Digital Assets Team
Australian Securities and Investments Commission
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Melbourne VIC 3001

via email: digital.assets@asic.gov.au

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Dear Digital Assets team

I am pleased to attach Kraken's views on the Australian Securities and Investments Commission's (ASIC) consultation paper *"CP 381 Updates to INFO 225: Digital Assets: Financial Products and Services"* for your consideration.

We are one of the world's oldest and largest global digital asset businesses, founded in 2011 as one of the first exchanges to offer spot trading. Kraken's services are subject to regulatory licenses and permissions as applicable in the jurisdictions in which we operate. We are trusted by over 14 million traders and institutions around the world. We have the distinction of trading over 200 digital assets across multiple fiat currencies which enables our customers to navigate the crypto landscape with ease and flexibility.

Our history in Australia stretches back to 2013 with the founding of Bit Trade Pty Ltd, one of Australia's longest-running crypto exchanges. Kraken acquired Bit Trade to support Australians in accessing crypto so that they can achieve financial freedom and inclusion. In addition, Kraken acquired Beaufort Fiduciaries Pty Ltd, an Australian financial services licensee, to provide an expanded set of products to wholesale clients. We are registered with AUSTRAC as a Digital Currency Exchange and have been engaging separately on issues relating to AML/CTF and Travel Rule implementation.

As cryptocurrency adoption among Australians increases, it is essential that regulations acknowledge and adapt to the vital role digital currency plays in providing faster, cheaper transactions as well as a myriad of use cases throughout the digital economy.

Close collaboration between industry, regulators and government will enable us to establish Australia as a world-leading jurisdiction for digital asset regulation, setting a benchmark for others to follow and ensuring our continued participation in this dynamic and rapidly growing industry.

With this in mind, we thank ASIC for taking a collaborative approach to regulation and providing the opportunity for industry participants to reflect on its proposals. In order to create a clear and effective regulatory environment for digital assets, we would like to highlight the following points in our response:

- **Regulating through the Treasury's pending framework**: We have been heavily engaged with the Treasury as it develops proposals for a regulatory framework for digital assets. We strongly support an approach which treats tokens as non-financial products whilst regulating the risks at the level of centralised intermediaries such as custodians, issuers and exchanges. We are therefore concerned that some of the proposals contained within CP 381 run counter to this approach, particularly the illustrated examples which aim to split out various types of assets.

- **Instilling a broad no-action relief for firms acting in good faith**: As new licensing obligations are introduced for digital asset firms, it is extremely important to provide a safe harbour for firms trying to navigate a shifting and complex regulatory environment in good faith. As part of this, we

would like to see a specific prohibition from regulatory enforcement for historical conduct which, as a result of the reforms, brings that conduct within the AFSL perimeter.

- **Regulating staking as a unique cryptoasset activity:** Staking is a novel and unique activity without a clear analogy in traditional financial services and should be regulated as per its features and idiosyncratic risks. This does not mean a light touch approach - on-chain staking intermediaries should be held to a high standard around consumer protection and transparency, asset safekeeping, and resilience. Australia should follow the UK's lead and regulate intermediated staking as a standalone financial service as part of the upcoming digital asset framework.

- **Recalibrating regulation of stablecoins:** Given their strong potential to revolutionize the payments industry, and deliver economic benefits to consumers and businesses alike, we encourage ASIC to carefully consider regulation of stablecoins. Despite these payment benefits, we note that not all stablecoins are used predominantly for payments. We therefore warn against shoehorning existing stablecoins into being regulated as a non-cash payment facility.

- **Aligning regulation of wrapped tokens with its underlying use case:** We also note that wrapped tokens are generally used to allow holders to deploy assets on a different blockchain rather than to gain price exposure to the underlying asset. This is an important distinction because wrapped tokens allow users to engage with protocols across different blockchains. Regulating them as derivatives would therefore misunderstand their purpose.

We would be very happy to meet with your team to discuss the above points in further detail if helpful.

Yours sincerely,

Jonathon Miller
Managing Director Australia
Kraken

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Consultation Response

Part A: The proposed updates to INFO 225

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.

