Piper Alderman

Response to ASIC Consultation Paper 381

Updates to INFO 225

March 2025

Introduction

Piper Alderman welcomes the opportunity to provide this submission in relation to ASIC's consultation on *CP 381 Updates to INFO 225: Digital assets: Financial products and services* and provide input towards Australia's proposed regulatory approach to digital assets.

One of Australia's oldest law firms with a national reach, Piper Alderman also operates one of the largest specialist teams in Australia focused on blockchain and digital assets. We have deep technical and legal experience in the digital asset space, having served Australian and international clients for over 8 years. In that time, we have provided submissions to nearly all Government consultations concerning regulatory approaches to digital assets.

We advise start-ups, digital currency exchanges, financial institutions and investors, analyse digital asset related products and services, act in controversies, advise on taxation and assist in restructuring matters.

The principal author of this submission is Steven Pettigrove, a Partner in the Financial Services and Fintech team at Piper Alderman and Head of the Blockchain Group. Steven is ranked a Band 2 Fintech lawyer in Australia by the prestigious Chambers & Partners and is co-author of the forthcoming "Law of Code: Blockchain and Digital Assets in Australia" which is to be published by Lexis Nexis.

The views within are the authors' own and should not be taken as being representative of the views of the other partners of Piper Alderman.

We take a politically neutral position when considering policy, underpinned by a belief in the economic and social benefits of technology and innovation, and a focus on what regulation means at a practical level for both businesses and their customers and users.

We welcome ASIC's consultations and the provision of further guidance on the application of existing laws to digital asset related offerings, and ASIC's proposal to provide a licensing pathway for entities operating in the regulated sector. However, the proposed updates to INFO 225 are not a substitute for fit-for-purpose legislation. There are a wide variety of crypto-asset related offerings which would fall outside the worked examples in the draft guidance. There are also important areas of emerging activity and technological innovation which are largely beyond the scope of this paper, such as token issuance, trading and custody in non-financial product digital assets, real world asset tokenisation and decentralised finance.

For the most part, the guidance addresses how the existing law may apply to digital asset related offerings, rather than how digital asset related offerings can be offered under the existing law or how ASIC can exercise its regulatory and relief powers to facilitate digital asset related offerings and their unique features and risks.

It is important that policy makers take into account the policy objectives set by Government, the unique features and risks of blockchain technology and digital assets markets, and international developments which will inevitably impact Australia and the way Australians engage with digital assets. This is important to protect consumers and ensure that Australia and Australians can participate and benefit from the emerging digital economy.

We thank ASIC again for your hard work on preparing this Consultation and we hope that industry feedback will help inform ASIC's approach in seeking to clarify its guidance and to explore fit-for-purpose approaches to accommodate digital asset related offerings within a comprehensive regulatory framework.

Steven Pettigrove

Partner and Head of Blockchain Group

Executive Summary

Technological innovation in relation to blockchain and digital assets continues to gather pace internationally and domestically.

Against this backdrop, many jurisdictions around the world, including the European Union, United States, the United Kingdom, Singapore and Hong Kong, are actively exploring and implementing new regulatory frameworks for the issuance and trading of digital assets.

While there are ongoing efforts in Australia to establish new laws and reform existing laws to regulate digital assets, no formal legislation has been passed so far. In this context, the proposed updates to INFO 225 risk pre-empting ongoing legislative and policy reforms which are intended to deal wholistically with the same policy objectives which this Consultation Paper seeks to address (for example, the Treasury's proposal to regulate payment stablecoins).

It is also important to take into account international developments in the context of Australia's competitive position as a hub for technology innovation. An ill-fitting attempt to apply the existing regulatory framework to many digital asset offerings risks driving innovation overseas or encouraging regulatory arbitrage – offshore operators accessing the Australian market and depriving consumers of the very protections secured by Australian laws.

An attempt to regulate innovative digital assets offerings (for example, new digital primitives such as stablecoins or wrapped tokens) under existing laws risks placing a "square peg in a round hole". While technology neutral, the existing regulatory framework was designed with specific products and risks in mind (mostly during the early days of the internet) and not the specific features or risks of digital asset related offerings.

ASIC should also consider practical challenges faced by crypto firms which may seek to apply for an Australian Financial Services Licence (**AFSL**) and comply with financial services laws in good faith, but nevertheless find it difficult to do so. Such challenges include design and distribution obligations, de-banking, lack of responsible managers with regulated experience, and difficulty to obtain professional indemnity insurance.

While we appreciate that ASIC is proposing a transitional approach for firms that are actively applying for or varying an AFSL, we recommend that ASIC should expand this transitional relief to all firms which have commenced operations prior to the guidance being finalised.

Submissions to questions

We have focused our submissions on the following questions identified in CP 381.

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.

While the worked examples are helpful to the extent that they further explain ASIC's views of the existing law, they are prescriptive in nature and fact-specific, meaning it can be difficult to draw general principles from them. It would be helpful for ASIC to comment specifically on the kinds of product features, rights or terms that make a digital asset related offering a financial product or otherwise mean it is unlikely to be a financial product by reference to the worked examples.

In certain cases, the worked examples are not representative of digital assets related offerings in the Australian market.

Example 5 is non-representative, as few market players hold money raised from

token sales (gold-linked tokens or otherwise) in a trust or in the form of gold-related financial products like futures or options; a physical gold bailment-type holding arrangement is more common.

