Alternative Investment Management Association – Aust Chapter
Michael Gallagher, AIMA Australia
+61 (0)412 224 400
info@aima.org

26 February 2025

Digital Assets Team
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

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

Dear Digital Assets Team

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

1. About AIMA

AIMA is the world's largest membership association for alternative investment managers. Its membership has more firms, managing more assets than any other industry body, and through our 10 offices located around the world, we serve over 2,000 members in 60 different countries. AIMA's mission, which includes that of its private credit affiliate, the Alternative Credit Council (ACC), is to ensure that our industry of hedge funds, private market funds and digital asset funds is always best positioned for success. Success in our industry is defined by its contribution to capital formation, economic growth, and positive outcomes for investors while being able to operate efficiently within appropriate and proportionate regulatory frameworks. AIMA's many peer groups, events, educational sessions, and publications, available exclusively to members, enable firms to actively refine their business practices, policies, and processes to secure their place in that success. For further information, please visit AIMA's website, www.aima.org.

As the global representative of the alternative investment industry, AIMA's involvement with digital assets reflects the growing interest of our fund manager members in this evolving asset class. An increasing number of our member firms are considering, or already active in, various digital asset markets or making use of products using distributed ledger technology. It is in this context that AIMA provides some responses to the questions set out in the Consultation Paper 381 – Updates to INFO 225: Digital assets: Financial products and services (**Consultation Paper**).

2. Submission

This submission has been prepared by members of AIMA's Regulatory Committee.

3. Executive Summary

Australia's approach to digital asset regulation has been marked by uncertainty, inconsistency, and missed opportunities, leaving investors, businesses, and the broader financial system exposed to unnecessary risks. Despite multiple attempts at crafting policy frameworks, successive governments have failed to implement a cohesive and enforceable regulatory structure, allowing the industry to operate in a legal grey area. This lack of clarity stifles innovation, deters institutional investment, and creates an uneven playing field where unregulated entities can exploit gaps in oversight while legitimate businesses struggle with compliance uncertainty.

While excessive regulation could hinder growth, the absence of a well-defined framework exposes consumers to fraud, market manipulation, and financial instability. Australia urgently needs a balanced approach—one that fosters innovation while ensuring robust consumer protection and financial integrity. Whilst this paper is a step towards providing further clarity, it does so without the needed policy adjustments required to cater for an industry that has very different product attributes to those imagined by the existing financial product AFSL concepts and regulatory frameworks. Without decisive action, Australia risks falling behind global leaders like Singapore and the EU, where clear regulations provide both industry confidence and investor safeguards.

Overall, we are concerned that seeking to fit digital assets into the existing regulatory frameworks that apply to financial products will add to the complexity of the existing regime (a regime which is already been the subject of proposed simplification reforms). It is also likely to lead to unintended consequences in situations where the regulatory consequences of applying existing regulatory frameworks to new categories of digital assets have not been fully worked through. The advent of digital assets and the potential to transform financial services deserves a regime which is fit for purpose and able to adapt as these instruments and their use develop. We consider that attempts to apply the existing regime to these new asset classes will result in further complexity and delays as issues are identified and we are faced with the implementation of exemptions and the like to manage these regulatory issues.

We also think the problem of a lack of an appropriate legal regime will be exacerbated in situations where participants in the digital assets industry seek to operate cross border with tokens and other digital assets which are able to be used by Australians. Without consistency of approach with other major markets, the development of the Australian industry may continue to be hindered by regulatory characterisations and compliance costs, risking us lagging developments in other parts of the world.

4. Detailed Submission

CP381 Specific questions (pp26 onwards)

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

Overall, the guidance appears to be relatively comprehensive in presenting ASIC's position surrounding the classification of digital assets within the existing regulatory framework.

However, given that there are also proposed legislative reforms, it will be necessary to actively revisit and adjust and update INFO 225 to take into account the proposed reforms as they progress. Whilst the consultation helpfully contemplates transitional regimes, this approach of transitional regimes which contemplate licensing and other relief may also need to be taken to facilitate industry participants adjusting their licensing authorisations and other matters, such as approaches to disclosure and other aspects of compliance as digital assets are brought within the existing regulatory regime.

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

From an investment management lens, the additions in INFO225 are helpful. More worked examples on explaining the important risk considerations and best practice measures ASIC would expect of sub-custody arrangements, specifically in regard to hot and cold storage arrangements would add value. Helpfully RG133 was updated at the end of 2024 to build out guidance on holding crypto assets and the like, it should be reconciled or be more aligned to the terminology in INFO225.

