ASIC CP 381 Update to INFO 225 Digital Assets

Submission
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Dear Team

Digital asset facilities are the shop fronts for Australian retail investors and regulating them should be the focus. Any person spruiking (shilling) digital assets to retail investors should be regulated. Yet we are undergoing a historical period of technological transformation in the digitisation of financial services, with extreme experimentation, and to regulate retail sales activity by shoehorning Corporations Act provisions will be inefficient and ineffective.[2]

The focus should be on regulating retail activity under the ASIC Act. ASIC should deem most crypto products to be financial products for the purposes of section 12BA and Part 2 Division 2 of the ASIC Act, and should focus its attention on prosecuting under that Division.

ASIC should recommend to Treasury (if it has not already done so) that a study of digital assets be conducted by CoFR for the purposes of defining the legal aspects of digital assets.

The laws of regulation are, as we know, distinct from the 'private law of digital assets' which comprises of property law, contracts, equity, bankruptcy law, conflicts of laws, and the like.

Regulation cannot operate effectively unless it anchored in a sound private law.

The United Kingdom was wise to lead with the Law Commission's study of digital assets, which produced the Digital Assets: Final Report (June 2023). Led by Sarah Green, it was tasked to understand what digital assets are according to property law and private law, to help HM Treasury and the FCA determine the best way of regulating digital assets only after they assessed what they were dealing with; that is, the true nature of digital assets at law.

[1] *Researcher, University of Adelaide*. For example, see: https://stanford-jblp.pubpub.org/pub/alternative-juridical-take-cryptoassets/release/1. https://www.linkedin.com/in/fred-pucci-53ba8a28/.

[2] For reasons the author will elaborate in a follow-up letter or meeting with ASIC.

[redacted]

We can also borrow from the model Uniform Commercial Code (UCC) maintained by the Uniform Law Commission in the United States: in particular Article 12. We need a cradle-to-grave legal model such as the 'controllable electronic records' (CER) model that underpins UCC's Article 12 and related Article 8 recent amendments. This is important for recovery of borrowed digital assets, or to recover from bankrupt holders.

Digital assets are owned and controlled in a number of different ways. The examples put forward in CP 381 / INFO 225 including memecoins (ex. 9) are interesting but are founded on the wrong approach. The proposal prima facie sounds sensible for administering the existing laws, but a radical approach is warranted, to be effective in stamping out fraud, scams, and retail losses from 'get rich quick' hooks.[3] The most harm lies there and the best tool to address that harm is not securities regulation, at this stage. The harm is best handled by using the imported (ex TPA) provisions of the ASIC Act. The reason for highlighting this is that the ASIC Act is mentioned in passing in this Proposal. It is included in a comprehensive shopping list of laws, but not given the priority it deserves.

Given scarce resources, ASIC should direct its attention to this (the ASIC Act), for 2 years, while the CoFR work is undertaken. In the interim, ASIC could operate a modified licensing regime for the licensing of exchanges and other retail shopfronts with AFS licences, Australian market licences or clearing and settlement facility licences, while never losing sight of its clear priority: the enforcement of Part 2 Division 2 of the ASIC Act.

Good luck, and thank you for the thoughtful work presented in this Proposal.

Kind regards

F. Pucci 27-Feb-2025
Sydney

[3] Misleading behaviour (or fraud) associated with digital assets should be regulated as much as other financial services. Sports betting is a social concern. Why is it excluded by ASIC and governed by disparate state laws?