Example 8 is overly prescriptive and does not match a common fact pattern seen in market. It would be helpful to have a clearer example of ASIC's views in relation to application of existing laws to a native utility token of a layer 1 blockchain used to secure a network.

The non-cash payment facility (**NCPF**) in Example 13 does not conform with the non-custodial digital wallet offerings on the market. For non-custodial wallets, there is typically no right against the issuer or factual ability by the issuer to make a payment. This feature should distinguish common non-custodial digital wallets from that identified in Example 13, in which the facility carries a right against the issuer to make payment.

ASIC's views expressed in Example 13 are inconsistent with its previous submission to the Senate's inquiry into digital currency.[1] In the submission, after analysing how a transfer of bitcoin is made using non-custodial bitcoin wallets, ASIC submitted that such a wallet did not comprise an NCPF merely because the bitcoin wallet facilitated the direct movement of digital currencies from one person's wallet to another with the person initiating the payment retaining ultimate control of the funds, suggesting that the lack of a third party or intermediary having any control over or role to play in relation to the cryptocurrency being transferred from one digital wallet to another may be key in viewing peer-to-peer digital wallet transfers as not being a NCPF.

Further, ASIC's comment that the mere "ability to use a digital asset" to make a payment may a constitute NCPF contemplates a significant expansion of the regulatory perimeter which is not addressed by the worked examples. Such an approach is inconsistent with the legislature's intention. Following ASIC's logic, many other goods or commodities with intrinsic value, such as bearer instruments or physical goods such as the "slab of beer", could be treated as an NCPF, when accepted as a form of payment.

Treating digital assets as NCPF does not address the specific risks related to digital assets, such as disclosure considerations and software and cyber-security risks. Furthermore, digital assets are routinely traded on secondary markets, while the current financial services regulatory regime does not contemplate trading in NCPFs on secondary markets.

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.

If ASIC were to issue more examples, it would be helpful to have ASIC's views on:

1. different types of staking offerings, i.e. native staking, reward-based staking and third-party staking or pass through services;

2. different types of wallet arrangements, i.e. custodial, non-custodial, and multi-party arrangements.

A2Q3 For any of these examples, are there any unintended consequences? If so, what

[1] Australian Securities and Investments Commission, Submission No 44 to Senate Standing Committees on Economics, Inquiry into Digital Currency (December 2014), [65].

are these and what do you propose in response?

Given the prescriptive nature of the examples in the proposed INFO 225, there are many digital asset offerings in market that do not neatly fit them. For instance, digital assets such as bitcoin and ether possess features that do not align with the examples. Under this paper, the regulatory treatment of many crypto-asset related offerings will remain unclear particularly in light of broader public statements indicating ASIC's views that a number of "widely traded" crypto assets are financial products. A misalignment between these statements and the paper is undesirable from a rule of law, market and innovation perspective as it would leave substantial uncertainty in respect of ASIC's views in respect of products which are not covered by the worked examples. This again risks driving innovation overseas and encouraging regulatory arbitrage which is inconsistent with the policy goal of securing appropriate consumer protections.

Ultimately, any update to ASIC's regulatory guidance is not a substitute for fit-for-purpose legislation for digital assets, like the Markets in Crypto Assets (or MiCA) regime in the European Union. The legal uncertainty and unique features and risks of digital assets related offerings are best addressed by comprehensive legislation and tailored regulations and relief, rather than by incremental guidance and enforcement action intended to test the regulatory perimeter which is time consuming and inefficient.

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?

Stablecoins are innovative digitally native products that are best addressed through legislative reform. There is currently a proposal by Treasury to regulate stablecoins, such as the 'Payments System Modernisation' proposal. An approach which seeks to fit stablecoins within the existing laws is unlikely to deal with the unique features and risks of stablecoins, for example:

1. redemption obligations;

2. reserve requirements;

3. auditing and compliance obligations.

Further, such an approach would be inconsistent with most other common law jurisdictions around the world (such as Hong Kong, Singapore, and the EU).

Unlike traditional derivatives which are often used to speculate on the price of an underlying asset or to hedge against risk, wrapped tokens are typically used to facilitate interoperability or transfer value between different blockchain networks, allowing assets to be transferred across platforms. For example, wrapped bitcoin (WBTC) is a tokenised version of bitcoin that can be used on the Ethereum network. This functionality is fundamentally different from derivatives like options or futures. The key risks associated with wrapped tokens include software and cyber security risks associated with the redemption of the wrapped asset, rather financial speculation or default risk.

In that context, we do not consider it would be helpful to include examples addressing stablecoins and wrapped tokens in this guidance, and where the application of existing laws is likely to be subject to substantial debate.

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.

Classifying these assets as financial products could stifle innovation by imposing traditional financial regulations that are not fit-for-purpose on these assets. As discussed above in response to A3Q1, wrapped tokens are primarily used to facilitate interoperability between blockchain networks and accordingly should be treated the same way as their respective Layer-1 digital asset.

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

ASIC's no-action proposal is welcome for those who are operating in the regulated sector in light of the significant changes to ASIC's existing guidance. However, the no-action position should apply from the time that the draft guidance is finalised as ASIC policy in the interests of rule of law and a level playing field across the sector.

We thank you for considering our submission and would be pleased to answer any questions you may have concerning the above.

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