The use of hot and cold wallet storage is a highly technical area. There is a unique set of risks presented by such arrangements, and a concentration of expertise offshore. One only need look at the digital asset funds which are listed on the ASX and Cboe exchanges. There is a clear reliance on offshore specialist digital assets custodians who are licensed, regulated and importantly independently audited in this specific area. There appears to be a dearth of custody providers in the Australian market who could match the expertise of a Gemini for example.

As a result, partnership with offshore specialist digital assets custodians is often very important to Australian market participants. To the extent those custodians need to hold an AFSL to provide such services then, there should be an avenue for them to be exempted under mutual recognition relief on the basis of their offshore regulatory status, similar to the exemptions under the foreign financial services providers regime (both existing and proposed).

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 we advocated when participating in the recent wholesale versus retail investor definition consultation as part of the Managed Investment Scheme review, there is an important role the wholesale markets play in providing access to sophisticated educated investors, who most likely possess the wherewithal to invest and bear any associated risk. It will be important to ensure this part of the market is provided the flexibility to operate in a more nuanced manner with respect to execution of orders, whist ensuring custody of assets is as robust as what one would expect for a retail managed investment scheme offering.

We recommend clarifying requirements for a wholesale fund managers who deal in digital assets through the use of SaaS based custody arrangements for wholesale funds (ie. effectively a software solution). We recommend these arrangements do not require managers to hold custody authorisations for the purposes of managing their funds, but rather that managers be required to disclose internal controls and audit requirements to manage risks i.e. key lifecycle management, IT general controls, segregation of company and investor assets, appropriate cyber security measures and the like.

In Draft Info 225 on page 19, it states that:

> *"When a person controls the private keys related to an address on a public blockchain, they will likely be providing a custodial and depository service."*

We would submit that the use of a SaaS based custody arrangement by a fund manager should not of itself give rise to the need for the manager to hold a custodial authorisation. We say this because we expect that many wholesale managers would not currently hold custodial and depository authorisations as part of their AFSL authorisations in order to give effect to trading instructions. It would seem to be unnecessary to require those managers to vary their AFSL to include such an authorisation in situations where we would expect that they would then seek to rely only on the conditions to which an incidental provider of custody services is subject to, particularly when this would not be the case for traditional asset classes also managed by that fund manager.

In addition to the matters set out above, we recommend expanding the definition of custody to clarify whether, for example, if a company holds the private keys to a bridging contract where consumers deposit crypto which is effectively "escrowed" in order to re-create the assets on another Layer 2 blockchain, are they providing a custody service given any compromise of this contract would cause absolute loss for consumers.

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 are commenting where the example is relevant to our members.

- *Example 1 – agree;*
- *Example 2 – agree;*
- *Example 4 – agree, however it is critical the language around crypto asset and digital asset is tightened up. For example, RG133 uses the term crypto yet Info 225 refers to digital. Further, industry needs absolute clarity on whether a Bitcoin for example is a security, or a currency.*
- *Example 5 – agree, must ensure any long short exposures are adequately captured through derivative authorisations;*
- *Example 11 – agree;*
- *Example 12- agree; and*
- *Example 13 – agree.*

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.

Given the early stage of many tokenisation projects, it would be beneficial that ASIC clarifies how it would treat tokens which are in effect wrappers of traditional financial products i.e. where the issuer maintains an off-chain record of all investors and allocations and any trading of the token occurs through off-chain processes which are subsequently reflected back on chain. In this respect the traditional register is the source of truth of the financial product rights. This is the current situation we see for many real world asset tokenisation projects.

As discussed below, and as considered by ASIC in the consultation paper, it would be beneficial to include further examples regarding stablecoins and wrapped tokens in INFO 225.

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

We consider that it is very difficult to say at his stage, however any tightening of regulatory settings always seems to assist in rationalising the number of quality providers. Therefore, an unintended consequence of any change to regulation could cause temporary market dislocation given complexities that tend to emerge as regulations change. Notwithstanding the current regulatory state, which lacks certainty on the regulatory approach to a wide range of digital assets, is far from ideal and must be improved.

