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RE: UPDATES TO INFO 225: DIGITAL ASSETS CONSULTATION

**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.**

**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.**

General comments

ASIC's updated guidance on the classification of digital assets as financial products represents a significant and welcome development in regulatory oversight. **The decision to evaluate digital assets through the lens of their associated rights and benefits establishes a more robust framework for understanding their fundamental nature.** This approach aligns with the recognition that an asset's true value derives from its underlying bundle of rights while appropriately separating an asset's true value and its speculative trading activity. While digital assets may experience price fluctuations driven by market speculation, their essential character and regulatory classification should be determined by the rights and benefits they offer to holders. However, when clarifying the rights and benefits attached to digital assets, ASIC notes *"A 'token' is not separated from its associated bundle of rights, benefits, expectations and features for the purpose of being traded on a digital asset or crypto platform."* ASIC's inclusion of "expectations" alongside rights and benefits in this guidance requires careful consideration, as it introduces potential ambiguity into the classification framework for digital assets. **The core problem lies in distinguishing between legitimate expectations that arise from formal rights**

and benefits versus speculative expectations driven by market sentiment or informal assumptions about future value.

The guidance's approach aligns with the broader international regulatory trend of attempting to classify and regulate digital assets within existing financial frameworks. However, this approach presents significant challenges, as digital assets possess unique characteristics that often transcend traditional financial instrument categories. This results in regulatory uncertainty and has sparked extensive debate among industry participants, legal experts, and regulators. It is questionable whether the existing frameworks can be effectively adapted to accommodate digital assets or whether new, purpose-built regulatory approaches are necessary to address the unique attributes and risks associated with these innovations. The discussion below further highlights some of the weaknesses of applying traditional regulatory frameworks to digital assets.

As noted by ASIC, digital assets vary significantly in their characteristics, rights, and issuance conditions. Indeed, while they can be traded digitally across global markets, this attribute alone does not classify them as financial products. Each digital asset must be evaluated individually based on its specific features and circumstances and given the wide (and growing) variety of digital assets, the worked examples provided fall somewhat short. These examples seem to be carefully curated to demonstrate clear-cut examples of whether or not a digital asset is a financial product. **In other words, the majority of the examples for both positive case (digital asset is financial product) and negative case (digital asset is not financial product) are rather unambiguous, avoiding the edge cases and complex scenarios that generate substantial debate around their status in the Australian and international stage.** Overall, the guidance has not provided much clarity on whether the commonly purchased or sold digital assets in Australia such as Bitcoin and Ethereum are financial products.

First, the use of terminology in some examples clearly signals the perspective of traditional financial products. Terms like "*financial returns*," "*investing in*," and "*yield-bearing*" are traditional markers of investment products, making these scenarios relatively straightforward to classify under existing regulatory frameworks. This choice of unambiguous examples, while providing helpful baseline

guidance, may not fully address the more nuanced situations that practitioners frequently encounter in the digital asset space.

Second, the examples provided for non-financial products oversimplify classification by selecting cases that are unambiguously distinct from financial products. The selected examples appear disconnected from the relevant classification categories they purport to illustrate. It is not clear how these examples are a good representation of negative cases of digital assets not being financial products, for example, Example 6 (Membership NFT) and Example 7 (Token representing a claim for pre-paid services) are used to demonstrate whether digital assets could be or involve interests in a managed investment scheme, and Example 10 (Tokenised concert ticket) to illustrate whether a digital asset could be, or involve, an offer of security. Put differently, the straightforward nature of these examples bypasses the complex classification questions that require regulatory guidance. Market participants frequently deal with digital assets that combine elements of both financial and non-financial products, or which evolve in their characteristics over time. The current examples do not provide insight into how to approach such hybrid or dynamic cases. While ASIC acknowledges: *“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 and any changes to the marketing of the digital asset”*, **none of the examples discuss how a digital asset might evolve and even shift between the financial product and non-financial product categories.**

Third, the current categorisation approach in the examples appears narrow by focusing on single financial product classifications rather than exploring the full spectrum of potential regulatory characterisations. This is particularly evident in Example 7 (Token representing a claim for pre-paid services), where the analysis only considers whether the example resembles a managed investment scheme classification but not relevant financial product categories such as a facility for making a financial investment. On the other hand, while Example 1 (Exchange token) appears to be a facility for making financial investments, it also exhibits characteristics of an Initial Coin Offering (ICO), which falls under the section of digital assets as securities.

Finally, there appears to be a lack of clear distinction between financial services and financial products in the current interpretation. While Section 763A

of the Corporations Act provides specific definitions for financial products, several examples presented appear to describe arrangements that more closely align with financial services. This ambiguity is particularly evident in Example 2, where ASIC's position states that "*Company B's facilities for staking these digital assets are likely to be facilities for making a financial investment.*" This raises two critical points requiring clarification. First, the nature of the "facility" needs a precise definition, specifically whether it refers to the native token being staked. Second, the act of providing "*staking services as a means of earning returns*" more appropriately falls under the category of financial services provision rather than a financial product.

Recommendations

A more comprehensive framework would benefit from including additional examples that explore edge cases and scenarios with greater complexity. For example, the guidance could explore:

- Hybrid digital assets that provide both utility functions and potential financial returns
- Digital assets where the primary purpose is non-financial, but includes a secondary characteristic that might resemble a financial product
- Digital assets that evolve in their characteristics over time such as digital asset first issues as the way to raise funds for the project and then transforms into governance token when the project matures
- Tokenised real-world assets and tokens represent the fractionalisation of assets.

