

27 July 2021

The Manager Consultation Paper 343

Australian Securities &
Investments Commission

By Email: [REDACTED]

Marshall Investments is a private investment company that was founded by the Marshall Family in 1995. The company now manages a diversified investment portfolio that includes equities, property, private equity and lending products. As an office we are well connected into the investment community and do a lot of our investing alongside other high net worth individuals and family offices.

The emergence of cryptocurrencies has been a major theme in recent years and as this asset class has gained prominence in local and offshore markets it has gained even more credibility of late as institutional capital has begun making meaningful allocations to this space. We discuss our investment themes regularly with other family offices and high net worth individuals and a lot of the investment community are looking for the best way to participate in this area.

Our view and that shared by others is an ETF is the most logical way to participate in this area. The big impediment to holding bitcoin directly as an example, is the requirement to hold the codes if you wish the asset to be held in the most secure environment (ie. off line in a cold wallet) and this obligation has inherent risk in a private office with staff turnover. The ability to invest via an ETF provides liquidity as the asset can be traded daily on a recognized and regulated exchange and the security of the underlying asset is maintained by professionals with the appropriate infrastructure to safeguard the bitcoin. Just like a gold ETF the security can be traded daily at it's market price and there seems no reason why you could have an ETF for gold and not the same instrument for different crypto currencies.

Marshall Investments not only has an interest in acquiring access to bitcoin but other cryptocurrencies as well and see no reason why the ETF space could not cater for a range of currencies or other exposures in the crypto space.

The ASIC CP 343 only recognises two crypto-assets, BTC and ETH. We think this is restrictive to new innovation and ultimately denies access to Australian consumers a globally legitimised crypto-asset and will push investors and corporates offshore at the detriment of Australian consumer and Australian economy.

Marshall Investments deeply believes that under the Australian legal system the best consumer protections for access to Bitcoin and other crypto-assets is by use of a Bitcoin ETF and other associated ETPs.

Three brief highlights

- ASIC should categorise **Bitcoin as a commodity**. Bitcoin is seen by major regulators as a commodity for years. ASICs suggestion that crypto-assets, and Bitcoin in particular, should be a special class creates unintended consequences and complications that will make Australia less competitive

internationally and further erode Australia consumer protections. There is a sound legal basis and movement internationally for treatment of crypto-assets as commodities/a type of property.¹

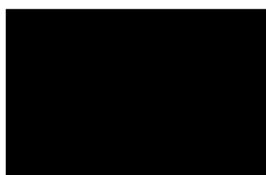
- **Custody of Bitcoin and crypto-assets preference should be in Australia** if it is available. Consumer protections for the asset class is best practices to be located in Australia and the detailed reasons are below. In the case of access for Australian auditors, access for Australian law enforcement, ATO orders and taxation and to ensure property rights are maintained in a liquidation event.
- These ETP structures which are well known and have been in use for many years, if they can accommodate crypto-assets, should be utilised to **avoid the need for additional layers of regulation with the attendant cost and complexity that brings ultimately at the detriment of the Australian consumer**. Such an approach would be consistent with the Canadian path, which ASIC has previously taken note of in responding to the Senate Inquiry into Australia as Technology and Financial Centre.²

ASIC has clearly put considerable and considered thought into CP343 and this engagement with crypto-assets is most welcome by both the financial services industry and the cryptocurrency / blockchain industry. We do have concerns that the proposals in CP343 veer into policy making, particularly in relation to the creation of a new way of treating crypto-assets.

Below are comments provided in response to ASIC Consultation Paper 343 "Crypto-assets as underlying assets for ETPs and other investment products" (CP343) which seeks feedback on how crypto-assets can meet existing regulatory expectations for ETPs and proposals ASIC is presently considering. We have prepared these comments with the assistance of Michael Bacina, Partner in Piper Alderman's Blockchain Group.

