently regardless of how the asset is marketed, or the contents of terms and conditions or initial disclosures such as white papers. However:

  - the current drafting of Examples 1 and 3 appear to suggest that ASIC considers that representations, or lack thereof, about the financial character of a digital asset are, in fact, relevant. Example 1 contains a clear representation about a buy-back event, and Example 3 is substantially focused on the marketing of the NFTs; and

  - this part of the draft INFO 225 does not clearly delineate when ASIC considers that a link between the relative success of a project and the market value of the digital assets it issues will or will not indicate that the digital assets should be treated as a facility for making a financial investment. In this regard, it is difficult to see how the NFTs in Example 3 would not be treated as financial products in light of ASIC's focus on establishing such a link – given that tradeable NFT assets associated with a "successful" gaming project would generally be expected to be associated with greater demand and liquidity. Our members also note that policy discourse, both in Australia and abroad, has generally been that digital assets with primarily functional or utility purposes such as gaming asset NFTs should not be regulated as financial products.

- The overarching impression is that ASIC's policy is that most digital assets will be financial products unless they fall within a non-financial product worked example: Draft INFO 225 seems to convey that ASIC has adopted a position of treating the general financial product definition in section 763A as a "catch-all" provision, and will presume that digital assets and arrangements involving digital assets will typically be captured as financial products or

[1] All references to sections are to sections of the *Corporations Act 2001* (Cth) unless otherwise stated.

services unless they fall squarely within one of ASIC's non-financial product worked examples;

Misalignment with pending Payment Service Provider and Digital Asset Service Provider reforms

- Publication of draft INFO 225 will be premature given impending reforms: Given industry is currently substantially concerned with considering and engaging with Treasury in relation to the imminent payment service provider (PSP) and digital asset service provider (DAF/DAP) reforms, ASIC's expanded position in draft INFO 225 may cause greater uncertainty pending finalisation of those reforms which may differ from ASIC's position, for example on Government policy grounds. Our members therefore consider there may be merit in delaying publication of draft INFO 225, or at least adjusting timing components of the no-action position to better align with reform implementation. Several members have expressed concerns that the updated INFO 225 acts as a temporary "*band-aid*" solution that may cause more harm than if it had not been proposed; and

Need for INFO 225 to be upgraded to a Regulatory Guide

- INFO 225 should become an ASIC Regulatory Guide: This draft INFO 225, or the iteration following the PSP and DAF/DAP reforms, may be more appropriate to be published as a ASIC Regulatory Guide, perhaps one in a series to complement and cross reference ASIC's guidance on the PSP and DAF/DAP reforms, instead of an information sheet.

A. Proposed Updates to INFO 225

A1. Overall approach to the update

A1Q1. Are there any topics or guidance that have not been included in the draft updated INFO 225 that you think should be? Please provide details.

Incidental financial product exemption

Our members have expressed concerns that draft updated INFO 225 does not explicitly address how the incidental financial product exemption in section 763E may apply in relation to digital assets, particularly given:

- the increased attention ASIC has given to the general financial product definition in section 763A, particularly the expanded section 763B definition of "makes a financial investment", which corresponds to the "miscellaneous financial investment product" pro forma licence authorisation, if the relevant product does not fall within a type of specified financial product under section 764A;

- the inherent uncertainty as to whether any particular digital asset that is functionally capable of being used to effect transactions on a blockchain (eg the

overwhelming majority of crypto assets) would be categorised by ASIC as a non-cash payment facility (NCPF) under the current framework (noting that Treasury is yet to clarify whether an equivalent to the current section 763E exemption will be retained under the proposed PSP reforms); and

- there has been longstanding uncertainty regarding ASIC's views on the application of the section 763E exemption generally. This is an opportunity for ASIC to clarify its position in draft INFO 225, at least in relation to digital assets.

- one member recommended ASIC develop a clear framework distinguishing utility tokens from financial products, particularly for loyalty programs, governance tokens, and access-based tokens, ensuring that businesses offering non-financial services are not unnecessarily captured[2]. This would prevent unnecessary regulatory burdens on businesses that use tokens for access rights, loyalty programs, or governance purposes.

