28 February 2025

Digital Assets Team
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Dear Digital Assets Team

RE: Consultation Paper 381 and updates to INFO 225

Introduction

The Financial Services Council (**FSC**) welcomes the opportunity to provide feedback on Consultation Paper 381 and updates to INFO 225 regarding digital assets.

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, financial advice licensees and investment platforms. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses. The financial services industry is responsible for investing more than $3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is one of the largest pools of managed funds in the world.

The FSC does *not* represent businesses directly offering digital assets to consumers. However, the FSC does represent some:

1) fund managers, superannuation funds, IDPSs[1] and IDPS-like platforms who may:
   a) offer financial products with an exposure to digital assets;
   b) utilise digital asset-related technology such as blockchain and tokens; or
   c) at some stage:
      i) consider offering digital assets potentially capable of constituting financial products directly to investors; or
      ii) engage in (a) or (b) above.
2) financial advice licensees whose financial advisers may in some instances consider that it is in the best interests of some clients to allocate a responsible portion of their investment portfolios to digital assets.

General observations

Investments in digital assets are becoming increasingly mainstream. In 2021, the Senate Select

[1] Investor-Directed Portfolio Services.

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Committee on Australia as a Technology and Financial Centre found that Australians are "*one of the biggest adopters of cryptocurrencies on a per capita basis.*"[2] During the consultation period for this submission, the price of bitcoin has ranged from nearly 170,000 AUD to around 134,000 AUD, illustrating the volatility of even well-established digital assets. While this illustrates the volatility of digital assets, digital assets may still have a place in a well-diversified portfolio for those investors who seek exposure to digital assets.

Invariably, growth in demand for digital assets has been accompanied by calls for regulations to protect consumers and provide improved regulatory certainty for those in the business of providing services which are directly and indirectly connected with digital assets. As acknowledged by the International Organization of Securities Commission's (**IOSCO**):

> *Global retail investor exposure to crypto-assets has grown exponentially in recent years, as have retail investor losses due, not only to market conditions, but also regulatory non-compliance, financial crime, fraud, market manipulation, money laundering and other illegal crypto-asset market practices. The fragility and interconnectedness of the crypto-asset market continues to leave entities and investors exposed to significant losses triggered by all too frequent shock events.*[3]

The FSC supports targeted, proportionate and pragmatic regulation of the digital assets sector to protect consumers and provide greater regulatory certainty, while also balanced against the need to ensure that choice and innovation are not hampered. To this end, the FSC notes the Treasurer has indicated "*exposure draft legislation for the Government's 'digital asset platform' and 'payment stablecoin' reforms … will be released in 2025*".[4]

The FSC would like to see any new regime or any re-interpretation of existing financial laws also embody principles of competitive neutrality. The FSC considers that financial products which are not digital assets should be held to essentially the same standard as financial products that are digital assets, subject to potential allowances for differences in the nature of the assets. Financial institutions should not be unduly precluded from adopting or experimenting with new technologies.

When discussing possible regulation of digital assets, it is important to note that if ASIC provides digital asset firms with assorted licences and/or oversees a more robust regulatory framework, the speed and immutability of many digital asset transactions means that an enhanced regulatory presence may only provide an illusion of security. It could alternatively be argued that it is better to acknowledge digital assets are high risk and investors should take precautions accordingly.

Fund managers can mitigate risks for consumers by implementing best practice investment strategies within Australia's protective jurisdiction. Additionally, they can boost the capital available to the digital asset sector, creating local employment opportunities. However, to realise these benefits, fund managers need clearer guidance on their legal obligations and any accompanying compliance framework.

In this submission, the FSC advocates for targeted regulations and in doing so applies the same standards and objectives to ASIC's proposed changes to INFO 225 as it expects to apply to Treasury's forthcoming exposure draft on the digital asset reforms.

Key arguments in this submission include:

- To minimise uncertainty and disruption to industry, ASIC may wish to implement changes to INFO 225 be aligned with the legislation which is expected in this area;

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[2] The Senate, Final Report, Select Committee on Australia as a Technology and Financial Centre (October 2021) at page ix.
[3] IOSCO, Final Report: Policy Recommendations for Crypto and Digital Asset Markets (16 November 2023) at page 11.
[4] Joint media release by the Hon Dr Jim Chalmers MP, Treasurer, and the Hon Stephen Jones MP, Assistant Treasurer and Minister for Financial Services, Fostering an innovative, safe and secure digital asset industry (4 December 2024).