- As an overarching observation, we are concerned that the Infosheet 225 consultation undercuts the Treasury's existing workstream on establishing market structure legislation for cryptoassets. The cross-over between the two workstreams has sent mixed signals to industry and made it difficult to assess the proposals contained within this consultation.
- We strongly support the Treasury's approach which would treat tokens as non-financial products whilst regulating risks at the level of centralised intermediaries. This removes the need to make judgements on a token-by-token basis and instead focuses efforts on where the risks are most prominent. Indeed, this is in line with approaches taken in leading jurisdictions such as the EU and the UK.
- We do however understand that ASIC is setting out its interpretation of how current legislation applies to cryptoassets and note the delay to the Treasury's consultation process. However we would appreciate explicit clarification in the draft that ASIC's interpretation of the law is distinct from the law itself and that only the courts can determine application of the law.
- Despite this strongly held view, we include detailed comments on the proposals within the response below, with the caveat that it has been difficult to assess the proposals in isolation.

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

- We have particularly strong views on the following topics:
    - **Staking**: It is premature to ascertain whether staking arrangements may or may not form a financial product when staking is being considered as part of the treasury's legislative framework. We encourage Australia to follow the lead from the UK Treasury, who explicitly stated staking is a unique crypto activity and is in the process of developing a bespoke regime to regulate it, and the European Securities and Market Authority who recently issued an opinion agreeing that staking is inherently a non-financial activity.
    - **Wrapped tokens**: The classification of wrapped tokens is extremely broad and, in our opinion, misunderstands their most common use case as a tool for interopability between blockchains. Wrapped tokens are almost exclusively used to enable users to deploy assets on another chain, e.g. using Bitcoin to engage with activities on the Ethereum chain. This is a unique cryptoasset activity and is not utilised as a method of risk management or to gain exposure to price movements in another asset.

- **Payment stablecoins:** Treating stablecoins as non-cash payment facilities would be out of step with the Treasury's proposals. Furthermore, we note that presently most stablecoins are used for a broad range of use cases, including both payment and non-payment activities (e.g. as a stable store of value and a 'safe haven' within the digital asset sphere). For this reason, we would encourage an activity-based regulatory regime that accounts for the risks associated with a particular use case rather than trying to retrospectively fit narrow regulation to multi-use tokens.

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.

- As stated above, we strongly believe that the unique nature of staking and its importance to enhancing cyber security and functioning of proof-of-stake blockchains merits the activity to be considered for bespoke, standalone regulation.
- We note that whilst staking may be an ancillary service to custody, custody is not a pre-requisite for staking services. Furthermore, staking services vary widely in their structure and should not be uniformly categorized under financial product regulations.

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.

- We have provided comments on each of the examples in the table below:

Example	Comment
Example 1 Exchange Token	• Exchange tokens, often used for transaction fee discounts on the native platform, may not inherently be financial products unless they confer additional rights such as dividends or redemption features, highlighting that the broader context should be considered and may bring the token within the financial product definition. • Practitioners will benefit from more examples where exchange tokens evolve into financial products due to changes in their functionality or market use.

Example 2 Native Token Staking Service	• As per broader comments, we strongly disagree that staking is a financial service. As UK and EU authorities have attested, there are no true analogues in traditional finance and staking is more akin to a cyber security activity than a financial one. • We strongly encourage ASIC to consider staking regulation through the lens of the Treasury's legislative framework. There are a number of staking models in the market and a one-size-fits-all approach will only serve to limit Australians' ability to participate in blockchain validation and potentially undercut security of networks.
Example 3 In-Game Non-Fungible Tokens (NFTs)	• Our reading of this example indicates that most in-game NFTs are not financial products unless they have investment-like features or secondary market liquidity. • It would be helpful to include a scenario where an NFT confers future economic rights (e.g., royalties from secondary sales), which might bring it within the financial product definition.
Example 4 Yield-Bearing Stablecoins	• We would encourage ASIC to carefully consider regulation of stablecoins given their strong potential to deliver faster payments at a lower cost to consumers and businesses alike. • In addition to removing the need for intermediaries, increasing the efficiency of settlement functions, a core advantage stablecoins have over traditional payment instruments is that revenue can be generated from investing backing assets in low-risk, liquid instruments rather than by levying fees on consumers and businesses through interchange and merchant fees. • There is therefore a strong case for allowing issuers to pass yield on to consumers to enable them to share in the commercial success of the project. This should be optional depending on the model of stablecoin offered.
Example 5 Gold Asset Referenced Token	• We would appreciate further clarification of the regulatory perimeter - for instance, are there examples of gold-referenced tokens which may not trigger a financial product classification? How would ASIC classify a gold-based token with no redemption rights?