As mentioned above, given the lack of licensed digital asset custodians within the Australian market, consideration must be given to reciprocal rights for licensed entities in other jurisdictions being recognised as compliant with Australian financial services licensing requirements and RG133 to avoid disruption in service for existing providers.

Applying RG133 requirements to wholesale funds will significantly impact existing funds who choose to self custody assets due to costs of licensed digital asset custody. Furthermore, many of these funds hold early stage tokens which are not yet onboarded to custody platforms as they are purchased as part of a Token Generation Event (similar to pre-seed or seed share purchases). Mandating all tokens to be custodied by a custody provider would either require the licensed custodian to take on significant cost and operational inefficiencies to onboard an endless number of early-stage tokens prior to there being a market, or restrict wholesale funds to only hold mainstream tokens which are supported by custodians, effectively cutting out capital allocation to early stage projects. It would be helpful if ASIC could clarify whether their intention is that this segment of the market should be subject to typical custody requirements (including licensing authorisations, and financial and operational requirements) in relation to their dealings in digital assets particularly where the categories of types of digital assets are extensive. We recommend that the requirements for incidental custody be investor driven and follow the good practise which is outlined for managed investment scheme RE's i.e. independent internal controls disclosures over the key areas of risks such as SOC1, GS 007 and not require a full custody license.

In considering clarification of ASIC's position on digital assets and their applicability under existing financial products/services regulation, it should be noted the increase in costs which may be faced by digital asset focused companies. The cost of obtaining an AFSL and the ongoing compliance requirements need to be balanced against the potential risk of stifling innovation in this area. Governments should ensure that crypto assets are subject to appropriate statutory frameworks, while not stifling digital innovation with excessive "red-tape" in financial services. It is crucial to devise appropriate and proportionate crypto asset regulation and security safeguards for a robust digital economy that is accessible to both existing participants and new entrants.

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?Do you have any comments on the proposed guidance for digital asset businesses? Please provide details.

Yes, it would be useful to include an example of a wrapped token and stablecoin. This would provide further clarity as to ASIC's position in relation to these assets.

Stablecoins

(a) Stablecoins as a non-cash payment facility (NCP)

However, the classification of a stablecoin as a NCP may require further clarification, i.e. in terms of the appropriate financial product characterisation for this type of asset (at least as it is described by ASIC in the consultation paper). We say this because at paragraph 21 of the consultation paper, ASIC defines a stablecoin as an NCP facility on the basis that it is:

a) *marketed as a non-interest-bearing stablecoin;*
b) *the token is expected to maintain a stable price and value in AUD and be issued at par value;*
c) *the company will redeem, or buy back the tokens at par value in exchange for fiat money on demand from any holder;*
d) *the money received by the company is recorded as an asset, and the requirement to repay is recorded as a liability, on the company's balance sheet;*
e) *the company will either hold the money raised from token sales in a bank account or use it to purchase low-risk investments.*

To be considered an NCP facility under the Corporations Act, there is a requirement that the facility enables a non-cash payment, or it is commonly used to make such a payment to more than one person. In the current consultation definition, ASIC does not mention the use of the stablecoin as a payment mechanism (unless this is intended to be implied from the ability to redeem the token). However, we note that in order to be an NCP facility it is necessary that payments may be made to more than one person. If it is contemplated that the particular stablecoin can be a means of payment with other parties (i.e. other than just redeemed via the issuer) then this should be made clear.

(b) Stablecoins as a managed investment scheme

In Draft Info 225 attached to CP 381, Example 4 contains an example of a yield bearing stablecoin which is characterised as a potential interest in a managed investment scheme. Whilst this example makes it clear that the stablecoin can be used to settle digital asset transactions or participate in decentralised finance arrangements. It is not clear from this example which are the characteristics which make it a managed investment scheme as opposed to an NCP facility (and it should not be possible for the stablecoin to be both). Whilst yield may be a potential benefit, in this example a "benefit" which is referred to is the ability to use the token to make payments. We also note that, in addition, classification of a digital asset as an interest in a managed investment scheme may also have unintended implications / more hefty regulatory burdens on operators, such as the need to have a constitution and an appropriate compliance plan etc. This raises a number of questions which have not been resolved in the guidance. For example, is it intended that the full range of regulatory compliance which applies to registered managed investment schemes would also apply to those "schemes" that issue stablecoins? It is not clear whether other modifications to the law are necessary to facilitate the operation of stablecoins as managed investment schemes. For example, is it appropriate that the Constitution provisions of Part 5C.3 of the Corporations Act apply to the stablecoin? Should "members" who hold stablecoins should be able to participate in meetings of the scheme? Should members be able to remove the issuer and / or wind up the stablecoin scheme? Should the financial and operational requirements that apply to registered managed investment schemes apply to stablecoins which have a yield feature and not to those which are characterised as NCPs? If stablecoins are to operate as a currency and also have assets *supporting those coins then how are those assets to be safeguarded for those acquiring stablecoins?*