- ASIC should not apply regulatory requirements retrospectively where pre-existing AFS licence authorisations permit existing REs to invest in digital assets. These should continue to operate, accounting for REs existing expertise in managing multiple diversified MISs, and noting increasing growth and choice in this area should not be inadvertently hampered by unnecessary extra regulatory burden;
- Related to the above point, under ASIC's proposal that new registered schemes must be licensed as a 'named scheme' for two years before being permitted to operate as a 'kind scheme', existing REs who operate more than two MISs and therefore have requisite experience should not be required to divest digital assets (also noting that to divest due to needing to vary license conditions retrospectively may not be in the financial interests of the investor); and
- It is essential to put in place clearer transitional arrangements and resolve liability questions that the draft INFO 225 amendments would create where understanding of existing licensing conditions are changed, potentially opening market participants up to third party litigation.

List of recommendations:

1.1 The FSC recommends that competitive neutrality should be upheld in financial markets.

2.1 The FSC recommends that a less subjective criteria should be developed for determining whether digital assets constitute financial products.

2.2 The FSC recommends ASIC consult closely with Treasury, to minimise disruption to industry, and that ASIC adopt a transition timeframe which is aligned with the Government's planned legislative reforms.

3.1 The FSC recommends that REs with more than two MISs not be required to divest digital assets.

3.2 The FSC recommends that pre-existing AFSL authorisations continue to operate and well-established REs with demonstrated organisational competence not be treated like new market entrants.

3.3 The FSC recommends that ASIC include additional worked examples in INFO 225, particularly in relation to REs and financial advisers.

3.4 The FSC recommends that ASIC clarify the interaction between RG274 and INFO 225 with respect to mass market advertising of financial products with a digital asset exposure.

4.1 The FSC strongly recommends that IDPS and IDPS-like platforms not be required to obtain an Australian Market Licence if they offer their investors an exposure to digital assets.

4.2 The FSC recommends that digital asset exchanges not be required to hold an Australian Market Licence.

5.1 The FSC recommends that ASIC acknowledge the capacity constraints in the financial adviser profession by staging the implementation of any new regulatory interpretations which have the effect of significantly increasing existing burdens on financial advisers.

ASIC should provide greater clarity to financial advisers on the circumstances in which they can safely advise their clients to invest in digital assets.

6.1 The FSC recommends that ASIC work with APRA to provide greater clarity to RSEs on the circumstances in which they can safely invest in digital assets.

7.1 The FSC recommends that in addition to a class no-action position, the Government investigate ways to provide discretionary protection against third party actions.

7.2 The FSC recommends that ASIC adopt clear transitional arrangements which set unambiguous expectations for how REs, RSEs and financial advisers ought to comply with ASIC's revised regulatory expectations.

1. A qualitative approach to classifying digital assets as financial products

Since digital assets are location neutral it is important to encourage compliance by designing facilitative regulations. This represents our best hope of avoiding an exodus of digital asset providers which would in practise deprive Australian consumers from the benefit of many regulatory protections.[5]

In CP381, ASIC indicates "*We consider that many digital assets (whether alone or in combination with other products or services) are financial products under the Corporations Act*"[6] and flags the regulator will be moving to a qualitative assessment of whether a digital asset is a financial product.

As set out in CP381:

> *We think that an appropriate default position is that the existing AFS licence requirements, conditions and processes should apply to those digital assets that* are *financial products, and to businesses providing financial services in relation to those products. …*
>
> *The International Organization of Securities Commissions (IOSCO)'s recommendations in relation to crypto- and digital assets apply a principle of 'same activity, same risk, same regulation/regulatory outcome'. Many international regulators have applied this principle. The Government's proposed reforms adopt a 'similar activity, similar risk, same regulatory outcome' approach.*[7]

However, the formal IOSCO recommendation was:

> *Regulators should use existing frameworks* ***or New Frameworks*** *to regulate and oversee crypto-asset trading, other crypto-asset services, and the issuing, marketing and selling of crypto-assets (including as investments), in a manner consistent with IOSCO Objectives and Principles for Securities Regulation and relevant supporting IOSCO principles, standards, recommendations, and good practices (hereafter "IOSCO Standards"). The regulatory approach should seek to achieve regulatory outcomes for investor protection and market integrity that are the same as, or consistent with, those that are required in traditional financial markets.* (emphasis added)[8]

The FSC believes competitive neutrality should be upheld in financial markets: financial products which are not digital assets should be held to essentially the same standard as financial products that are digital assets, subject to potential allowances for differences in the nature of the assets. In line with the above IOSCO recommendation, the FSC supports accomplishing this objective through bespoke legislation which suit the needs of digital assets platforms.