We welcome ASICs open and consultative approach to this financial innovation sector which we believe will provide large growing economic and societal benefit to Australian citizens broadly.

Yours sincerely,



Andrew Martin

Executive Director

Marshall Investments

¹ See UK Jurisdiction Taskforce, "Legal Statement on Cryptoassets and Smart Contracts" (November 2019) and Slide 11, Commodities Futures Trading Commission, LabCFTC, "A CFTC Primer on Virtual Currencies" (17 October 2017)

² Paragraph 93, Senate Select Committee on Australia as a Technology and Financial Centre: Third Issues Paper - Submission by ASIC, Submission 61, Appendix 3 to CP343

Q	Question	Answer
B1Q1	Do you consider that crypto-asset ETPs should be available to retail investors through licensed Australian markets? Please provide details, including data on investor demand where available.	Yes, crypto-assets are available generally to retail investors by direct purchase via digital currency exchanges and wholesale investors may access a number of existing bitcoin wholesale funds (such as those offered by Apollo Capital, Cosmos Asset Management, Digital X, Monochrome Asset Management and others).
B1Q2	Do you consider that crypto-asset ETPs should be cleared and settled through licensed Australian clearing and settlement facilities? Please provide details.	Yes, unless existing clearing and settlement facilities decline to accept such products, in which case alternative clearing and settlement should be made available.
B1Q3	If you are a clearing participant, would you be willing to clear crypto-asset ETPs? Please provide your reasons.	Not applicable.

B1Q4	If you are a trading participant, would you be willing to trade crypto-asset ETPs? Please provide your reasons.	Yes, we would be trading crypto ETP's if they were available. This is an asset that we are seeking greater exposure as an investment house and the sooner there is a safe and credible way to trade the better from our perspective.
B1Q5	Do you agree with our approach to determining whether certain crypto-assets are appropriate underlying assets for ETPs on Australian markets? If not, why not?	<p>No. The definition proposed by ASIC is adopted from a UK definition but ASIC stops short of using the accompanying UK categories of crypto-assets leaving a technology based definition without a functional taxonomy of token categories.</p> <p>ASIC should adopt the FCA's token category system, which would enable easier categorisation of crypto-assets, or alternatively to recognise that, absent additional features, a simple crypto-asset should be treated as a commodity / property, for the reasons set out above.</p> <p>ASIC's goal should be to regulate activities, not technology, and to be technologically neutral in approach. The suggested new category and definitions of crypto-asset is too broad and either needs further categorisation or a simpler approach to avoid the unintended consequence of potentially regulating, or being seen to be regulating, the technology itself.</p>

B1Q6	Do you have any suggestions for additions or modifications to the factors in proposal B1? Please provide details.	Yes, guidance should be in line with ASICs submission to the Senate Inquiry Into Virtual Currencies which made clear that Bitcoin-like crypto-assets were more akin to commodities.
B1Q7	Do you have any suggestions for alternative mechanisms or principles that could achieve a similar outcome to the approach set out in proposal B1? Please provide details.	By treating crypto-assets which don't have features of financial products from the starting point as a commodity, market operators can consider applications by issuers for listing of such crypto-assets in a familiar framework (with due regard to pricing and custody) and make an informed decision as whether the asset proposed meets their listing rules and regulatory requirements.
B2Q1	Do you agree that a new category of permissible underlying asset ought to be established by market operators for crypto-assets? If not, why not?	No. For the reasons set out above in our answer above, either using the FCA token categories or a commodity-as-a-starting-point can assist in recognising crypto-assets should be treated like property / commodities under the existing ETP frameworks. In either case, existing ETP structures can accommodate crypto-asset ETPs now without the need of a new category of permissible underlying asset.
B3Q1	Do you agree with the good practices in proposal B3 with respect to the pricing mechanisms of underlying crypto-assets? If not, why not?	Yes.