Example 6 Non-fungible token memberships	• We broadly agree that this would not constitute a managed investment scheme.
Example 7 Token Representing a Claim for Pre-Paid Services:	• We broadly agree that this would not constitute a managed investment scheme.
Example 8 Fundraising for a New Blockchain or Blockchain Product	• The example implies that tokens sold as part of a fundraising initiative for blockchain development, often meet the definition of a managed investment scheme under s764A(1)(b). This would be when the funds are pooled and contributors share in the profits or success of the project. • Tokens sold purely as donations (without expectations of profit) likely fall outside financial product definitions while tokens providing early access or discounts but marketed as speculative opportunities may blur the lines, necessitating clearer regulatory thresholds. Expanding on scenarios where the same token offers transitions from utility to investment features post-fundraising would be helpful. There may be a need for ongoing compliance reviews as product features evolve.
Example 9 Meme Coins	• We would encourage ASIC to consider a regulatory regime which is based on specific cryptoasset activities rather than a category of token. • Whilst, as the Example 9 states, there is typically not a sufficient connection between the use of initial funds and potential capital gain, it is still important to regulate the issuance and custody of memecoins to the same standard as other tokens to avoid consumer detriment.

Example 10 Tokenised Concert Ticket	• We broadly agree that this would not constitute a managed investment scheme.
Example 11 Tokenised Security	• We agree that products should be regulated as per their underlying use case and that the act of tokenisation does not alter the classification.
Example 12 Contract for Difference Over a Digital Asset	• As above, we agree that tokenization does not impact the regulation of the underlying product and that contract for differences are derivative products.
Example 13 Digital Asset Wallet	• We disagree that digital asset wallets should be necessarily categorised as a non-cash payment facility. Whilst one may or may not be able to initiate payments from wallets, we strongly believe that regulation should focus on the core purpose of a wallet rather than ancillary activities. • This is especially the case for self-hosted wallets, whereby the wallet provider is simply providing basic IT services to enable the customer to custody their own assets. In line with international best practice, we believe that self-hosted wallets should be considered separately from the main custody framework.

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.

- No further comments.

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

- We have included unintended consequences as part of our answer to question 4.

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? ".

- We have identified the following observations on wrapped tokens and stablecoins:
    a. **Wrapped tokens**: We would like to reiterate previous comments on wrapped tokens, particularly the fact that they are used almost exclusively for utility purposes - deploying assets on different blockchains without exiting positions. There is no true analogue in traditional finance and we would therefore encourage bespoke regulatory treatment as a non-financial product.
    b. **Stablecoins**: We also note that the stablecoin classification is extremely broad and could potentially capture almost all existing stablecoins. It is also unclear whether this would apply only to those denominated in Australian dollars or whether the intention is to capture all fiat-referenced stablecoins.

A3Q2: What are the practical implications for businesses (e.g. for issuers or intermediaries) if wrapped tokens or 'stablecoins' with these features were classified as financial products? Please give details.

- We are concerned that the proposals would likely bring forward a chilling effect on listing of wrapped tokens as derivative regulation is disproportionate to the use cases and risks at hand. We expect this would be to consumers' detriment as they will no longer be able to switch between blockchains with ease, e.g. to engage with defi protocols.
- The impacts of the stablecoin market could also be significant if a wide interpretation and application of a non-cash payment facility is taken, as argued above.

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.

- We are concerned that ASIC's approach would create significant cliff-edge risks for users of these products. In the event it proceeds regardless, a significant transition period would be required in order to allow customers to exit positions without major disruption to the market (including possible depegging of stablecoins on secondary markets).

Part B: Licensing of digital asset businesses and their ongoing obligations

B1 - General comments

- We reiterate our comments in relation to Question 1; namely, that we strongly support the Treasury's approach to regulating digital asset platforms. While we appreciate ASIC's desire to bring forward regulatory clarity, we think it is important that ASIC work in alignment with Treasury's proposal, rather than front-run it.

- At the same time, there is an undeniable trend of crypto-native businesses applying for or acquiring a range of AFSL authorisations. This includes Kraken, as one of our group companies is an AFS licensee.[1] Our observation is that such licenses are used to offer traditional financial products which are underpinned by digital assets, such as futures where the underlying contract and associated collateral is in digital assets.

- To date, there has historically been a large degree of uncertainty over the spot trading and ancillary activities of digital assets, owing to whether any underlying digital asset is a financial product. In our view, the most efficient solution to this conundrum is the Treasury proposal, which seeks to regulate the activities themselves, putting to rest the endless spectre of whether a single digital asset (out of the vast universe of digital assets available for trading) is a form of financial product.

