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Submission on ASIC Consultation Paper 381 – Updates to INFO 225: Digital assets: Financial products and services

MinterEllison appreciates the opportunity to make a submission in relation to the Consultation Paper on 'Updates to INFO 225: Digital assets: Financial products and services' released on 4 December 2024 (**Consultation Paper or CP 381**).

MinterEllison is a leading Australian Law firm. We advise major financial institutions, fintechs, token issuers, financial advice firms and other financial intermediaries in Australia and overseas.

The views expressed in our submissions are ours alone and do not necessarily reflect the views of our clients.

Overview

Subject to our submissions below, we believe that the amendments proposed in relation to '*INFO 225: Digital assets: Financial products and services*' (**INFO 225**) appropriately deal with the rapidly changing digital asset landscape, balancing the need to foster innovation while still protecting consumers from harm.

We appreciate the time and effort expended in restructuring and redrafting the existing INFO 225, including crafting worked examples as a direct response to stakeholder requests, and the opportunity to respond to the various proposal and questions.

In summary, we:

- (a) agree with the worked examples included in the draft INFO 225 and believe they are likely to be helpful for industry;
- (b) believe additional insight and commentary would be useful to address the matters we discuss in more detail below;
- (c) respectfully disagree with ASIC's view expressed in the Consultation Paper in relation to the regulation of stablecoins as a financial product. In particular, we do not believe it is correct to characterise stablecoins as a non-cash payment facility (**NCPF**). A stablecoin of itself does not ordinarily give the holder the ability to make a non-cash payment, it is merely the form of value ultimately used to make a payment. The holder of a stablecoin can only make a non-cash payment using a stablecoin if they have access to a facility or arrangement that provides the holder with a right or ability to transfer the stablecoin to another person; and

- (d) we broadly agree with the proposed approach to licensing digital asset businesses and the no-action position, but have some key suggestions around the scope and duration of the no-action position.

Our detailed submissions in response to the proposals and questions raised in the Consultation Paper are set out below. We have omitted questions in relation to which we do not wish to make any submissions.

1. Updating INFO 225

A1.Q1: Are there any topics or guidance that have not been included in draft updated INFO 225 that you think should be? Please provide details.

- 1.1 We have included detailed submissions further below (see paragraph 3 below) regarding our view that a stablecoin is not a financial product. If, despite our submissions, ASIC maintains its view that a stablecoin (with the features listed in paragraph 21 of CP 381) may be a financial product, we strongly suggest ASIC substantially broaden the proposed guidance in INFO 225 (for example, under the heading 'When could a digital asset be, or involve, a non-cash payment facility') to further explain ASIC's rationale for why/how a stablecoin may constitute a NCPF, including with examples.

A1.Q2: Are there any topics or guidance that were included that you think should not have been included? Please provide details.

- 1.2 For the reasons set out in paragraph 3 below, we believe the guidance relating to ASIC's proposed view that a stablecoin could constitute a NCPF should not have been included.
- 1.3 In particular, ASIC states in the draft INFO 225 that a digital asset which is 'designed for use in payments may be a non-cash payment facility in themselves'. We do not believe that is a correct application of the law with respect to NCPFs. Although stablecoins may be designed for use in payments (similar to fiat currency) and is the means by which payment is made, the focus should be on the facility which gives the holder a right or ability to make a non-cash payment using a stablecoin.

2. Worked examples

A2.Q1: 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.

Example 2: native token staking service

- 2.1 In this example, ASIC has stated the staking service is likely to be a miscellaneous financial investment facility (**MFIF**) and also potentially a managed investment scheme (**MIS**). Given the similarities in the definitions of a MFIF and a MIS, we believe industry would benefit from additional commentary from ASIC on why the service could be a MIS.
- 2.2 In addition, if ASIC does believe the staking service could satisfy both definitions, we suggest ASIC provide guidance on what steps the service provider should undertake in order to ensure appropriate compliance with AFS licensing laws – since categorisation as a MIS may result in additional obligations (e.g. scheme registration) over treatment as a MFIF.