Escrow services

Our members have also suggested that industry would benefit from clearer guidance on ASIC's views regarding the factors it considers will indicate that cryptocurrency escrow services will constitute financial services. For example, NCPF or custodial or depository services, noting the legal complexities and uncertainties of assessing whether decentralised smart contract arrangements involve any relevant digital assets (ie assuming they are financial products) being *held* by a service provider on behalf of another in the sense contemplated under the section 766E(1) custodial or depository services definition;

Staking

Subsequent to ASIC publishing the draft INFO 225 and the Consultation Paper, the UK Government has published the *Financial Services and Markets Act 2000 (Collective Investment Schemes) (Amendment) Order 2025 (SI 2025/17)* (Staking Instrument), which provides that arrangements for providing access to blockchain validation staking arrangements do not amount to collective investment schemes for the purposes of the UK financial services law.

While it is acknowledged that INFO 225 is intended to reflect ASIC's views regarding the current law, our members have suggested that if ASIC is considering implementing a similar arrangement (for example as a stand-alone legislative instrument), then draft INFO 225 would benefit from ASIC including specific statements acknowledging this point. Our members have also expressed a desire for ASIC to consider whether it would be appropriate for such a position to be extended to liquidity staking, noting that there is

[2] e.g. For example, governance tokens used in decentralised ecosystems, such as DAO tokens, may grant voting rights or participation in protocol decisions without conferring financial rights. These should not automatically be classified as financial products if they do not provide financial returns or investment-like characteristics.

currently substantial legal uncertainty regarding core features of liquidity staking and other common DeFi arrangements (which our members expect ASIC will eventually address in future regulatory guidance).

Reinstate ASIC's views as to characterisation of layer 1 tokens such as Bitcoin and Ethereum as not being financial products

Our members have highlighted that the existing and draft INFO 225 no longer contains any statement as to ASIC's view that layer 1 tokens like Bitcoin and Ethereum are not themselves a financial product. It would be helpful to reinstate words to this effect in draft INFO 225.

Distinguishing between self-custody versus custodial wallets

Members highlighted that guidance should clearly distinguish between custodial and non-custodial wallets for digital assets. With a custodial wallet solution, the digital assets are directly controlled by the third-party intermediary on behalf of a customer. The third party often pools collective customer funds into a blockchain address they directly control themselves. These are commonly omnibus accounts, and an internal ledger by the third-party determines how much of each digital asset the third-party is holding on behalf of which customer. In a custodial solution, the customer no longer holds or has access to the private keys and can no longer unilaterally access their digital asset on the blockchain. Instead, the customer has a relationship with an intermediary who has access to the digital assets on their behalf. Custodial providers can then execute transactions on behalf of customers (including the ability to withdraw assets to their own self-custody wallet).

One of our members commented that this fundamental distinction highlights why self-custody solutions cannot be appropriately classified as payment facilities. Where custodial solutions actively intermediate transactions and control user funds - properly bringing them within the scope of payment facility regulation - self-custody solutions provide only the technical means for users to secure and access their own digital assets. This is more akin to a physical safe or secure storage device than a payment service.

International standards support this distinction. The Organisation for Economic Co-operation and Development's (OECD) Crypto-Asset Reporting Framework (CARF) exempts self-hosted wallets from compliance obligations applicable to intermediaries, recognising that they do not retain control over assets or participate in covered transactions. Instead, obligations are placed on entities providing exchange or transaction facilitation services on behalf of customers[3]. A similar risk-based approach

[3] Organisation for Economic Co-operation and Development (2022). Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standardmon Reporting Standard . [online] OECD. Available at: https://web-archive.oecd.org/2022-10-10/642425-crypto-asset-reporting-framework-and-amendments-to-the-common-reporting-standard.pdf.

should be applied when considering non-cash payment facility regulations, ensuring regulatory obligations are aligned with actual intermediation risk.

A clear regulatory distinction between custodial and non-custodial wallets would allow ASIC to maintain strong consumer protections while fostering innovation in digital asset security and self-custody solutions. This approach would ensure appropriate oversight of genuine payment facilities while recognising that self-custodial wallets, by design, empower users with direct control and mitigate intermediary risk rather than introducing it.