- Accordingly, we think it is premature to provide direct answers to many of the questions asked in Part B, because it assumes ASIC will continue to front-run Treasury's (and, by extension, the Government's) policy work in this space. Because we think ASIC should instead work in coordinated alignment with the Government, our answers below seek to provide our general views about appropriate timelines and conditions for transitionary measures (including no-action type arrangements and license modifications) for the regulatory reform that is currently proposed.

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

- As part of any regulatory reform process, there must be acknowledgement that the sector in question will, at some point, require a license or authorisation for activity they have been engaging in and for which they historically did not hold that license or authorisation. Accordingly, our view is that there should be a safe harbour for businesses who, as a result of the reform process, are clearly made obligated to acquire a specific type of license. While it is within ASIC's remit to grant 'no-action' type relief (and we are supportive of the motivation to offer 'no-action' type relief), more than that, we also think Treasury should include a specific prohibition from regulatory enforcement action for

[1] Beaufort Fiduciaries Pty Ltd (ACN 162 139 871 | AFSL 545124).

historical conduct which, as a result of the proposed reforms, would bring that conduct within the AFSL regulatory perimeter.

- We broadly agree with the aims of the class no-action position, however we would strongly advocate for this to be applied broadly t in the context of the Treasury's pending regulatory framework.

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

- In the spirit of working in alignment with the Treasury proposal, and as a matter of procedural fairness, we think ASIC should adopt an official position of 'no-action' to align with the transition period following the Treasury proposal becoming law. This should be applied broadly to include matters contemplated by draft INFO 225, except in cases of clear fraud or other intentional misconduct (of which we note ASIC has ongoing investigations). Any other type of enforcement action in the present environment would be a 'regulation by enforcement' type of test case, which we think is out of step with ASIC's own obligations and stated intent to provide commercial certainty to the entities within the financial system.

- Looking at the list of proposed conditions, in particular, we are particularly concerned that the no-action position would not be available in relation to lending/earn products, given much of the relevant case law is currently subject to appeal. Even more concerning is the prospect of ASIC writing to a person informing them that the no-action position does not apply to them, presumably irrespective of whether or not that person is also complying with the eight other listed conditions.

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.

- For reasons outlined above, we think ASIC should simply adopt a 'no-action' position toward the crypto industry (excepting instances of fraud and other intentional misconduct) until such time as the Treasury proposal has become law and any transitionary period has elapsed.

- We understand that legislation giving effect to the Treasury proposal has been a victim of limited Parliamentary time but remains a priority for the Government. Conversations with both the Government and Opposition suggest that the pending crypto legislation will be prioritised following the pending election. If that is the case, then we expect the transitionary period would not be materially different to the periods contemplated in ASIC's consultation paper (perhaps a year longer). In any event, the entire industry

would be moving forward with certainty during that period as a result of what the legislation requires.

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.

- For reasons outlined above, we think the deadline for applying for the relevant license authorisations should be that imposed by the forthcoming legislation, and that ASIC should not take enforcement action in relation to such matters until that time.

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?

- As per our previous answers, we support a broad approach to no-action until the Treasury framework becomes law and transition periods have elapsed.

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

- As a general principle, yes we agree that regulation should be technologically neutral in the sense that investor protection outcomes should be the same, however the differences in crypto-based operations or other distinct factors must be accounted for through the rulemaking, guidance and relief mechanisms, as appropriate.

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

- Yes. Detailed regulatory guidance that clearly articulates how regulated entities can comply with their obligations is an essential feature of any successful regulatory regime, particularly where that guidance minimises complexity, provides for flexibility in application and seeks to do so in a way that minimises costs on the regulated population.

- While it is difficult to provide an exhaustive list of the regulatory guidance that will need to be created or tailored in advance of the Treasury proposal becoming law, at a minimum we would suggest the following steps be considered:
    - In our view, INFO 225 (including this latest proposed update) is no longer fit for purpose. What began as a short document in 2018 is now 32 pages (at least in its proposed updated form). As INFO 225 itself states: "*[i]nformation sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance*." Once the Treasury proposal becomes law, ASIC

should draft a new Regulatory Guide that details the regulation of digital assets in Australia.