Example 4: yield-bearing stablecoins

- 2.3 In this example, ASIC expresses a view that a yield bearing stablecoin is likely an interest in an MIS, and that the funds contributed generate several benefits including financial and non-financial benefits. ASIC goes on to provide, as an example of a benefit, that a token that is stable in value and is able to be used for making payments provides benefits that contrast with other tokens that have highly volatile prices.
- 2.4 We agree that the yield-bearing stablecoin generates a financial benefit in terms of the yield that is paid to holders in the form of additional stablecoins. However, we have the following concerns about the example:
- (a) It is not clear from the example that the yield arises from the pooling or use in a common enterprise of the stablecoin holder's contribution as required by the second limb of the MIS

definition in section 9 of the *Corporations Act 2001* (Cth) (**Corporations Act**). In our view, this should be clarified in the example.

- (b) Neither the stability in value of the stablecoin nor its ability to be used in a facility to make payments appear to be a financial benefit or a benefit consisting of rights or interests in property in the sense meant by the second limb of the MIS definition. A stablecoin is a store of value. Without more, we submit that a stablecoin would not represent a MIS interest. We therefore suggest that these elements be removed from the example and that ASIC instead focus on the yield bearing component of the product.

Example 5: gold-linked token

- 2.5 This example assumes there is a trust relationship between the product issuer and the customer, such that each token represents an interest in the trust holding the underlying gold asset.
- 2.6 We suggest ASIC explore and comment on the implications of the gold-linked token in the absence of a trust structure. We expect that in the alternative scenario the token may constitute a derivative.

Example 7: token representing a claim for pre-paid services

- 2.7 We agree with ASIC's comment that the product in this question is unlikely to constitute a MIS. However, when considering the token described in this example, we also turned our mind to whether it could instead fall within the definition of a 'security'. Although we believe that is unlikely, we believe this example would benefit from commentary from ASIC on whether and why the token could be a security (or any other financial product) – similar to ASIC's approach in Example 9.
- 2.8 This example also refers to Company F and Company G interchangeably, which appears to be an error.

Example 11: tokenisation

- 2.9 In this example, we expect there is a real risk Company K is 'dealing' (either by arranging for or dealing on behalf of) given that company is helping corporate clients issue corporate bonds.
- 2.10 We believe this example would therefore benefit from additional guidance from ASIC as to whether Company K would be providing dealing services and/or what type of conduct it would need to engage in to provide dealing services.

A2.Q2: 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.

- 2.11 We have included detailed submissions below (see paragraph 3 below) why we believe that a stablecoin is not a financial product. If, despite our submissions, ASIC maintains its view that a stablecoin (with the features listed in paragraph 21 of CP 381) may be a financial product, we strongly suggest ASIC include a specific example covering this issue.
- 2.12 Apart from Example 11, all of the other examples relate to the issuer of a specific digital asset that may constitute a financial product. We believe it would be useful if some of the examples were to be reworked/expanded to consider other participants in the broader digital asset ecosystem, i.e. to include commentary on whether and how other service providers may be subject to the AFS licensing regime where the digital asset is likely to be a financial product.

3. 'Stablecoins' and wrapped tokens

- 3.1 ASIC has put forward its view in the Consultation Paper that a stablecoin with certain prescribed features may be a NCPF.
- 3.2 We acknowledge there may in fact be stablecoins which provide holders with the right or ability to make or cause a non-cash payment to be made – and therefore it will always be a case-by-case analysis as one cannot rule out the relevant token containing features which enable non-cash payments to be made. However, in our experience, a stablecoin (with the features referred to by

ASIC) itself does not generally provide such a facility. We therefore submit ASIC's proposed view is not consistent with:

- (a) the definition of what constitutes a NCPF in sections 763A and 763D of the Corporations Act;
 - (b) the approach taken recently by the Federal Court in *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2024] FCA 457 (**BPS case**);
 - (c) the general understanding in the market of how the AFSL regime applies (or more relevantly does not apply) to stablecoins.
- 3.3 The proposed view also appears to conflict with ASIC's guidance in the existing INFO 225 with respect to the application of the NCPF concept to digital assets – and therefore represents a significant departure from ASIC's established policy/views regarding the matter.
- 3.4 We understand ASIC's view is based on the premise that the meaning of '*makes non-cash payments*' under section 763A(1)(c) of the Corporations Act includes payments being made by passing the *ownership* of a NCPF from one person (the payer) to another person (the payee). While we agree that transfer of a stablecoin is a non-cash payment, we do not agree that the stablecoin itself would normally be the 'facility' through which the non-cash payment is made and if it is not, the stablecoin itself will not be a NCPF.
- 3.5 Similarly, we do not believe that a digital asset designed for use in a payment facility (i.e. as a store of value or means of payment) is itself a NCPF.
- 3.6 Determining whether something is a NCPF relevantly requires consideration of whether there is a *facility* that provides the holder with a right or ability to make *non-cash payments*.
- 3.7 A '*facility*' is defined broadly to include intangible property, an arrangement or a term of an arrangement or a combination of both of those things.¹ In determining whether something is a *facility*, Downes J recently stated in the BPS case that:

*'the identification of the financial product should focus upon the point at which a person performs one of the functions identified in s 763A(1) of the Corporations Act [(i.e. in this case, make non-cash payments)] with the question then being asked: what is the direct mechanism or thing which allows the person to perform this function?'*²

- 3.8 With the above in mind, we note that the issuance of a stablecoin does not of itself ordinarily enable a stablecoin holder to make a non-cash payment. That is, by acquiring a stablecoin, the holder does not acquire a right to make a payment or otherwise use the stablecoin to make a payment. There can of course be, and there often is, a facility or arrangement (or '*direct mechanism*' as referred to in the BPS Case) enabling a stablecoin holder to use a stablecoin to make payments (i.e. non-cash payments). Such a facility or arrangement is distinct from the stablecoin, and it is a separate question whether that facility or arrangement constitutes a NCPF.
- 3.9 The above distinction appears to have been considered and recognised by ASIC in Example 13 in the draft INFO 225. In Example 13, ASIC contemplates a company which issues both the digital asset wallet service (i.e. the facility which enables payments to be made) and the form of value (i.e. the proprietary stablecoin) that is used by customers to make payments to others using the wallet service. ASIC states that the digital asset wallet service itself is likely to be a NCPF because **'it is the facility through which clients can and do make payments to third parties'**.
- 3.10 To that extent, there appears to be an inconsistency between ASIC's approach for determining what is a NCPF in Example 13 with its earlier guidance in the draft INFO 225 that a digital asset itself can be a NCPF where it is designed for use in payments.
- 3.11 We note ASIC's guidance in the existing INFO 225 aligns with our view above. ASIC currently states:

'Just because a crypto-asset is the form of value that is used to complete a transaction does not necessarily mean that the crypto-asset is an NCP facility.'

¹ Section 762C of the Corporations Act.

² *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2024] FCA 457 at [109].

*Whether or not a crypto-asset is, or involves, an NCP facility **will depend on the rights and obligations associated with the asset**. If the asset provides the holder with a right to use the asset to make a payment, it is likely to be an NCP facility.*

In some instances, there may be NCP facilities that involve the use of a crypto-asset. For example, if a person offers an arrangement where payments can be made using a crypto-asset but fiat currency is sent to the recipients, that arrangement is likely to be an NCP facility.' [Our emphasis in **bold**]