However, the FSC strongly recommends that legislative reforms or changing regulatory expectations from ASIC should not allow the fig leaf of being a technology or fintech company to exempt a company from the types of responsibilities which are owed by a financial services provider to its consumers. To do otherwise would create an uneven playing field for industry, blur the line between financial

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[5] Swyftx submission to the Senate Select Committee on Australia as a Technology and Financial Centre (June 2021) at page 2; FinTech Australia submission to the Senate Select Committee on Australia as a Technology and Financial Centre (July 2021) at page 10.
[6] CP381 at page 14.
[7] CP381 page 18.
[8] IOSCO, Final Report: Policy Recommendations for Crypto and Digital Asset Markets (16 November 2023) at page 14.

institutions and technology companies, and undermine important consumer protections. The FSC also considers that digital asset companies should be subject to the same capital adequacy requirements as their financial services equivalents where they perform substantively similar roles.

The FSC also suggests that if start-up technology or fintech companies are finding existing regulatory requirements difficult to comply with, then this is also the case for new market entrants in financial services. This should spark a broader conversation about the extent to which current individual regulations suppress competition and, therefore, undermine the ultimate best interests of consumers.

Lastly, any regulatory changes or revised regulatory expectations should not inadvertently preclude financial institutions from adopting or experimenting with new technologies such as blockchain and tokenisation, or stop them from including digital assets in their asset allocations.

Recommendation 1.1: The FSC recommends that competitive neutrality should be upheld in financial markets.

2. Uncertainty

Uncertainty from ASIC's approach

Draft INFO 225 indicates that digital assets should be assessed on a case-by-case basis to determine whether they might constitute a financial product. As stated in draft INFO 225:

> *The rights and benefits attached to digital assets, or products involving digital assets, are a key consideration in assessing the legal status of those digital assets and products as a financial product. These rights and benefits can be described in a 'white paper', a document issued by the business making the offer or sale of the digital asset. Rights and benefits may also be determined from other circumstances (e.g. by how the digital asset is marketed to potential clients, advertising materials, communications with clients and other documentation which sets out legal rights and benefits attached to a digital asset and its related arrangements).*
>
> *What is a 'right' should be interpreted broadly. Rights that may arise in the future or on a contingency, and rights that are not legally enforceable are included.*
>
> *The rights and benefits may change over time with changes in the features or uses of the digital asset, how common use of the digital asset evolves (see discussion below related to a facility for making a financial investment), and any changes to the marketing of the digital asset.*[9]

The FSC notes that this creates significant uncertainty even in the case of mainstream digital assets. It would therefore be helpful if ASIC could provide its definitive view on whether certain well-established financial products such bitcoin will ordinarily constitute financial products. The FSC is also concerned that if an overly purposive approach is taken to whether or not a digital asset is a financial product, this will foster uncertainty. For example, bitcoin should either be a financial product or not be a financial product when it is transacted: the answer should not depend on the underlying purpose for which it is bought or sold as this is not easily known to counterparties and exchanges. Similarly, it would be helpful to understand whether when INFO 225 refers to digital assets, it also intends to refer to digital asset futures.

Recommendation 2.1: The FSC recommends that a less subjective criteria should be developed for determining whether digital assets constitute financial products.

[9] Draft INFO 225 at page 4.

Uncertainty from three potential regimes governing digital assets

The FSC supports ensuring the maximise possible alignment between the regulatory activities being undertaken by ASIC and Treasury.

The FSC is supportive in principle of the idea of new legislation to clarify the legal status of digital assets and digital asset platforms, in the expectation that it will also provide greater certainty to the financial services industry. However, the FSC notes that if ASIC significantly changes its interpretation of the current law in line with its current proposed timeframe (during Q2 2025)[10] and further reforms are then passed by the Parliament, this means the practical obligations of market participants will have changed three times – potentially significantly – within a relatively short period. This will be a source of uncertainty and expense for industry and make Australia a less attractive place to domicile digital assets for investment purposes.

