

6 March 2025

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**Submission to consultation on proposed updates to INFO 225: Digital assets:
Financial products and services (Consultation Paper 381)**

The Tech Council of Australia (**TCA**) welcomes the opportunity to make a submission to the Australian Securities & Investment Commission's (**ASIC**) consultation on its proposed updates to Information Sheet 225 *Crypto-assets* (**INFO 225**).

The TCA is Australia's peak industry body for the tech sector. We represent over 150 tech companies from a diverse cross-section of Australia's tech sector, including those operating in the digital assets and broader financial technology markets. This includes local leaders (such as Block, Swyftx and Immutable) and online platforms that link Australians to global markets (eg Coinbase).

As ASIC notes in its Consultation Paper 381 (**CP 381**), the digital asset market is rapidly evolving. Supporting the growth of this sector is critical to unlocking a wide range of opportunities for the Australian economy and consumers (eg greater efficiency, security and transparency of financial transactions). We also recognise that widespread adoption of emerging digital asset technologies will require building consumer trust and we support the development of a fit-for-purpose consumer protection framework. We consider there is a significant opportunity for Australia to emerge as a leader in responsible digital asset innovation, supported by a business environment with clear, flexible and risk-calibrated regulation. In this regard, we note the government's ongoing efforts to update financial services laws for the digital assets sector and its objectives in ensuring effective consumer protections while supporting innovation that enables growth and competition in Australia's financial sector.

It is not clear that separate updates to INFO 225 are required at this stage. The TCA is concerned that the proposed updates pre-empt government reforms on the horizon, potentially exceed ASIC's regulatory authority and are, moreover, unclear. We consider that this is likely to increase regulatory uncertainty and may prompt changes in market behaviours and market structures that were not intended by the government.

The TCA recommends that ASIC wait for the government to finalise legislative reforms relating to digital asset platform regulation and the licensing framework for payment service providers before proposing updates to INFO 225 or any other guidance materials that would impact digital asset service providers (other than the proposed class no-action position, which the TCA welcomes in principle). If, following reforms, updates are required to INFO 225, we note that updates should be limited to guidance on specific processes or compliance issues and should not reflect positions which are not settled at law.

Overlap with existing reform agenda

As identified in CP 381, the government is currently progressing reforms to the financial services framework in respect of digital assets and licensing of payment service providers.¹ We acknowledge that ASIC's proposed updates to INFO 225 intend to complement the government's proposed reforms (as noted in CP 381), however the details of these reforms have not been released. It is prudent to defer any substantive changes to INFO 225 until these reform processes have been completed, to avoid inconsistency with future legislation and, to the extent possible, a piecemeal approach to updates (eg ASIC has stated that the INFO 225 will need to be updated if reforms relating to 'payment stablecoins' are implemented).

The TCA also advocates an approach to regulation of the digital assets sector that is aligned with international norms (particularly given the ease with which cross-border transactions can be effected through decentralised digital assets). We note that this is also one of the government's stated objectives for its new framework, and we urge ASIC to await clarity from government and avoid implementing any updates that may put the Australian market at a disadvantage compared to its peers.

Proposed class no-action position

ASIC has suggested that, due to the proposed updates to INFO 225, it will offer transitional relief for digital assets business that are making genuine efforts to obtain their licence. The TCA supports a limited class no-action position in principle and suggests that this should be expanded to cover past and future activity and be available (1) regardless of whether the updates to INFO 225 are implemented or when a business commenced operations, and (2) at least until the government finalises its proposed digital asset reforms. Such an approach may incentivise digital asset service providers to apply for licences (supporting ASIC's regulatory aims, without needing to implement the broader updates proposed to INFO 225).

Scope of proposed updates and regulatory uncertainty

The TCA is concerned that several aspects of the proposed updates will result in increased regulatory uncertainty. In particular:

- **Hypothetical worked examples** – we have received member feedback that ASIC's interpretation of existing financial product definitions in the context of hypothetical digital asset scenarios is inappropriate, overly prescriptive and, in some cases, flawed.