- 3.12 We agree with the above commentary and believe it should be retained.
- 3.13 To the extent that ASIC maintains its view in relation to stablecoins (i.e. that they are themselves NCPFs) in the final guidance, we have the following observations in relation to the features listed in the Consultation Paper that ASIC believe results in a stablecoin constituting a financial product:
- (a) ASIC refers to the stablecoin being 'marketed' as a non-interest bearing stablecoin. We are not convinced that this is a relevant consideration. It would suggest that if the stablecoin is not marketed at all, then it would not be a financial product.
 - (b) ASIC refers to the stablecoins being fiat-backed, pegged 1:1 to the AUD. The literal reading of this would mean that stablecoins that are pegged to a foreign currency would not be a financial product. We assume ASIC does not intend to limit its view in this way.
 - (c) ASIC refers to monies received from stablecoin sales being held in a bank account or used to purchase low-risk investments. We acknowledge this condition has likely been identified by ASIC to capture those stablecoins that aim to maintain stable value with reference to a fiat currency – and not stablecoins that are collateralised or stabilised via other crypto assets. However, this would suggest that if the monies received are not held in a bank account or invested in low-risk investments, the stablecoin would not be a NCPF.

A3.Q1: 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?

- 3.14 To the extent that ASIC maintains its view that a stablecoin may be a financial product in its final guidance, we believe it is imperative that ASIC include two separate worked examples in relation to a non-interest bearing stablecoin, one where the stablecoin would (in ASIC's view) qualify as a financial product and another where it would not.

A3.Q2: 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.

- 3.15 ASIC's view in relation to regulation of stablecoins as financial products, if maintained in the final guidance, will have far reaching impacts not just on issuers of 'regulated' stablecoins but also on other industry participants that buy, sell and/or use stablecoins within their business. For example:
- (a) Centralised exchanges would likely need an AFS licence to 'make a market' in NCPFs. This seems to be an anomalous characterisation of the role of centralised exchanges which unlike ordinary market makers do not make a margin on the sale or purchase of stablecoins. This may also have unintended consequences for businesses that use or intend to use stablecoins as part of their normal operations. For example, a business that regularly buys and transfers/sells third-party issued stablecoins as a method to make payments may be taken to be making a market in the stablecoin.
 - (b) Marketplaces that facilitate the trading of regulated stablecoins may need to obtain an Australian markets licence.
 - (c) Anyone who provides any recommendation or opinion about stablecoins would be providing financial product advice and would need to obtain an AFS licence.
 - (d) The activities of issuing, acquiring, varying or disposing of a regulated stablecoin would also constitute a financial service (of 'dealing' in a NCPF) and require an AFS licence.

- 3.16 Importantly, the Australian government has already proposed to regulate payment stablecoins as part of the payment systems reforms, and in particular, to regulate stablecoins as a type of a stored value facility (and not a NCPF as proposed by ASIC). The Government's proposed approach is therefore conceptually different to ASIC's proposal (acknowledging ASIC is restricted to regulating within the boundaries of the existing regulatory perimeter of the AFSL regime).
- 3.17 We believe the Government's proposal to regulate stablecoins as a stored value facility is a more suitable characterisation of the inherent feature of a stablecoin and therefore more appropriate. Similarly, the Government's proposal to impose a two-tier model to regulate stablecoins, i.e. both AFS licensing and potentially prudential requirements on major payment stablecoin issuers also appears justified in light of the core risks posed by payment stablecoins.
- 3.18 If the Government's reform is implemented in the near future, there would be a clear mis-alignment between ASIC and Treasury. We would also have significant unnecessary regulatory burden on industry as a result of having to potentially obtain an AFS licence now (in response to ASIC's view on 'regulated stablecoins') and then pivoting to take necessary steps to comply with the new legislative framework for the regulation of payment stablecoins (assuming it is enacted).
- 3.19 ASIC's proposal to regulate stablecoins as a financial product may also have the potential to reduce consumer choice and drive down competition and innovation in the Australian market. In particular, we may see offshore-based issuers of 'regulated stablecoins' ceasing operations in Australia and seeking to restrict/prohibit Australians from accessing the relevant stablecoins. In addition, local innovators may decide to establish operations in offshore jurisdictions that do not impose the same type of regulatory treatment of stablecoins.