B3Q2	Are there any practical problems associated with this approach? If so, please provide details	No.
B3Q3	Do you think crypto-assets can be priced to a robust and transparent standard? Please explain your views.	Yes, indices continue to be introduced for crypto assets, including by the New York Stock Exchange, CME Group and S&P Dow Jones, all highly respected index providers, covering hundreds of crypto-assets. Those indexes use major digital currency exchanges for source data, and not small exchanges which ASIC has identified have been the subject of research raising concerns regarding price manipulation. The ever widening indexes and inclusion of crypto-assets stands in contrast to ASIC's suggestion that only Bitcoin and Ether have suitable markets for price discovery.
B3Q4	Do you consider that a more robust and transparent pricing standard is achievable in relation to crypto-assets? For example, by using quoted derivatives on a regulated market. Please explain and provide examples where possible.	Yes, see above answer to B3Q3.

B4Q1	Are there any other good practice expectations in INFO 230 that need to be clarified or modified to accommodate crypto asset ETPs?	We suggest that a section on crypto-backed ETPs be introduced into INFO230 clarifying the definitional approach and custody expectations for crypto-assets as well as making clear that licensed custodians can custody crypto-assets under RG133.
C1Q1	Do you agree with our proposed good practices in relation to the custody of crypto-assets? If not, why not? Please provide any suggestions for good practice in the custody of crypto-assets.	Yes.
C1Q2	Are there any practical problems associated with this approach? If so, please provide details.	If custody is permitted to be offshore, investor protection is necessarily reduced by Australian jurisdictional reach being limited. However, Australian custody providers need reassurance that they can custody crypto-assets under RG133. ASIC should provide that guidance and assurance.
C1Q3	Do you consider there should be any modifications to the set of good practices? Please provide details.	Yes, ASIC should consider mandating custody in Australia if it wishes to provide the best protections for Australians investing in crypto-assets.

C1Q4	Do you consider that crypto-assets can be held in custody, safely and securely? Please provide your reasons.	<p>Yes. The manner in which private / public key pairs for crypto-assets operate together with sharding systems and a highly open and traceable public database gives a sound basis for custody, safety and security, with real time monitoring of custodied crypto-assets available at low cost.</p> <p>The major international custodians BitGo, Coinbase Custody and Copper are holding a significant amount of digital assets and have had no issues with safety or security to date. Overseas ETPs are utilising these custody solutions.</p>
C1Q5	Do you have any suggestions for alternative mechanisms or principles that could replace some or all of the good practices set out in proposal C1? Please provide details.	As noted above, we suggest a preference for Australian custody where possible. We also suggest GA007 be used as equivalent to SOC 2 Type II.
C1Q6	Should similar requirements to proposal C1 also be imposed through a market operator's regulatory framework for ETPs? If so, please provide reasons and how it could work in practice	Listing applications at present must explain the custody proposed. Market operators are increasingly sophisticated and knowledgeable of crypto-assets and are aware of the special needs for crypto-asset custody, which can be reviewed at the time of listing and via regular audit of the custody used.

C2Q1	Do you agree with our proposed good practices in relation to risk management systems for REs that hold crypto-assets? If not, why not?	Yes.
C2Q2	Are there any other regulations (other than KYC and AML/CTF) that should form part of an appropriate baseline level of regulation for crypto-asset trading platforms used by REs and connected service providers? Please provide details.	No. Given the rapid development of the crypto space, REs need flexibility to adopt best practice solutions as they emerge.
C2Q3	Are there any practical problems associated with this approach? If so, please provide details.	No.
C2Q4	Are there any other matters related to holding crypto-assets that ought to be recognised in the risk management systems of REs and highlighted through ASIC good practice information? Please provide details and any specific proposals.	We believe crypto-asset custody is the primary asset-specific risk which REs need to manage carefully.