The situation described above should be contrasted to the discussion of NCP facility in Draft Info 225, in particular the paragraph:

> *Digital assets designed for use in payments may be a non-cash payment facility in themselves. For example, many tokens are expressly designed to be used for, and are promoted as a means to make, payments between users. They are designed to be used as a store of value and a means of payment, and for this reason are sometimes described as 'electronic cash'.*

In Example 13, Company M is described as (a) a non-custodial digital asset wallet service and (b) issuer of a proprietary stablecoin token. Whilst this example describes Company M as likely to be providing a NCP facility by operating the digital asset wallet, it is not clear whether it is contemplated that Company M is also the operator (issuer) of a managed investment scheme by issuing proprietary tokens.

Wrapped Tokens

In terms of "wrapped tokens", yes we think examples would be useful as this would arguably represent a very complex financial product, as it could constitute a security (or a currency given lack of clarity) with a bundling of a derivative or potentially spot FX considerations. The consequences of characterising wrapped tokens as derivatives will limit access for retail clients or investors who may seek advice because many financial planners may not be licensed to provide advice.

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

The primary implication will be the need to undertake licensing analysis to determine whether any of the activities of the businesses involved in providing services to wrapped tokens or stablecoins that are financial products. For those businesses that don't already hold an AFSL because they may not be currently operating in traditional financial services then there will be a need to transition those businesses to an AFSL environment. The experience needed to apply for a derivatives authorisation typically is more particular than say a more general securities authorisation. A practical issue will how do such businesses, their responsible managers and representatives demonstrate that they meet traditional licensing tests in circumstances where activities have historically been unregulated?

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.

The worked example states that a stablecoin / wrapped token would constitute a financial product. We agree with this approach if the current direction of the reforms is to be adopted and see no reason why another regulatory setting would need be applied, resulting in more bureaucracy and more confusion.

There are many examples of firms who have taken the care and diligence to understand the existing legislative and regulatory settings and as such understand the implications of the Corporations Act and ASIC's oversight. This can come at considerable cost and time. Relief and should be given to parties who can demonstrate they have taken concerted efforts to conduct their affairs within spirit of the law. Where this cannot be demonstrated, there should be no relief. It would be in this deliberately unlicensed section of the market, where the most risk is posed to investors.

We believe the critical risk to stablecoins relates to the backing of the stablecoin by the issuer and ensuring that it has the necessary collateral, which is held in client monies account, on trust and segregated from company funds with regular audits. Therefore, ASIC should look to broaden its requirements for both yield and non-yield bearing stablecoins and the protection of the backing of the coins. Reference should be made to the requirements for stablecoins defined by the AICPA's stablecoin disclosure and stablecoin internal controls guidance papers which define auditing criteria for the stablecoin facility.

We also think it is important to consider the regulatory settings which ASIC expects to apply in situations where foreign issued stablecoins may be acquired by Australians. Is it intended that the foreign issuer is to comply with Australian licensing and disclosure rules, particularly in situations where those products may be offered in accordance with their local (home) jurisdiction laws?

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

Yes, AIMA agrees that a class no-action position is an appropriate mechanism for facilitating transition in circumstances where participants in the market have not historically been required to be licensed but are now being required to transition into a licensing regime.

B1Q2 : Are the proposed conditions appropriate? Are there any additions or changes to the

proposed conditions that will be more effective for investor protection?

AIMA considers that the conditions appear reasonable.

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.

Yes, AIMA agrees with this proposal.

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.

Yes, a deadline is appropriate but could only be considered at such time ASIC has a final position and then imposed with sufficient time for industry participants to make applications for licensing and for ASIC to manage that licensing process.

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?

AIMA considers that the no-action position should apply to all aspects of the regulatory regime which is to apply to product issuers until such time as those product issuers have had the ability to obtain a licence. For example, product issuers should not be required to issue regulated disclosure documents until such time as they obtain an AFSL.