Alignment and Compliance with RG 185: self-custody wallets

A tailored approach for self-custody wallets is also supported by Regulatory Guidance 185 relating to customer 'uses' of a non-cash payment facility. 185.60[4] and 185.61[5] are indicative of the type of products intended to be licensed.

A self-custody solution operates fundamentally differently from the arrangements described above. In each of those cases, the user relies on a third party to 'make a payment' or 'cause a payment to be made', whether directly, as with a stored value facility, or indirectly, as with a cheque facility. In contrast, self-custodial wallets do not involve third-party control over the shared ledger or blockchain, making it inappropriate to suggest that they perform either function.

Our members viewed that compliance with RG 185 on non-cash payment facilities is likely to be - in accordance with relief provisions[6] (RG185.17), given that applying these requirements to self-custody providers would impose unworkable and impractical obligations, necessitating a fundamental redesign of their products. Our members noted , unlike traditional financial service providers, self-hosted wallet providers and developers do not maintain direct customer relationships and would face new licensing, conduct, and disclosure obligations, including compliance with the ePayments Code.

Implementing these requirements would require self-custody providers to fundamentally alter their product structure and build insight into transactions, despite not being party to them. For instance, they would be required to issue transaction confirmations, even though they have no visibility or control over user transactions. This would amount to a

[4] (a) an instruction by a client to make a non-cash payment to a particular payee is a 'use' of the NCP facility by the client; (b) for a cheque facility, the writing of a cheque to a particular payee is a 'use' of the facility by the client, while the arrangement giving the ability to write that cheque is the NCP facility; (c) for a stored value facility, the NCP facility is the arrangement (which may include a physical device) that gives a person the ability to make non-cash payments to various payees from time to time, while presentation of the device to make a purchase is a 'use' of that facility; and (d) for direct debits, the NCP facility is the arrangement between the client and a financial institution that gives the client the ability to make direct debit payments to various persons (payees) from time to time, while an order by the client to make a direct debit payment to a payee is a 'use' of the facility.

[5] Specific examples of NCP facilities include cheque accounts, traveller's cheques, stored value cards, electronic cash, direct debit services, payroll cards, funds transfer services and electronic bill payment services.

[6] RG185.17 - "*We recognise that, for some types of NCP facilities, relief is appropriate because: (a) compliance with the financial services regulatory regime may be disproportionately burdensome; and (b) the likelihood and extent of potential consumer detriment may be minimal.*"

complete redesign of an entire product category to align with regulations intended for intermediated payment services.

One of our members added that imposing such obligations could mislead consumers by implying that self-custody wallets function with the same intermediary oversight as traditional payment facilities. This mischaracterisation risks undermining the core value proposition of self-custody solutions—user sovereignty and direct control over digital assets without intermediary risk. These features remain a primary reason why users choose self-custody wallets over custodial alternatives.

Rather than applying regulations designed for intermediated financial services, the regulatory framework should acknowledge the fundamental differences of self-custody solutions. These solutions provide the tools for users to control their own digital assets, aligning with the broader principles of blockchain technology and decentralised finance, where reducing intermediary risk and enabling direct peer-to-peer transactions are key objectives.

Harmonisation with Global Standards and Cross Chain Transactions

Our members support regulatory settings that align with international best practices[7] to promote cross-border consistency, facilitate compliance, and enhance Australia's competitiveness in the global digital asset market. Regulatory coherence with key financial jurisdictions will reduce friction for industry participants operating across multiple markets, ensuring Australia remains an attractive destination for investment and innovation in the digital asset sector.

Our members also noted that given the borderless nature of digital assets and their operation across multiple blockchain networks, clear regulatory guidance on cross-chain transactions and interoperability solutions would provide much-needed certainty for industry participants.

A1Q2. Are there any topics or guidance that were included that you think should not have been included? Please provide details.

FinTech Australia does not have any specific views in relation to this question.

A1Q3. Do you agree that the good practice guidance in INFO 225 directed to responsible entities is applicable to providers of custodial and depository services that provide custody of digital assets that are financial products? Are there any good practices that you would like added (e.g. on staking services)? Please provide details.

FinTech Australia does not have any specific views in relation to this question. Please refer to the response to question A1Q1 on staking above.

[7] E.g., MiCA in the EU, SEC guidance in the US.