For example, members have indicated that the proposed regulatory characterisation of staking services ignores the lower risk profile of certain staking services which should be differentiated from existing financial product analogues. In the context of staking, it is key to note that consumers already own the tokens, and this is unregulated. Imposing burdensome licensing obligations on staking service

¹ See Treasury, *Regulating Digital Asset Platforms* (Proposal Paper, October 2023) and Treasury, *Payments System Modernisation: Regulation of payment service providers* (Consultation Paper, December 2023).

providers could obstruct the consumer benefits of staking and instead cause consumer harm inadvertently (eg where consumers are driven to risky offshore service providers).

Members have also raised concerns with ASIC's proposed treatment of digital asset wallets, which does not acknowledge key differences between custodial and non-custodial wallets and instead suggests that both may constitute non-cash payment facilities (notwithstanding that consumers retain complete control and ownership of digital assets through non-custodial wallets).

We do not recommend introducing the proposed worked examples in INFO 225, noting that the risks (and benefits) of digital assets and related products are not identical to those of existing financial products and the current regulatory framework is not designed for decentralised financial systems. To avoid targeting the wrong risks (or failing to capture potential benefits), we suggest that ASIC waits for the government's proposed digital asset regulatory framework before determining the need for any updates to its regulatory guidance materials.

- **Non-cash payment facility** – the TCA does not propose to comment on the appropriateness of the definition of a non-cash payment (**NCP**) facility and considers this a matter to be addressed by the legislature (in consultation with industry participants and technical experts). However, we note general concerns in respect of ASIC's focus on digital assets themselves being an NCP facility. The new draft INFO 225 suggests that any coin/token may be an NCP facility on the basis that it may be used as a store of value and a means of payment. In our view, these statements do not add clarity to ASIC's position on the application of the NCP facility definition and its interaction with digital assets. For example, it is unclear whether ASIC is suggesting that a payment stablecoin (as described in the Treasury's Consultation Paper on [Payment System Modernisation: Regulation of payment service providers](#)) would be an NCP facility under the existing *Corporations Act 2001* (Cth) (**Corporations Act**). If that is ASIC's view, we suggest that this is an inappropriate characterisation, noting that Treasury's Consultation Paper proposes to introduce a new regulatory concept for those arrangements.

We also note that any expansion in the application of the NCP facility definition will also affect the broader financial services industry which is also awaiting reforms to the payments licensing framework.

While we agree that regulatory certainty is important for the market, in our view the suggested updates to INFO 225 in connection with NCP facilities do not achieve this end and are inappropriate in the absence of legislative reform. We are concerned that such changes may have adverse impacts on competition in the digital assets market, for example, by increasing the compliance burden on any businesses which may have entered the market or structured operations in reliance of ASIC's guidance in the existing INFO 225.

Potential for regulatory overreach

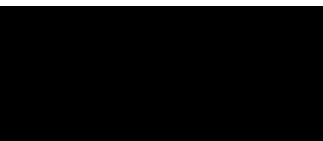
More generally, we are concerned that the proposed updates to INFO 225 will have the effect of entrenching ASIC's interpretation of the law, without statutory or clear judicial basis, and potentially in excess of ASIC's regulatory authority. Members have also raised concerns that none of the reasons given by ASIC for updating INFO 225 relate to addressing consumer harms.

It is inappropriate for such updates to be set out in information sheets, which are intended to provide guidance on specific processes or compliance issues or an overview of a more detailed regulatory guide. While guidance in information sheets is not legally binding, it can signal ASIC's compliance and enforcement approach and, if unsuitable or excessive, lead to changes in market behaviours or market structures that were not intended by the government.

We also do not agree with ASIC's intentions for INFO 225 to be a 'living document', subject to iterative update in line with the evolution of digital assets. This will not provide businesses with sufficient certainty to innovate or invest in Australia and can lead to unintended consumer harms (eg where businesses withdraw, or fail to enter, the Australian market, this may lead to reduced consumer options or encourage consumers to seek unregulated offshore alternative products).

We appreciate the opportunity to contribute feedback to these proposed updates and would be pleased to assist ASIC with any further information it requires.

Yours sincerely

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Harry Godber

Head of Policy & Strategy

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