The FSC notes that Blockchain Australia observed in 2021:

> *Regrettably, a key ongoing challenge facing the industry in Australia to date has been that, because regulator guidance has often been either absent, ambiguous or out of alignment with the practical realities of the underlying technology, the crypto-asset sector in Australia has found that the costs as a result of this uncertainty are excessively high. Lawyers are often unable to give clarity and assurance on new services, and the subsequent dilemma facing businesses has been to either continue building at home or relocate overseas where the focus can be weighted towards managing growth rather than managing regulatory risks.*[11]

The FSC is concerned that the circumstances outlined above will exacerbate the situation described here by Blockchain Australia, and notes that the uncertainty also creates difficulties for the financial services industry.

Given ASIC's approach proposed in CP381 and draft INFO 225 will cause significant disruption to industry, yet will likely be superseded in whole or part by new legislation, the FSC respectfully suggests that ASIC may wish to adopt a timeframe for implementing the revised approaches set out in draft INFO 225 which is synchronised with the implementation of any new legislation, to minimise disruption.

By way of example, it is possible that some firms which ASIC has not previously considered to be obliged to hold an Australian Financial Services Licence (**AFSL**) might, under draft INFO 225, be required to hold an Australian Markets Licence, only to subsequently need to pivot and apply for a different type of licence under the scheme laid out in Treasury's forthcoming exposure draft legislation.

Recommendation 2.2: The FSC recommends ASIC consult closely with Treasury, to minimise disruption to industry, and that ASIC adopt a transition timeframe which is aligned with the Government's planned legislative reforms.

3. Fund managers

Licensing issues for responsible entities

As noted in draft INFO 225:

> *It is important to note that having an AFS licence does not authorise you to provide any and all financial products and financial services. Rather, you are limited to offering the financial*

[10] The timeframe flagged in CP381 for the adopted of a revised INFO 225.
[11] Blockchain Australia submission to the Senate Select Committee on Australia as a Technology and Financial Centre (23 July 2021) at page 37.

products and financial services that are detailed by the authorisations on your licence.[12]

Typically, the responsible entities (**REs**) which run managed investment schemes (**MISs**) are licensed at an asset rather than scheme level. A revised interpretation of how digital assets fit into the definition of "*financial product*" has implications for whether REs are and have been complying with the terms of their AFSLs. REs might therefore find themselves in breach of their existing AFSLs and/or forced to divest their holdings in digital assets. For reasons explained below in the class no-action section, the transitional and liability limitation arrangements proposed in draft INFO 225 are insufficient to relieve REs of these issues.

Fundamentally, there is a need to ensure that REs will not be retrospectively held to new regulatory expectations or expected to immediately meet new expectations without being given the opportunity to bring themselves into compliance with them.

In draft INFO 225, ASIC notes:

> *We expect that applicants proposing to operate registered schemes that hold digital assets (whether the scheme holds one or more digital assets) will initially apply for 'named scheme' authorisation. This authorises the licensee to operate only the specific digital asset registered scheme(s) named on the licence.*
>
> *Consistent with RG 105, we expect applicants to operate two named digital asset registered schemes for at least two years before we will consider granting them a broader 'kind scheme' authorisation for digital assets. The 'kind scheme' authorisation allows the licensee to operate multiple digital asset schemes without needing to vary the licence with each new scheme.*[13]

While it is prudent to expect many new market entrants to follow the staged approach to broad licence authorisations in RG105 (*Organisational Competence*), the FSC suggests that such an implementation approach will have unintended consequences for REs. Many well-established REs have diversified product offerings through their MISs and, in many cases, already administer more than two MISs. The FSC strongly recommends that, at a minimum, existing REs with more than two MISs not be required to divest digital assets from their additional MISs.

It is also unclear how any requirement to transition to "*named scheme*" authorisations under draft INFO 225 should be reconciled with pre-existing AFSL authorisations that permit "*kinds of registered scheme*" (asset-level authorisations) which already capture certain digital assets.[14] The FSC strongly recommends that pre-existing AFSL authorisations continue to operate and well-established REs with demonstrated organisational competence not be treated like new market entrants.