A2. Worked Examples

A2Q1. Do you have comments on any of the proposed worked examples? Please give details, including whether you consider the product discussed may/may not be a financial product.

Our members have provided feedback on a number of the worked examples ASIC has included in draft INFO 225, which we have set out in the table below.

As a general comment, our members observed that many examples stopped short of expressing the counterfactual and therefore the line across which ASIC considers the product would "convert" to a financial product or vice versa.

Worked Example	Feedback
Facility for making a financial investment	
Example 1 DCE issues token with representation that a buy back will occur if the exchange achieves certain success metrics	While our members generally acknowledge the need for ASIC to include an example of an arrangement that would clearly fall within the general financial product definition in section 763B, our members have suggested that the inclusion of the buy-back representations substantially reduces the utility of the example for industry. In particular: • ASIC has clearly stated that it considers that a connection between the market value of a digital asset and the relative "success" of the project is a relevant factor for this financial product category, however does not clearly establish the parameters for this factor; and • it would therefore be more useful to token issuing projects to have regard to an example where: o it is expressly stated the project does not represent any expectation of any financial return or benefit; and o the value of the issued tokens organically increases due to natural economic forces of supply and demand associated with more users wishing to own or use the tokens (e.g. by reference to an inherent utility or other characteristic of the token).

	Alternatively, if ASIC considers that the buy-back representation is necessary to provide a clear example of a represented financial benefit, then our members suggest that ASIC also extends the Example to consider the counterfactual where the project did not include either the buy-back representation or mechanism.
Example 3 NFT token	As discussed above, our members have expressed concerns that the current drafting of this example when considered against Example 1 creates confusion as to whether ASIC's view is generally that a project that does not market or mechanically provide for an identified financial return or benefit will not be considered to be a facility for making a financial investment.
Managed investment scheme	
Example 4 Yield bearing stablecoin	While our members expressed a clear desire for ASIC to include worked examples and guidance specific to stablecoins, our members generally considered that a yield bearing stablecoin example provides little utility to industry, on the basis that: ● while yield-bearing stablecoin projects do exist, the substantial majority of stablecoins are not yield-bearing; and ● as a result, the example provides little utility for Australian businesses that issue stablecoins or otherwise interact with stablecoins for the purposes of determining whether any particular stablecoin would be treated as a financial product (and therefore such interactions as being financial services). Please refer to more detailed comments regarding proposed stablecoin examples further below.
Example 5 Gold-linked digital asset token	Our members have suggested that ASIC's proposed example of a gold-backed token structured as physical gold and gold-related financial products held under a trust relationship generally does not reflect the typical structures of simple commodity or other physical asset backed token arrangements, which are more commonly structured as bailment relationships with mechanisms for physical delivery of the underlying asset.

Example 8 Tokens issued to raise funds to establish a new blockchain	Our members have suggested that this example should be expanded to include more details of the features of the H2 token, along with an explanation of whether ASIC considers the H2 token would constitute a financial product – for example in circumstances where the H2 token is conceptually analogous to a well-known layer 1 token such as Ethereum or Solana.
Securities	
Example 9 Meme coin	Our members have expressed concerns with ASIC including an example of a meme coin that it would not consider to be a financial product without drawing clear attention to the importance of certain aspects of the fact pattern, as explained below. As discussed above, while it is implicit throughout draft INFO 225 that ASIC will take into account representations made by product issuers for the purposes of assessing a financial product characteristic of an asset (e.g. whether miscellaneous financial investment facility, security, managed investment scheme or otherwise), this is not clearly and explicitly stated in draft INFO 225, with the result that Example 9 suggests to the market (particularly legally unsophisticated actors that may seek opportunistic profits associated with issuing a meme coin) that meme coins are generally not financial products. While ASIC states that the value of the meme coin in Example 9 is not connected with the success of Ms I's business, it is difficult to reconcile this position with the positions ASIC has taken earlier in draft INFO 225, particularly given that: • a meme coin issuer's business is inherently the issuance and marketing of their meme coin, and such issuers commonly create additional revenue from fees generated by establishing trading pools and other on-chain arrangements that facilitate liquidity for their token; • meme coins typically have no marketable function other than ownership of the asset, association with or support of the brand or meme and prospects of disposing of the asset, and therefore successful marketing of the meme coin intrinsically drives the