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 mentioned above, AIMA considers that there needs to be clarity in relation to the full extent of regulatory obligations which apply to wholesale providers of tokens which may be stablecoins or wrapped tokens. Generally, AIMA is in favour of a level playing field which should apply to providers who operate in this space when compared to traditional wholesale financial markets. However, given the unique features of the digital assets space it is important that the regulatory guidance takes into account these aspects as part of the regulatory guidance. For example, the reliance on technology, and hot and cold wallets, is a feature which is particular to this asset class. We discuss above that applying traditional custody concepts to these aspects of digital assets may have unintended consequences, such as requiring managers to hold custody authorisations by virtue of their role in the technology solutions which facilitate transactions in these assets. This would be an inadvertent, and we submit, an inappropriate outcome for this industry, particularly in the wholesale space. There are already well established approaches which are used by investors in this space to assess and diligence the internal controls adopted by digital asset managers, such as the use of SOC reporting, GS007, cyber security assessments (NIST, ISO27001). It is our view that ASIC stipulates the specific risk areas which it expects audit and assurance firms should focus on when conducting these assessments to ensure that firms appropriately cover the nuanced risks of digital asset management and have suitable skills.

Regulating cryptocurrencies and digital assets as financial products presents significant practical challenges, particularly due to their global issuance and availability on international exchanges. Traditional financial products are subject to strict disclosure requirements, including Product Disclosure Statements (PDS), prospectuses, and ongoing reporting obligations to ensure investor protection. However, applying these requirements to crypto-assets is highly impractical because many tokens are issued by decentralized or anonymous teams operating outside regulated jurisdictions. A global crypto exchange may list a token without enforcing any jurisdiction-specific disclosures, making it nearly impossible for regulators to ensure compliance. Additionally, crypto-assets can be fractionalized, traded 24/7, and wrapped into various DeFi protocols, further complicating oversight. Unlike traditional securities, where issuers are legally obligated to provide standardized disclosures, many crypto projects operate with dynamic tokenomics, evolving governance structures, and opaque risk factors that do not fit neatly into existing regulatory frameworks. This mismatch creates a regulatory arbitrage, where issuers and exchanges can bypass strict financial regulations by operating in jurisdictions with looser controls, undermining investor protections and creating *enforcement challenges for national regulators. Without global coordination, efforts to regulate crypto-assets like traditional financial products may result in fragmented, ineffective oversight, pushing innovation offshore while failing to safeguard investors effectively.*

Similar considerations apply where digital assets are to be acquired by funds. If foreign funds are "wrapped" in an Australian regulated feeder vehicle then this will likely satisfy local regulatory requirements but likely at an increased cost to investors. Should investors, particularly wholesale investors, be restricted from accessing these assets directly and if so, how should the Australian regulatory requirements apply to those foreign issuers?

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

As a general comment, we believe that tailored policy is necessary to create a fit for purpose regulatory approach to digital assets. In this regard we note our comments above regarding characterisation of digital assets as managed investment schemes, NCP's or derivatives and the various unintended consequences that can arise from applying those traditional asset frameworks to new asset classes.

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.

Please see our earlier comments in relation to wholesale and unregistered managed investment schemes. We believe in this instance the burden of custody licenses should not apply as it will remove the ability of market access for many of the schemes as custody providers often provide partial coverage to digital asset products and certainly not early-stage projects which wholesale investors are looking to get access to.

We also agree that the existing omnibus relief should be extended for digital assets as they are fungible in the same way as traditional securities or derivatives.

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?

In theory no, as it seems clear that by and large much of the regulation can be handled through the Corporations Act. Emphasis needs to be on market operators and clearers. This is where the risk of investor harm is higher. There is evidence to suggest that investment managers can leverage the established regime as it applies to financial services and products issued as managed investment schemes.

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?

Yes, in circumstances where the traditional financial product authorisations are to be maintained in the absence of a standalone regime for digital assets and provided that unintended consequences of this approach are appropriately considered.

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 refer to our comments above, in circumstances where there will not be a standalone regime for digital assets then these authorisations would seem appropriate. Whilst this may facilitate some certainty for product issuers, our concern remains that other industry participants who may play a role in these instruments will not have these specific authorisations and they may be hard to obtain. In this regard consideration will need to be given to transitional arrangements and experience and ongoing compliance requirements which are appropriate to this part of the industry.