- In addition to the standalone Regulatory Guide, a number of existing Regulatory Guides will likely need to be updated to include specific guidance in relation to digital assets. To that end, we note ASIC issued an update to Regulatory Guide 133: *Funds management and custodial services: Holding assets* in December 2024 to include guidance in relation to holding crypto assets (see Section F). While this type of an update is what we would expect would be needed following the passage of legislation and the transitionary period, we would caution ASIC from updating too much of its regulatory guidance preemptively in the event it is required to duplicate its effort post-reform. We would also expect any such updates would be published in draft for consultation and feedback.

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.

- In general terms, we are supportive of the custody regime for digital assets proposed by the Treasury in its draft proposals and support policy development in the context of the broader regime.

- In line with this, we are supportive of omnibus client accounts - they are the best option for protecting client assets when it comes to managing the operational and cyber risks of crypto. We strongly believe that best-in-class custodians deploying industry-leading security should be able to safeguard Australian customer assets, wherever in the world those custodians happen to be.

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?

- Whilst there are significant overlaps in terms of competencies between traditional finance and digital asset exchange, we also note the idiosyncratic nature of digital assets may require specific knowledge, e.g. differences in custodying keys or running a staking node where there is no exact parallel in financial services.

- We therefore strongly encourage ASIC to acknowledge experience in the digital asset sector as equivalent to traditional finance experience but also, where appropriate, recognise knowledge and expertise to demonstrate competence where digital asset activities are unique.

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?

- We disagree with the notion that existing authorisations are appropriate for digital asset service providers. We strongly support the Treasury's proposal to regulate the majority of digital asset-related activity under the proposed 'digital asset facility' authorisation, acknowledging that the existing authorisations will have a role to play in relation to products and arrangements that are clearly financial products (eg, crypto-based derivatives, P2P transfer/payment facilities, digital asset tokens which are *clearly* securities, etc.).

- As noted above, while there is a general trend of crypto-native companies obtaining AFSLs for such products and arrangements, there has remained a large degree of uncertainty over the spot trading (and ancillary) activities of crypto businesses, and whether (and if so, how) they fit within the existing framework. That uncertainty stems from the looming spectre of any single digital asset offered through such activities being a financial product. While we can all agree that a digital asset token representing (and providing the holder with all of the rights and obligations in relation to) a single share of Commonwealth Bank stock would be a security, the problem we have all been grappling with in Australia is the vast number of tokens which do not neatly map to any one of the myriad of financial products listed in the Corporations Act.

- With respect, we do not think that successive Governments have set out to regulate digital assets on the basis that the current version of the Corporations Act (and, by extension, the existing AFSL authorisation suite) is so readily capable of effective regulation over the digital asset ecosystem. In our view, it is not. Nor do we think the problem is solved by adopting an expansive interpretation of the Corporations Act. This only exacerbates uncertainty, which is why we are so strongly supportive of the Treasury proposal. It is an efficient approach, precisely because it targets the risks posed by centralised intermediaries like crypto exchanges, and regulates those risks without leaving the 'digital-asset-as-financial-product' boogieman lingering around, only to be solved through expensive litigation where the outcomes are not certain, and where investors may or may not be better off as a result.

- While we accept there would, of course, remain digital asset tokens that would be clear examples of a financial product (such as the Commonwealth Bank example mentioned above), we expect this would be a clearly identifiable subset of tokens, for which existing authorisations and requirements would be generally appropriate. But for the vast majority of digital assets, this would not be the case, so, for the sake of both business certainty and investor protection, an alternative regulatory pathway needs to be created.

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?

- We think this is a question best answered following the Treasury proposal becoming law. This is because we would expect that the offerings which ASIC has referred to as constituting, eg, an atypical form of derivative (ie, because it is not an option, swap or future, or otherwise used for risk management, hedging or speculation) could be captured under the digital asset facility authorisation, or perhaps even accounted for as part of the forthcoming payment system reforms (or both). An example which comes to mind is a yield-bearing stablecoin (Example 4 in draft INFO 225).

- We are concerned that expanding the concept and associated AFSL authorisation for a derivative is premised upon the broadest possible reading of s761D of the Corporations Act. With respect, we do not think the law is sufficiently settled to justify such a position. Rather, a yield-bearing stablecoin could be accounted for both as a 'financialised function' (using the Treasury proposal concept) and 'payment stablecoin' under the forthcoming payment reforms. In this sense, we would encourage ASIC (and all stakeholders in the regulatory reform process) not to allow financial product definitions to become so untethered from their common commercial applications as to make those definitions functionally useless.

- Similarly, we would expect that the Treasury proposal and forthcoming payment system reforms would temper the need for AFSL applicants to select the 'miscellaneous financial activity' category.