	price of the asset. In this sense, unlike digital assets that have some other form of utility or purpose, the only factor that has any relevance to the value of a meme coin is the efforts of the issuer to market and spread the "meme" or otherwise branding; and • as a result, an example involving a meme coin issuer that makes no representations about the market value of their product increasing (e.g. "going to the moon" or some other project-specific catch phrase) is unrealistic, and may encourage activities associated with consumer harm.
Example 13 Non-custodial wallet	As discussed above, custodial and self-custody wallets are different and require different regulation. As such, worked example 13 should be amended to refer to custodial wallets specifically and exclude self-custody wallets.

A2Q2. Are there any additional examples you would like to see included? Please give details of the suggested example(s), and why you consider the digital asset discussed may/may not be a financial product.

Our members have suggested that industry would benefit from ASIC including worked examples addressing:

- escrow arrangements, as discussed above;
- utility tokens, as discussed above;
- intermediary arrangements that may amount to dealing by arranging, noting that ASIC has included a brief explanation[8];
- derivatives that are more complex or less obvious than a contract for difference over a digital asset (as described in Example 12). Members have also suggested that it would assist for ASIC to set out its views on whether certain wrapped token arrangements may fall within the "contract for future services" exemption at section 761C(3)(b);
- examples that ASIC would consider to constitute "making a market" vs. "operating a market" vs "neither"; and
- self-custody wallet scenario included as a separate worked example to provide clarity on its treatment under a future licensing regime, if required.

A2Q3. For any of these examples, are there any unintended consequences? If so, what are these and what do you propose in response?

Our members encourage ASIC to consider fit-for-purpose guidance that ensures financial product classification remains principles-based, proportionate, and risk-aligned, avoiding unintended regulatory burdens on non-financial digital assets. A broad application of financial product definitions could capture utility tokens, in-game assets, and social tokens, imposing compliance obligations on businesses where there is no meaningful financial intermediation. Regulatory clarity should ensure that digital assets serving a functional or ecosystem-based purpose are not inadvertently classified as financial products.

The decentralised nature of DeFi and smart contract-based applications also presents unique regulatory challenges. Traditional financial product definitions rely on the presence of identifiable intermediaries, whereas DeFi protocols often operate without centralised control. Applying financial services obligations to autonomous smart contract-based lending or liquidity mechanisms could result in compliance requirements falling on developers who do not exercise ongoing control over the protocol. ASIC should

[8] Page 18 of the draft INFO 225.

consider a functional, risk-based regulatory approach that focuses on actual financial intermediation and control, rather than the underlying technology.

Our members highlighted that a proportionate regulatory approach is important to supporting responsible innovation and maintaining Australia's competitiveness in digital asset markets. Overly broad classifications could deter investment, stifle innovation, and drive market participants offshore to jurisdictions with clearer, more targeted regulatory settings.

A3. Wrapped tokens and stablecoins

A3Q1. Do you think it would be helpful to include an example of a wrapped token and/or a 'stablecoin' in INFO 225? If so, do you have any suggestions on the features of the potential examples in paragraphs 20-21?

Noting ASIC's comment at paragraph 24 of the Consultation Paper in relation to the proposed PSP and DAF/DAP reforms, which are likely to have significant implications for regulation of stablecoin products and some wrapped tokens, our members have expressed the view that it would be too premature, and therefore inappropriate, to include examples of these products in this iteration of draft INFO 225.

However, our members have also indicated that, once the PSP and DAF/DAP reforms have been implemented, industry would benefit significantly from a future iteration of INFO 225 including a substantial stand-alone section addressing ASIC's views regarding the regulatory implications for stablecoin products with various features, as well as for intermediaries dealing with these products – for example, where a stablecoin qualifies as a payment stablecoin but not any other category of financial product, confirming that a broker would not provide financial services by arranging for a trade involving this stablecoin (i.e. only the issuer provides a financial service as contemplated by the PSP reforms).

A3Q2. What are the practical implications for businesses (e.g. for issuers or intermediaries) in providing services in relation to wrapped tokens and/or 'stablecoins' that are financial products? Please give details.