In CP381, ASIC set out the view that:

> *We generally do not believe that the licensing forms need digital asset specific authorisations (e.g. to separate 'digital assets that are securities' from securities more generally).*[15]

In line with this sentiment, the FSC maintains that where an existing financial institution is licensed to deal in financial products, it should not require further licensing authorisation (or additional approvals) to deal in digital assets which now happen to constitute financial products.

Furthermore, under ASIC RG2 (*AFS Licensing Kit: Part 2—Preparing your AFS licence or variation application*) there are at least four types of asset-level authorisations for REs which are potentially relevant to digital assets: derivatives, financial assets, crypto-assets and other. Industry would benefit from clarification in INFO 225 (and potentially, updates to RG2) as to the precise circumstances in which each authorisation should be sought for digital assets.

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[12] Draft INFO 225 at page 20.
[13] Draft INFO 225 at page 29.
[14] RG2 (*AFS Licensing Kit: Part 2—Preparing your AFS licence or variation application*) at RG2.92.
[15] CP381 at page 19.

Recommendation 3.1: The FSC recommends that REs with more than two MISs not be required to divest digital assets.

Recommendation 3.2: The FSC recommends that pre-existing AFSL authorisations continue to operate and well-established REs with demonstrated organisational competence not be treated like new market entrants.

More examples

Industry would also benefit from further examples in draft INFO 225 to reduce uncertainty. Examples which would be particularly instructive would involve REs that offer an MIS that has underlying holdings in digital assets which may constitute financial products. Detail on how such holdings might be reconciled with pre-existing AFSL "*kinds of registered scheme*" authorisations as described in RG2.92 would be particularly beneficial to industry.

Importantly, since Bitcoin and Ethereum transactions presently represent such an overwhelming majority of digital asset transactions, the FSC suggests that it would be extremely helpful to the market if additional detailed examples could be provided concerning them. ASIC has explicitly recognised these products in helpful ways in, for example, INFO 230. Additional examples may address:

- ASIC's considerations in relation to whether Bitcoin and Ethereum are financial products;
- licensing considerations for entities that offer diversified or concentrated funds (including wholesale, retail and quoted products) with an exposure to Bitcoin or Ethereum (including where such digital assets may form a substantial or a minor part of a fund's portfolio).

The FSC's broad view is that licensing conditions for a fund with exposure to digital assets should not be more onerous than equivalent funds. For instance, existing ETFs with a primary exposure to commodities are in many respects analogous to an ETF with substantial exposure to Bitcoin and Ethereum. The FSC does not consider the latter ETF should be subject to substantively different regulatory standards. Similarly a diversified fund which has a small allocation to digital assets is arguably analogous to any fund with a diversified exposure. The FSC does not believe that it should be treated differently in terms of its license obligations just because it has exposure to digital assets.

The FSC also supports the inclusion of a more concrete framework or checklist approach which users of INFO 225 can use to help understand ASIC's interpretation of their obligations.

As set out below, industry would also benefit from further examples concerning financial advisers.

Recommendation 3.3: The FSC recommends that ASIC include additional worked examples in INFO 225, particularly in relation to REs and financial advisers.

Products targeting retail investors

Digital assets remain high risk for retail investors. With many retail investors concerned whether they can safely store wealth in digital assets, there is an opportunity for fund managers to act as a trusted intermediary between retail investors and the digital asset sector. Investors can benefit from getting an exposure to digital assets and the protections of Australian law. Fund managers can both help to de-risk the sector for consumers by adopting best practice investment strategies (all within Australia's protective jurisdiction) as well as increasing the overall amount of capital made available to the digital asset sector and thereby create opportunities for local employment. However, before such benefits can be achieved it is first necessary for fund managers to be provided with greater certainty as to their

precise legal obligations.

It is also important to note that the relative anonymity of digital assets and tokenised forms of ownership has adverse implications for the ability of fund managers to comply with certain obligations to retail investors, such as under design and distribution obligations under Part 7.8A of the *Corporations Act 2001* (Cth) (**Corporations Act**). As noted by IOSCO:

> *Crypto-asset markets differ significantly from traditional financial markets in having a high proportion of retail participants directly accessing CASP trading platforms. Many crypto-assets and CASPs are operating in non-compliance with applicable law in some jurisdictions, where important retail client protections already exist.*

Design and distribution obligations

Paragraph 12(g) of CP 381 states that proposed changes to draft updated INFO 225 include adding consideration of the design and distribution obligations regime (**DDO**). Draft INFO 225 includes a brief and broad summary of DDO obligations that apply to issuers, namely that DDO requires issuers to develop a TMD, take reasonable steps to distribute the product accordingly, and engage in monitoring and review.