C2Q5	Should similar requirements to proposal C2 also be imposed through a market operator's regulatory framework for ETPs? If so, please provide reasons and outline how it could work in practice.	See the answer to C1Q6
C3Q1	Do you agree with our proposed expectations regarding disclosure obligations for registered managed investment schemes that hold crypto-assets? If not, please explain why not.	Broadly yes, but the disclose references to crypto being "by design" a significant user of electricity continues a myth. Bitcoin in particular has been identified and is in use to rescue "stranded" energy and access increasing amounts of renewable energy.
C3Q2	Are there any practical problems associated with this approach? If so, please provide details.	Mandated disclosure can risk reinforcing myths about crypto-assets, so we submit great care should be taken to ensure the risks being raised are reasonable and any mitigation is also permitted to be noted.
C3Q3	Are there any additional categories of risks that ought to be specified by ASIC as good practice for disclosure in relation to registered managed investment schemes that hold crypto-assets?	No and we refer to the answer at C3Q2 above.

C4Q1	Are there any aspects of the DDO regime that need to be clarified for investment products that invest in, or provide exposure to, crypto-assets?	No, as crypto-assets should be treated like commodities when they function as such, any requirements applicable to commodities should be applicable to those ETPs backed by crypto-assets which are commodities.
D1Q1	Do you agree that crypto-assets are capable of being appropriate assets for listed investment entities on Australian markets? If not, why not?	Yes, particularly where they meet the definition of a commodity. The increasing availability of crypto-assets to retail investors via listed ETPs in comparable countries is further evidence of their suitability for Australian ETPs.
D1Q2	Do you agree with our proposed expectations for LICs and LITs that invest in crypto-assets to ensure equivalent standards are applied by market operators? If not, why not?	Yes, and see our answer to question B1Q5 above.
D1Q3	Are there any practical problems associated with this approach? If so, please provide details.	See our answer to B1Q6 and B1Q7 above.
D1Q4	Are there additional standards which ought to apply via market operators to LICs or LITs that	No.

	invest in crypto-assets? If so, what are these expectations and why should they apply?	
D1Q5	Should LICs and LITs only be able to invest significant funds in crypto-assets if this is either set out in their investment mandate or with member approval? If not, why not?	Yes, subject to treating crypto-assets like for like with comparable assets such as commodities.
D1Q6	For the purposes of this proposal, we consider a material investment is where an entity invests or plans to invest more than 5% of its funds in crypto-assets. Should another materiality threshold apply	No.
E1Q1	Do you agree with our proposal to establish a new asset kind that will cover crypto-assets?	<p>No. We refer you to our comments above at question B1Q5, crypto-assets as ASIC has defined are merely a technological representation of an existing kind of asset. For the overwhelming majority of crypto-tokens, a commodity/property classification is appropriate.</p> <p>We submit ASIC should adopt the FCA categories of tokens which should accompany the FCA definition of crypto-assets, or alternatively adopt a sensible like-for-like classification starting from the position that a tradeable digital good (including crypto-assets) is a commodity, and that if there are</p>

		<p>additional features to that crypto-asset, then it may also be a financial product, preference share, derivative or another financial product.</p> <p>We respectfully suggest the comment at para 94 (that crypto-assets do not fall within any existing asset kind that can be selected by an applicant in applying for a licence) falls into error. There are a range of commodity backed registered managed investment schemes which also do not fall within the list of boxes which may be selected when applying for a financial services licence.</p> <p>We submit that ASIC consider introducing a “commodity” category more broadly for a licence applicant to select if the regulatory objectives of ASIC are to be technologically neutral and which would have a benefit of bringing other property (other than real property) or commodity backed ETPs into their own category.</p>
E1Q2	Do you consider that crypto-assets may be captured by the existing asset kinds? If so, please explain.	<p>Yes, the reasons set out immediately above, and the examples of ETPs and registered managed investment schemes providing access to commodity investments show that crypto-assets can be considered commodities and immediately accommodated in ETPs.</p> <p>We respectfully suggest if ASIC considers another category is needed, that a “commodity” category be introduced, without changing the need for custody to be appropriately handled or pricing certainty to be managed.</p>