Some of our members have expressed concerns that the current uncertainty regarding the regulatory characteristics of various stablecoin and wrapped token arrangements creates additional uncertainty about the regulatory implications of interacting with those assets as an intermediary. This uncertainty can result in substantial additional costs to businesses, whether costs of obtaining legal advice assessing financial product characteristics of any digital asset prior to onboarding the digital asset, or obtaining and maintaining an AFSL or market licence with sufficiently broad licence authorisations, as a

conservative position in case any particular digital asset is later determined to be a financial product in the future.

Our members have suggested that this environment has had a material detrimental impact on investment in Australian digital asset businesses, particularly utility projects that rely on stablecoins, wrapped tokens, or other digital assets to facilitate their infrastructure but otherwise do not generally have a financial product or service purpose. In particular, feedback has been that investors are showing diminishing willingness to commit capital to otherwise innovative Australian digital asset start-up projects, due to negative sentiment regarding the relative regulatory cost and risk of Australian projects when compared to other leading digital asset jurisdictions.

A3Q3. Would any transitional provisions or regulatory relief be needed to facilitate transition from regulation of a wrapped token or a 'stablecoin' as a financial product under the current law to the Government's proposed approaches to 'stablecoins' and wrapped tokens? Please give details.

Other than the comment above in relation to Question A3Q2, one of our members has emphasised the need for transitional provisions or regulatory relief to ensure stablecoin issuers and wrapped token providers can adapt without operational disruption. To facilitate a smooth transition, they recommend a time-limited regulatory sandbox to allow continued operation under interim measures and a phased compliance approach providing a 12-24 month transition period to meet evolving regulatory requirements.

ASIC may also consider regulatory alignment between the current financial product framework and the Government's proposed stablecoin regime, offering clear guidance on how businesses can transition without unintended overlap. Our members in this space recommend that transitional provisions account for decentralised issuers, given their lack of direct control over issuance and redemption processes

B. Licensing of digital asset businesses and their ongoing obligations

B1. Proposed class no-action position

B1Q1. Do you agree that ASIC should progress with a class no-action position as proposed here? If not, please give reasons.

For the purposes of this response, it is assumed ASIC proposes to include details of its no-action position in the updated INFO 225 to be published (noting this proposal is only in the Consultation Paper and draft INFO 225 only references no action letters on page 22).

While our members acknowledge that the proposed no-action position is intended to provide an opportunity for businesses that may become aware of licensing gaps (ie due to the updated guidance) to apply for an AFSL without facing penalties, and to corral them into a cohort of AFSL applicants ahead of those to which the PSP and DAF/DAF reforms will apply, our members have expressed concerns about a number of aspects of the proposal. For convenience, FinTech Australia has consolidated member feedback on ASIC's questions B1Q1 to B1Q4 regarding the proposed class no-action in this response.

Our members' overarching feedback is that the no-action position unreasonably pushes businesses that are innovating in this space (and have already launched a product) towards applying for an AFSL (and incurring substantial associated costs) even in circumstances where there is continued material and reasonable uncertainty around the fundamental legal and regulatory characterisation of core aspects of their products. While a business may seek competent legal advice assessing the likelihood that their product offering does or will involve provision of financial services, it is currently unclear how Australian courts would legally characterise many common features of blockchain arrangements. This means that while it may be open for a competent and well-informed legal advisor to conclude, based on relevant existing jurisprudence, that it is reasonably defensible that a project does not provide any financial services, or only particular financial services, the emerging nature of this area of law naturally leads to a greater risk of positions changing due to new jurisprudence or legislative reform.

Some of our members have suggested that the no-action position is unworkable in terms of the proposed requirement to have launched a product prior to the release of the Consultation Paper and then also lodge an AFSL application within six months of the updated INFO 225 being published. In particular, ASIC will be aware that:

- collating the required people proofs (including fit and proper person checks for directors of ultimate holding companies, which may be foreign) can take a long time, and an application will not be accepted by ASIC for analysis until all required proof documentation is submitted. If ASIC chooses to proceed with the proposed no-action position, it is suggested that ASIC will need to exercise its discretion to accept applications that may not be complete in terms of documentation (but not materially deficient) and grant extensions of time to provide outstanding documents, where intending applicants evidence reasonable efforts to obtain required proofs, and/or to accept statutory declarations to this effect; and

- identifying and securing the services of suitably competent responsible managers for novel financial products can be challenging, particularly in circumstances where numerous businesses operating in this evolving space are pushed to apply for AFSLs in a condensed period.