The FSC recommends that the considerations of DDO set out in INFO 225 should provide more tailored and specific statements to support its purpose of helping businesses involved with digital assets—and considering offering or promoting digital assets—to understand their obligations.

In particular, ASIC may wish to highlight the features of a digital asset-related financial product which may require its issuer to consider narrowing its target market.

Further, where a digital asset-related financial product has features which warrant a narrow target market (and in the FSC's view, this is likely to be the case in most instances), INFO 225 may benefit from additional considerations and examples, in relation to:

1. describing the target market;
2. reasonable steps including distribution methods and marketing and promotional materials;
3. setting distribution conditions and restrictions; and
4. review periods.

In particular, RG274 (Product design and distribution obligations) presently states:

> *mass market advertising or prominent online methods, such as banner advertising, generally are not appropriate for a product with a narrow target market.*[16]

The FSC suggests that INFO 225 includes ASIC's considerations of mass market and online advertising in relation to retail financial products with digital asset exposure. The FSC considers a wide target market could be seen as appropriate where a financial product offers exposure to digital assets as a component of an overall diversified exposure.

It may also help industry for ASIC to make specific comments in relation to the above as it pertains to ETFs, although the FSC is aware that ASIC is separately consulting on related matters.

Recommendation 3.4: The FSC recommends that ASIC clarify the interaction between RG274 and INFO 225 with respect to mass market advertising of financial products with a digital asset exposure.

[16] RG274 Table 6.

4. Platforms and exchanges

The FSC is not presently aware of any IDPS or IDPS-like platform offering investors financial products with exposure to digital assets. Draft INFO 225 reads that "*where a digital asset is a financial product, then any platform that enables consumers or other persons to make or accept offers to buy (or be issued) or sell these digital assets may involve the operation of a financial market*" which requires holding an Australian Market Licence.[17] The regulatory guide should be drafted more clearly to clarify it is not intended to require IDPS and IDPS-like platforms to obtain an Australian Market Licence before enabling access to investment options that may be exposed to digital assets. To set such a requirement would create an inconsistent regulatory burden compared to MISs, registrable superannuation entities (**RSEs**), and stockbrokers.[18]

It would be very useful to the industry to see an example in INFO 225 setting out how an IDPS or IDPS-like platform that offers investors direct and indirect digital asset exposures (potentially, but not necessarily, through some form of third-party intermediated custodianship arrangement) should approach their licensing obligations with ASIC. Any further regulation of IDPS and IDPS-like platforms should be proportionate, acknowledging the several safeguards that already exist (including the requirement of being onboarded by a financial adviser operating under an AFSL, having access restricted investment menu when unadvised, and product governance frameworks).

The FSC also considers that it is in the interests of fund managers and investors to have ready access to Australia-based and well-regulated digital asset exchanges. The FSC is therefore opposed in principle to measures which might cause an exodus of exchanges from Australia. In particular, the FSC considers that the imposition of a requirement (or expectation) for exchanges to hold an Australian Market Licence should be reconsidered.[19] The loss of Australia-based exchanges is likely to cause unwarranted damage to the industry and may unnecessarily deprive fund managers and investors of protections under Australian law.

The imposition of a requirement for exchanges to hold an Australian Market Licence was expressly opposed by the Senate Select Committee on Australia as a Technology and Financial Centre,[20] with this recommendation being accepted by the previous Government.[21] In its proposals for a new regime governing digital asset platforms, Treasury has only proposed the imposition of a requirement to hold an AFSL – not an Australian Market Licence,[22] and ASIC Commissioner Alan Kirkland has also previously flagged that an AFSL is expected to be the standard to which digital asset platforms will be held "*within the existing financial services framework*".[23]

This is also broadly consistent with IOSCO's approach, which notes that many digital asset exchanges are substantively actually only brokers:

> *Despite common market parlance of collectively referring to CASPs as "exchanges" or "trading platforms", a CASP may not in fact be an exchange (or what is commonly known as a market operator). It may instead operate as an intermediary such as a broker or dealer, or both. On the basis of "same activity, same risk and same regulation/regulatory outcomes", specific*