E2Q1	Do you agree with our approach to restrict the crypto-assets a registered managed investment scheme is authorised to hold (e.g. to bitcoin or ether)?	<p>No. We do not see why the approach to crypto-assets being held in registered managed investment schemes should be limited to a “whitelist” or pre-authorised crypto-assets.</p> <p>Consistent with Australia’s principles based approach to financial services regulation we submit that a like-for-like classification approach would more sensibly permit a principles based approach to inclusion of specific crypto-assets within any particular registered managed investment scheme.</p>
E2Q2	Do you consider there are any other aspects of the AFS licensing regime that need to be clarified or modified to accommodate investment products that invest in, or provide exposure to, crypto-assets?	<p>There has not been a single registered managed investment scheme to date which provides material exposure to crypto assets to investors. We submit this may be as registered schemes must have assets separately custodied and there are no licensed custody providers offering crypto-custody at this time.</p> <p>There is nothing in RG133 which prevents crypto-asset custody and we submit that clear and supportive guidance should be provided by ASIC to custody providers and an update to RG133 to make clear that licensed custodians can provide custody for crypto-assets would support and accommodate investment products which invest in or provide exposure to crypto-assets. This support may also assist in dispelling myths and misunderstandings around crypto-assets.</p> <p>ASIC should, as part of this consultation, consider what other features of the MIS licensing regime should be amended to encourage and facilitate</p>

		registered MISs which can offer crypto-asset exposure to Australian retail investors.
F106(a)	Regulatory and financial impact - ASIC request for information on proposals or alternative approaches including likely compliance costs	Significant compliance costs and delay will be required to accommodate a new category of crypto-asset including the need for a Regulation Impact Statement and further delay in the amendment of laws, instruments or regulations as well as the engagement of professional services for licence variation applications to accommodate the new asset category.
F106(b)	Regulatory and financial impact - ASIC request for information on proposals or alternative approaches including likely effects on competition	<p>We submit that a new category of crypto-asset will place Australia at odds with the rest of the world in how crypto-assets are treated for the purposes of investment vehicles and that this will raise a barrier to competition from offshore providers of investment products backed by crypto-assets. It may also impact the ability of Australian investment managers to expand their offerings overseas if those jurisdictions do not have comparable methods for crypto-backed investment products.</p> <p>The present time for processing of AFSL applications or variations is not insignificant, and there will be a flood of applications or variations to existing licences if a new category of crypto-asset is created. ASIC should consider the internal cost and time-cost in processing these applications, which will delay and increase costs for new products being made available to Australian retail investors.</p>

F106(c)	Regulatory and financial impact - ASIC request for information on proposals or alternative approaches including other impacts, costs and benefits.	<p>The suggestion to restrict suitable crypto-assets to Bitcoin and Ether at this time, and a collaborative process with market operators to set a prescriptive formula to even consider crypto-assets has an immediate cost to businesses wishing to offer crypto-assets.</p> <p>Australia has fallen behind Canada in launching crypto-asset ETPs and the proposed 2 crypto-assets, with an unknown path to more “permissioned” crypto-assets is, we submit, inconsistent with a principles based regulatory approach.</p> <p>An approach which fully adopts the FCA’s categories of tokens, if ASIC wishes to proceed with the crypto-asset definition in CP343, should be adopted to avoid the costs of ongoing uncertainty in relation to crypto-asset classification.</p> <p>As suggested above, an alternative would be recognising crypto-assets as commodities unless a particular crypto-asset has an identifiable feature which renders it the subject of additional regulatory compliance such that it is better characterised as, for example, a derivative or share. This approach would fit better with INFO225, require less amendment to guidance and permit a faster time to market for ETPs which seek to include crypto-assets.</p>
---------	--	---