Our members have also noted that, aside from the proposed no-action position, there are other ways that industry participants are obtaining, and will continue to obtain, comfort regarding the regulatory status of their products, including:

- seeking competent legal advice and taking a reasonably defensible view. Noting that the Federal Court in the "Blockearner case"[9] ultimately determined not to impose penalties on the basis that the defendant had obtained competent legal advice, our members suggest that ASIC consider taking a similar policy position; and/or

- engaging directly with ASIC and/or Treasury in relation to their product offering and the future PSP and DAF/DAP reforms that will redefine the regulatory perimeter for many digital assets; and/or

- applying for specific individual relief in accordance with the requirements of RG 51. ASIC can determine not to grant the relief where it agrees with an applicant's submissions that their product offering is not a financial product/service; and/or

- request a non-action letter[10]; and/or

- apply for an appropriate AFSL.

B1Q2. Are the proposed conditions appropriate? Are there any additions or changes to the proposed conditions that will be more effective for investor protection?

Please see above comments regarding the proposed conditions. In addition, the proposed requirement that an applicant would have to be a member of AFCA should be qualified as only applying in relation to applicants that offer their products to retail clients (i.e. not wholesale clients only).

[9] *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (Penalty) [2024] FCA 578.*
[10] As noted on page 22 of draft INFO 225.

B1Q3. Do you agree that the class no-action position should be dependent on a person lodging an AFS licence application or written intention to apply for a market and/or CS facility licence? If not, please explain and suggest an alternative.

FinTech Australia members generally agrees with this, subject to our comments above on improvements to make the no-action process more workable, and noting the alternative approaches industry participants will continue to take to obtain sufficient regulatory comfort.

B1Q4. Should there be a deadline for applying for an AFS licence or commencing pre-lodgement discussions in relation to a market and/or a CS facility licence? Please provide reasons.

Please see above comments regarding practical issues with the proposed deadline with collating proof documents and securing sufficiently competent responsible manager nominees.

B1Q5. For product issuers, should the no-action position extend to other obligations—for example, to prepare a Product Disclosure Statement (PDS)? Why or why not?

Our members hold divergent views on whether the scope of the no-action position should extend to all other relevant obligations during the no-action period.

Some of our members agree that the scope of the no-action position should extend to all other relevant obligations during the no-action period, including in relation to applicable disclosure, financial, and client monies requirements. However, our members acknowledge that these obligations would need to be met from the date the AFSL is granted, which will require applicants to take necessary preparatory steps.

Other members, however, believe that the no-action position should not automatically extend to all obligations, including the requirement to prepare a Product Disclosure Statement (PDS). They argue that delaying these requirements may create regulatory uncertainty or disadvantage existing market participants that are already subject to these obligations.

Given these differing perspectives, further clarification from ASIC on the intended scope of the no-action position, including whether transitional arrangements could provide regulatory certainty without disadvantageous compliant entities.

B2. Application of existing licensing processes, regulatory guides and conditions to digital asset financial services businesses

B2Q1. Do you agree that the same regulatory obligations should apply to digital assets and traditional financial products of the same category (e.g. securities, derivatives)? Please explain your response and provide specific examples.

FinTech Australia members generally agree, however some of our members have raised the fact that they may already be sufficiently regulated under industry-specific legislative frameworks, although this would need to be assessed on an industry-specific basis.

B2Q2. Are there any aspects of ASIC's guidance that may need to be tailored for digital assets that are financial products?

Responsible Manager

Our members consider that it will likely be the case that most responsible manager candidates nominated will predominantly have experience in relation to digital asset projects that to date have not been considered financial products. Conversely, there may be nominated responsible managers that have traditional financial services experience but do not have deep digital asset experience. There are unlikely to be many/sufficient available nominees that will have both. In such circumstances, our members request that ASIC provide clear guidance in RG 105 setting out its expectations regarding the type of digital asset/financial services experience that it will accept in relation to proposed responsible managers' competency, particularly for an Option 5 nominee.