Such complex examples would better prepare market participants to navigate the full spectrum of digital asset classifications they may encounter. The inclusion of more ambiguous scenarios could help establish clearer principles for classification when the determination is less obvious. This would be particularly valuable given the rapid evolution of digital asset structures and use cases in the market.

ASIC should also consider restructuring the examples to demonstrate how a single digital asset might be evaluated across all relevant financial product categories, providing clear reasoning for both positive and negative determinations in each category. This approach would reflect the complex nature of digital assets, which may exhibit characteristics spanning multiple regulatory categories. For example, while a digital asset might not meet the specific criteria for

a managed investment scheme, its features could still align with the definitions of a security or facility for making a financial investment. Therefore, to enhance the guidance, ASIC could consider restructuring the examples to demonstrate how a single digital asset might be evaluated across all relevant financial product categories, providing clear reasoning for both positive and negative determinations in each category.

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?

The inclusion of stablecoins and wrapped tokens in INFO 225 will provide valuable regulatory guidance. However, there appears to be an inconsistency in the approach in INFO225 vs CP381. While the updated INFO 225 hints that both stablecoins and wrapped tokens should be classified as derivatives, CP381 presents a different perspective, proposing that wrapped tokens might be considered derivatives while stablecoins should be treated as non-cash payment facilities.

Given the complex and varied nature of these digital assets, it would be beneficial to establish dedicated sections that thoroughly examine the diverse design mechanisms and implementations of both stablecoins and wrapped tokens.

Wrapped tokens

The definition and characteristics of wrapped tokens outlined in paragraph 20 is appropriate: they are “*product that enables a digital asset (normally only available on its ‘native’ blockchain) to be represented on a different blockchain*”, “*price of the wrapped token changes in line with the price of the native token, but the prices are not identical*” and “*any subsequent holder of the wrapped token can redeem it for the native token*”. However, the assertion that a wrapped token to be used “*on the different blockchain has added functionality and lower fees*” appears overly restrictive. Users may have various motivations for utilising wrapped tokens across blockchains, such as purchasing native NFTs, which do not necessarily relate to enhanced functionality or reduced fees.

For example, wrapped ETH (WETH), a very common wrapped token, challenges this narrow definition. While WETH is one of Australia's most actively traded assets

and fulfils the traditional functions of wrapped tokens, its primary purpose stems from a different need: ETH as the native token on Ethereum predates the ERC-20 standard. To participate in DeFi services and other activities on its own Ethereum blockchain, ETH therefore must be wrapped to conform to these later-established standards.

Further, the technical capability for users to wrap and unwrap tokens through smart contracts, whether directly or through intermediary companies, differs significantly from actual market practice. In practice, users typically engage in straightforward token swaps between wrapped and unwrapped versions, treating these transactions similarly to exchanges between unrelated tokens. This market behaviour effectively disconnects the theoretical anchor between wrapped and unwrapped versions of the token. As a result, it becomes challenging to classify wrapped tokens as derivative contracts, since the practical implementation has diverged from the technical design that would support such a classification.

Stablecoins

While the general assessment of stablecoins as non-cash payment facilities appears appropriate, and the basic features described are accurate, several important considerations warrant attention. The current definition stating that these tokens are "*expected to maintain a stable price and value in Australian dollars*" requires more precise language to address the mechanisms of maintaining the peg. This is particularly important given the diverse landscape of stablecoins, which includes fiat-backed, commodity-backed, and algorithmic variants. Each type employs different methods to maintain price stability, and their effectiveness in maintaining their stated peg can vary significantly.

Further, the theoretical ability for stablecoin issuers to "*redeem, or buy back, the tokens at par value in exchange for fiat money, on-demand from any holder*" significantly differs from the practical reality, as evidenced by the terms and conditions of the two largest fiat-backed stablecoin issuers, Tether (USDT) and Circle (USDC). Tether's redemption process illustrates this disparity. While redemption is technically possible, several substantial barriers exist. Users must first complete KYC/AML verification to become eligible. More significantly, Tether imposes a minimum redemption threshold of 100,000 USD, coupled with considerable fees: either \$1,000 or 0.1% of the transaction (whichever is greater), plus a non-

refundable verification fee of 150 USD in Tether Tokens¹. These requirements effectively place direct redemption beyond the reach of most retail investors, forcing them to rely on cryptocurrency exchanges to convert their USDT to fiat currency. Circle's USDC implementation creates a similar distinction between institutional and retail users through its two-tier system. Circle Mint accounts, which enable direct USDC redemption, are restricted to registered businesses in specific regions (Type A users) that operate at scale. Retail investors and individual users are classified as Type B users, explicitly prevented from direct redemption privileges². This structure similarly channels retail investors toward cryptocurrency exchanges as their primary means of converting USDC to fiat currency. These two examples demonstrate that the stated ability to redeem stablecoins directly for fiat currency is primarily a theoretical construct for retail investors. The practical reality is that most stablecoin holders must rely on secondary market mechanisms, primarily exchanges, to convert their holdings to fiat currency.

¹ <https://tether.to/en/fees/>

² <https://www.circle.com/legal/usdc-terms#:~:text=Each%20USDC%20is%20intended%20to,held%20in%20the%20USDC%20Reserves.>