[17] Draft INFO 225, p.23.
[18] It is unclear whether ASIC intends for this to be the case in draft INFO 225 at page 23.
[19] Such a change is contemplated by draft INFO 225 at page 23.
[20] The Senate, Final Report, Select Committee on Australia as a Technology and Financial Centre (October 2021) at pages 134 to 135.
[21] Australian Government response to the Review of the Australian Payments System, the Senate Select Committee on Australia as a Technology and Financial Centre: Final report and the Parliamentary Joint Committee Corporations and Financial Services report: Mobile Payment and Digital Wallet Financial Services (December 2021) at page 16.
[22] Treasury, Proposal Paper: Regulating Digital Asset Platforms (October 2023) at page 12.
[23] Address by ASIC Commissioner Alan Kirkland, Crypto and digital assets: policy, regulation and innovation (20 March 2024) at Blockchain APAC's Policy Week.

Recommendations should apply to CASPs based on the role that they undertake.[24]

Recommendation 4.1: The FSC strongly recommends that IDPS and IDPS-like platforms not be required to obtain an Australian Market Licence if they offer their investors an exposure to digital assets.

Recommendation 4.2: The FSC recommends that digital asset exchanges not be required to hold an Australian Market Licence.

5. Financial advice

Licensing implications

Draft INFO 225 states:

> *Recommending or stating an opinion about a digital asset, or product involving digital assets, that is a financial product may be financial product advice, where the person stating the opinion intends to influence a person to make a decision in relation to the financial product. This may include making comparisons between two digital assets where at least one of them is a financial product, or making comparisons between a digital asset and a traditional financial product. For example, giving advice about the relative merits of investing in certain digital assets versus certain shares may be financial product advice. See Information Sheet 269 Discussing financial products and services online (INFO 269).*[25]

The FSC acknowledges it is important to place prudent limitations on who can and cannot provide financial advice regarding digital assets that are in substance financial products.

The FSC also notes that the number of financial advisers in the Australian market has fallen dramatically in recent years. The cost of professional financial advice is high and many Australians already find themselves unable to obtain financial advice regarding more traditional financial products. This may be exacerbated if financial advisers also become a major conduit through which investors access digital assets. Some financial advisers and AFSL-holders do not currently possess expertise related to digital assets and may require time to upskill if the financial advice industry was to be expected to step up to such a role.

The FSC has elsewhere advocated a view that it should be made easier for Australians to access financial advice, including through measures to reduce unnecessary red tape and increase the size of the profession. There is an expectation that the tranche 2 Delivering Better Financial Outcomes reforms will address these concerns, increasing access to affordable, quality financial advice. Notwithstanding the benefits of increased professional advice for Australian investors in digital assets the current program of reform to increase the supply of financial advice is, at present, focused primarily on ensuring consumers can better manage retirement planning and other savings goals where traditional investments and assets are often more prevalent.

It is important for ASIC to ensure that financial advisers have the clearest possible understanding of their legal obligations in this area. To this end, the FSC recommends that ASIC consider staging the transition of its revised regulatory expectations in this area in light of the tranche 2 advice reforms once legislated. When appropriate, this might also include investigating the merits of a dedicated regulatory guide or information sheet to assist financial advisers and licensees with understanding their obligations concerning digital assets. It would also be helpful to industry if INFO 225 could be

[24] IOSCO, Final Report: Policy Recommendations for Crypto and Digital Asset Markets (16 November 2023) at page 16.
[25] Draft INFO 225 at page 18.

updated to provide an example concerning financial advisers that gives some guidance on the types of scenarios where an investment allocation to digital assets is likely to comply with personal advice obligations including the best interests duty.

Recommendation 5.1: The FSC recommends that ASIC acknowledge the capacity constraints in the financial adviser profession by staging the implementation of any new regulatory interpretations which have the effect of significantly increasing existing burdens on financial advisers.

ASIC should provide greater clarity to financial advisers on the circumstances in which they can safely advise their clients to invest in digital assets.

6. Superannuation

The FSC also notes that present uncertainty about the status of digital assets has implications for RSEs which may contemplate including small allocations to digital assets in their investment mix. At present, however, regulatory uncertainty creates a significant disincentive to do so.