A3.Q3: 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.

- 3.20 We believe there may be a need for transitional provisions and/or regulatory relief if ASIC maintains its view that a stablecoin may be a financial product in its final guidance.
- 3.21 Issuers of stablecoins would need time to consider their business and whether it is affected by the Government's reforms, and subsequently undertake a licence application or variation to ensure compliance with the new regime. Time would also be required to comply with any tailored obligations that are imposed on payment stablecoin issuers. The same considerations would also apply to other participants who deal with stablecoins.

4. ASIC's approach to licensing digital asset businesses

B1.Q1: Do you agree that ASIC should progress with a class no-action position as proposed here? If not, please give reasons.

- 4.1 We agree that ASIC should provide class no-action relief. However, if ASIC maintains its proposal to regulate stablecoins as a financial product, the terms of the relief should be amended to better support industry to meet the licensing obligations that flow on from ASIC's proposal (to regulate stablecoins) as well as to clarify when and how the relief applies.
- 4.2 This would allow digital asset businesses currently operating in good faith to continue doing business whilst aligning its business to the final regulatory guidance published in the updated INFO 225.

B1.Q2: Are the proposed conditions appropriate? Are there any additions or changes to the proposed conditions that will be more effective for investor protection?

- 4.3 We broadly agree with the proposed conditions but wish to make the following submissions in relation to the conditions listed in the Consultation Paper.

Paragraph (b): commencement of operations

- 4.4 The proposal here is for the no-action position to only apply to persons that 'commenced operations in Australia before the date of the Consultation Paper'. We make the following observations regarding this condition:
- (a) It is not clear whether the reference to 'commencement' is intended to mean commencement of any business in Australia, or whether it is intended to mean those operations/services that would be the subject of the no-action position. We assume the latter but suggest this be clarified.
 - (b) It is not clear whether an offshore entity that provides services to Australian customers from offshore would be taken to have 'commenced operations in Australia'. Again, we believe this should be clarified.
 - (c) We believe it is unreasonable for ASIC to set the 'cut-off' date to be the date of the Consultation Paper. Given this is a consultation process, there remains uncertainty for industry as to whether and how ASIC will change its guidance in the final version of INFO 225 – particularly in relation to stablecoins (if ASIC maintains its view to regulate stablecoins). We believe it would be more appropriate for ASIC to use the date the final INFO 225 is published as the relevant cut-off date – at least in respect of stablecoins.

Paragraph (c): period before lodging licence or variation application

- 4.5 The proposal here is for the no-action position to apply **from the time that a person lodges** an AFS licence or variation application, provided that such application is lodged within 6 months from the date that the updated INFO 225 is published.
- 4.6 Accordingly, the no-action position will not apply between the time of publication of the updated INFO 225 and submission of a industry participant's AFS licence application. This would mean that businesses that currently do not believe they were providing financial services in relation to digital assets could still be subject to enforcement action between the date of publication of the updated INFO 225 and the date they lodge an AFS licence application in relation to those activities.
- 4.7 The only way to avoid this outcome would be for the business to lodge an AFS licence application on or before the date of publication of the updated INFO 225. This significantly reduces the usefulness of the no-action position proposed by ASIC, particularly in relation to ASIC's new position on stablecoins.
- 4.8 Given the draft nature of ASIC's proposals in CP 381, we do not believe it is reasonable or appropriate to require businesses to implement changes and/or prepare licence and/or variation applications before ASIC's updated guidance is finalised. We therefore submit that this condition should be amended to specify that the no-action position will apply to all digital asset service providers between the date of publication of the updated INFO 225 and the date they submit their AFS licence or variation application, provided that they submit a complete application within the time specified in the no-action position.