Application of Non-Cash Payment Facility Regulations to Self-Custody Wallets

Our members note that ASIC's interpretation of the Corporations Act broadly defines a non-cash payment facility as "performing monetary obligations by means other than fiat currency" and states that determining whether a facility falls within this definition depends on the terms and features of the arrangement. While certain digital assets may be captured under this broad interpretation, it is critical that the method of transmission is carefully considered when applying licensing requirements—particularly in relation to self-custodial wallets.

Non-cash payment facility regulations were designed for intermediated payment services, ensuring consumer protection against intermediary risk and operational failure. In contrast, self-custodial wallets do not introduce intermediary risk, as users maintain full control of their private keys and assets. Self-custody wallet providers do not hold or control digital assets, nor do they facilitate or process payments. Instead, self-custody wallets function as data storage tools that enable users to conduct direct peer-to-peer transactions. As the wallet provider plays no ongoing role in the transmission or

execution of payments, a self-custody wallet should not be classified as a non-cash payment facility simply because the underlying asset may be a financial product.

Members noted that ASIC acknowledges a similar distinction in its guidance on custodial services (page 19), stating that offering a 'self-custody' solution is unlikely to amount to providing a custodial or depository service. The same reasoning should apply when considering non-cash payment facilities, as self-custodial wallets do not 'make a payment' or 'cause a payment to be made'. These transactions occur directly on the blockchain or through digital peer-to-peer networks without the involvement of the wallet provider.

This distinction is essential to ensure that regulatory settings remain fit-for-purpose and do not impose inappropriate licensing obligations on self-custody solutions that are fundamentally different from custodial wallets or traditional payment intermediaries.

B2Q3. Do you agree that the approach proposed for custodial and depository services is appropriate for holding custody of digital assets? Do you agree that extending the omnibus client accounts is appropriate for digital assets that are financial products? Please explain, providing examples, if relevant.

FinTech Australia members agree that it would be appropriate for the omnibus client account exceptions to be extended to digital assets that are financial products.

However, a few of our members raised key concerns regarding custodial practices, particularly the risks associated with omnibus client accounts. While extending omnibus accounts to digital assets can enhance operational efficiency, it also increases rehypothecation risks, security vulnerabilities due to single-point failure, and challenges in private key management.

B2Q4. In relation to organisational competence, what are your views on what ASIC could consider in applying Option 5 in Regulatory Guide 105 AFS licensing: Organisational competence (RG 105) for entities providing financial services in relation to digital assets that are financial products?

Please refer to the response to question B2Q2 above.

B3. Proposed tailoring of licensing authorisations for digital asset derivatives and miscellaneous financial investment products

B3Q1. In relation to the authorisations sought during an AFS licence application, do you agree that the existing authorisations are generally appropriate to digital asset service providers?

FinTech Australia members collectively do not have a specific view in relation to this question. However, a few of our members have raised specific areas where additional

clarity or modifications may be necessary to ensure the framework remains fit-for-purpose.

In particular, the unique operational models introduced by blockchain-based financial services, such as decentralised exchanges (DEXs) and automated market makers (AMMs), do not always align with traditional financial product classifications. Additionally, many digital asset service providers rely on automated smart contract execution and innovative custodial structures, raising concerns whether existing authorisations adequately account for these functionalities. Further clarity is also needed on market-making and liquidity provision in DeFi, as some protocols act as liquidity providers rather than traditional market operators, making it unclear whether additional authorisations are required.

B3Q2. Do you agree with the proposal to tailor the derivatives and miscellaneous financial investment products authorisations? Are there any others that you would recommend?

FinTech Australia members collectively do not have a specific view in relation to this question. However, a few of our members noted that further clarity is needed on certain products to ensure regulatory certainty.

Tokenised derivatives, which rely on decentralised protocols and automated smart contracts, may not fit neatly within existing derivatives authorisations, requiring further guidance. Similarly, yield-generating financial products such as staking, lending, and liquidity mining introduce unique risks like impermanent loss and smart contract vulnerabilities, warranting a more nuanced regulatory approach. Some members also raised concerns about hybrid financial products that combine governance, staking rewards, and revenue-sharing mechanisms. Clear regulatory treatment of these models is necessary to ensure compliance while enabling innovation.