APRA's exclusion of digital assets from performance testing benchmarks also represents a deterrent to the more mainstream adoption of digital asset investments by superannuation funds.

Recommendation 6.1: The FSC recommends that ASIC work with APRA provide greater clarity to RSEs on the circumstances in which they can safely invest in digital assets.

7. Class no-action position

The FSC notes that if ASIC adopts a revised interpretation of the law regarding financial products as it relates to digital assets, this may have adverse implications for some financial institutions. Since this will be a revised interpretation of the law, rather than a new regulation, such entities may find themselves retrospectively liable for or otherwise disadvantaged by conduct which ASIC, industry and lawyers previously considered to be lawful.

By way of example, a fund manager with an existing AFSL may find that as a result of the changes in draft INFO 225, a current exposure to digital assets suddenly falls outside of the current terms of their AFSL (having previously been considered to fall within its terms), placing them in contravention of section 911A of the Corporations Act.

In CP381, ASIC acknowledges this type of risk and notes:

> *we are considering providing a no-action position in relation to firms that are actively and in good faith applying for a licence, or licence variation. It would apply to conduct occurring from the date of their application until their application is finalised (i.e. decided upon or withdrawn). For market and CS facilities licences, it would apply to conduct occurring from the time a person informs ASIC in writing of its intention to lodge a licence application or variation application. The no-action position would only apply to licensing breaches, not other misconduct (e.g. false or misleading statements, or fraud).*[26]

The FSC is supportive of the adoption of a class no-action position, but queries whether this would provide sufficient protection to firms which may be non-compliant with the revised interpretation section 911A of the Corporations Act set out in the draft INFO 225.

[26] CP381 at page 16.

Insufficient protection against third party actions

As set out in RG 108 (*No-action letters*), a class no-action position:

> *(a) is not legal advice and is specific to the facts and circumstances;*
>
> *(b) will not restrict ASIC's right to take action and may be withdrawn or revised; and*
>
> *(c) does not preclude third parties taking legal action.* [27]

A class no-action position would not therefore provide protection from third party actions or prevent ASIC from revising its position at a later point in time.

By way of example, Division 11 of Part 7.6 of the Corporations Act alone raises a series of potential issues. Division 11 of Part 7.6 covers situations where a financial services business enters a financial services agreement but does not hold an AFSL whose terms authorise them to do so (section 924A). This division has a range of possible implications for financial institutions. Clients could notify them of the rescission of their contractual agreements (section 925A), allowing clients to attempt reverse the impact of any financially disadvantageous transactions (subject to the terms of section 925B). As a result of rescission, there would be a statutory presumption (section 925G) that the institutions could not then enforce the contract against their clients (section 925E) or levy their ordinary fees (section 925F).

Similarly, cascading issues might exist under Part 7.7 of the Corporations Act regarding disclosure statements, and a range of civil actions might be undertaken by third parties under section 953B and other provisions – including on a retrospective basis.

Evidently, a class no-action position does not address these potential issues. So long as ASIC and the overwhelming majority of market participants maintain their present interpretation of section 911A, these issues are not problematical, however if ASIC adopts its position set out in draft INFO 225 then the risk of these problems escalates significantly.

Other comments on a class no-action position

The FSC notes that a further issue with class no-action positions is that they are forward-looking, and therefore would not address industry concerns about historical non-compliance with new interpretations of the existing law.

Ultimately, if ASIC adopts its approach set out in draft INFO 225, there is a need for sensible transitional arrangements that reflect the developing role of digital assets in Australia.

Recommendation 7.1: The FSC recommends that in addition to a class no-action position, the Government investigate ways to provide discretionary protection against third party actions.

Recommendation 7.2: The FSC recommends that ASIC adopt clear transitional arrangements which set unambiguous expectations for how REs, RSEs and financial advisers ought to comply with ASIC's revised regulatory expectations.

Next steps

The FSC appreciates the opportunity to contribute to this consultation and looks forward to continued

[27] RG108.6.

engagement with ASIC on its approach to digital assets. We would welcome the opportunity to meet with you or your team to discuss these issues in more detail and explore how we can work together to achieve these goals.

To arrange a meeting, please contact Jack Morgan, Director of Policy – Investment and Funds Management at [redacted]

Yours sincerely

Jack Morgan

Policy Director – Investments & Funds Management