Paragraph (c): length of no-action period

- 4.9 ASIC has proposed 6 month no-action position. We submit that a longer period would be appropriate.
- 4.10 In our view, a 9 month period would be more appropriate for digital asset service providers generally. This would allow digital asset service providers sufficient time to consider the guidance published in the updated INFO 225 (including obtaining external legal advice and seeking internal approvals to prepare regulatory applications) and to prepare and submit the relevant applications.
- 4.11 If ASIC maintains its view that a stablecoin may be a financial product in its final guidance, we submit that a longer period of 12 months would be more appropriate for businesses providing services in relation to stablecoins to take into account the fact that the proposal to regulate stablecoins is a significant deviation from both ASIC's existing position and the market's understanding of the application of the AFS licensing provisions to stablecoins. Affected industry participants will therefore need additional time to adjust their business operations to reflect ASIC's new guidance.

Paragraph (d): Length of no-action period

- 4.12 Please see our response in relation to para (c) above. A similar approach (albeit with extended timelines) should be applied in relation to market or CS facility licence applications.

Paragraph (i): Exclusion from no-action position

- 4.13 We agree that ASIC should have a right to exclude a person from the scope of the no-action position. However, we suggest that the condition be amended to include the grounds on which ASIC may exercise this right. Furthermore, the notice should not take effect from the date of the notice. Sufficient time should be provided for the person to conduct an orderly wound up / exit of their business in Australia.

B1.Q3: 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.⁸⁷

- 4.14 Yes, we agree, but please see our response under B1.Q2 above as to the coverage of the no-action position and when it should commence.

B1.Q4: 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.

- 4.15 Please see our response under B1.Q2 above. We agree with the imposition of a deadline to apply for (or vary) an AFS licence or commence pre-lodgement discussions, as this would ensure prompt action by digital asset service providers to ensure compliance with the regime. However, for the reasons set out under B1.Q2 above, we recommend extending the deadline.

B1.Q5: 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?

- 4.16 We are of the view that if ASIC is intending to provide relief from licensing requirements, it should also provide relief to other financial product obligations (other than standard consumer protection measures relating to false, misleading and/or deceptive conduct and unconscionable conduct and AFCA membership), including the obligation to prepare a PDS and comply with the DDO regime.
- 4.17 It will take affected business a significant amount of time to comply with financial product obligations. If no action relief is not provided in respect of these obligations, it will significantly reduce the benefit of the proposed no-action position. We therefore submit that the no-action position be extended to other the other financial product obligations arising under Parts 7.8A and 9 of the Corporations Act. This should be for the same period as we have suggested in paragraphs 4.9-4.11 above, i.e. 9 months for digital asset service providers generally and 12 months for stablecoin service providers. This period should not be linked to submission of AFS licence or variation applications, otherwise this will create a disincentive to lodge such applications early. All affected businesses should have the same time to comply with the financial product obligations.

5. Licence applications and ongoing obligations

B2.Q4: 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?

- 5.1 Similar to other situations where the AFS licensing regime has been extended to new products or services (e.g. claims handling), we recommend ASIC take into account the experience of responsible manager candidates who have experience in relation to digital assets or services even where the business providing that digital asset or services may not have been doing so within a regulated environment. That situation could arise where the relevant business has been engaging in business in a foreign jurisdiction which does not regulate the digital asset/service in the same manner as our AFS licensing framework. It could also arise where, as is the case with stablecoins, the digital asset has generally not been considered to be a financial product under our AFS regime until now (i.e. after publication of the updated INFO 225 if ASIC maintains its position in CP 381).

- 5.2 Even if a responsible manager candidate's experience has not been obtained within a regulated environment, we submit that the core knowledge and experience they should be expected to have relates to the operation of those products rather than how they are regulated in Australia.

Please contact us if you have any questions about any aspect of our submission. We have a strong commitment to working with ASIC and the industry to establish a regulatory framework for crypto and digital assets that is both fit for purpose and appropriately balances the need for innovation and consumer protection. We would welcome the opportunity to meet with ASIC to discuss our submission.

Yours faithfully

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