

7 March 2025

Digital Assets Team
Australian Securities and Investments Commission
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By email: digital.assets@asic.gov.au

Dear Digital Assets Team

ASIC Consultation Paper 381 *Update to INFO 225: Digital assets: Financial products and services* (CP 381)

1. This submission is made by the Digital Commerce Committee and the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committees**) in response to CP 381, which was released by the Australian Securities and Investments Commission (**ASIC**) in December 2024.
2. CP 381 seeks feedback on a proposed update to ASIC Information Sheet 225 *Digital assets: Financial products and services* (**INFO 225**) and ASIC's proposed approach to licensing digital assets and businesses.
3. The Committees thank ASIC for the opportunity to provide feedback, allowing a reasonable time for submissions to be made in response (factoring in the Christmas / New Year break) and for granting a short extension of time to make this submission.

Submissions

4. The Committees agree that it is appropriate for ASIC to revisit the content of INFO 225 at this point in time in light of the growth and development of the digital assets industry, as well as legal and policy developments both in Australia and in other jurisdictions. Overall, the Committees consider that the guidance ASIC has proposed in CP 381 will be helpful to the digital assets industry and other relevant stakeholders.
5. The questions posed by ASIC and the Committees' responses thereto are set out in the **Attachment** to this submission.
6. The Committees also wish to make the following points.

Preferred format for ASIC guidance

7. The clarity of the proposed INFO 225 document could be improved. Our committees consider that the document is too long (32 pages in total) and too detailed to be labelled as an information sheet. The Committees consider that it would be more appropriate for ASIC to reposition this document as a regulatory guide. One reason for this is that regulatory guides are easier to navigate because they are structured with numbered paragraphs. At the very least, this document needs a table of contents to assist readers to navigate it.

ASIC guidance on digital currencies

8. The proposed INFO 225 document does not provide explicit guidance on whether digital currencies are financial products. At least since 2014, ASIC has expressed its position that a digital currency (e.g., Bitcoin, Ethereum) is not itself a financial product. This means that a person does not require an Australian market licence or an Australian Financial Services License (**AFSL**) to operate a digital currency exchange, hold a digital currency on behalf of another person, provide advice, or arrange for others to buy and sell digital currency. In our committees' view, this position is correct and consistent with the Federal Court's decision in *ASIC v BPS Financial Pty Ltd* [2024] FCA 457. The clarity of the document will be improved by explicitly restating this long held position.

Attribution of legal responsibility and the "Responsible Machine Problem"

9. The Committees note that there is currently no guidance on the regulatory treatment of non-legal "persons" such as Distributed Ledger Technology (**DLT**), Autonomous Organisations (**AOs**) or Artificial Intelligence (**AI**) Systems (**Computational Systems**) in circumstances where, if they were a legal person, they would be regarded as carrying on a financial services business for the purposes of Chapter 7 of the *Corporations Act 2001* (Cth).
10. While, at present, it is still generally possible to trace the act of issuing a financial product back to a legal person under the Corporations Act, the Committees submit that there may be future scenarios under which this is no longer the case (assuming the definition of "person" in the Corporations Act remains as it is).
11. By way of background, the problem of how Computational Systems do not easily fit within existing legal frameworks has been labelled the "Responsible Machine Problem" or "Responsible AI Problem". It refers to the inability of the legal system to effectively integrate AI because the law allocates rights, responsibilities, liabilities and punishments to human beings. Representatives of law firm Stirling Rose are members of the Committee and have shared Stirling Rose's discussion of this issue, which is available [here](#).
12. The Committees submit that the financial services laws should be technologically neutral in their application, and consumers of Australian financial products and services should be protected from harm, irrespective of whether the harm is caused by a legal person (as currently defined in the Corporations Act) or a Computational System, and that there must be someone who can be held to account to take legal responsibility when harm occurs.

13. The Committees invite ASIC to consider the following potential regulatory positions with respect to the issue of a financial product by a Computational System:
 - (a) establishing a framework for attributing responsibility for the conduct arising from the use of the Computational System to a legal person; or
 - (b) holding a Computational System itself responsible for carrying on a financial services business and/or engaging in prohibited activities under the Corporations Act.
14. If ASIC were to entertain the latter approach, then the Committees note that significant work would need to be done, including:
 - (a) potential legislative reform to extend the Corporations Act concept of a “person” to include a Computational System;
 - (b) consideration as to how a Computational System might legally meet the requirements to hold an AFSL; and
 - (c) how a Computational System could be held to account if it were in breach of provisions for which monetary or criminal penalties may be invoked.
15. The Committees would be pleased to further discuss this challenge with ASIC and to collaborate with ASIC and other stakeholders in developing a solution.

Conclusion and further contact

16. The Committees hope that ASIC will find the feedback on CP 381 and other shared insights provided by the Committees useful in the digital assets policy development process, and would welcome further engagement with ASIC on this topic.
17. Please contact [REDACTED] or [REDACTED] if ASIC would like to discuss this submission or the emerging digital assets regulatory landscape more broadly with representatives of the Committees.

Yours faithfully

[REDACTED]

Dr Pamela Hanrahan
Chair
Business Law Section

Attachment to Law Council Business Law Section Submission—ASIC CP 381

Consultation Questions	Response
A The proposed updates to INFO 225	
<p>A1Q1 Are there any topics or guidance that have not been included in draft updated INFO 225 that you think should be? Please provide details.</p>	<p>The proposed INFO 225 document does not provide guidance on whether digital currencies are financial products. The Committees recommend that ASIC explicit restate its longstanding position that a digital currency (e.g., Bitcoin, Ethereum) is not itself a financial product.</p> <p>While it may be beyond the scope of the update to INFO 225, the Committees recommend that ASIC begin considering the formulation of a regulatory response to emerging scenarios where there is no legal “person” involved in the relevant transaction which causes a financial product to be issued. This is discussed in more detail in the body of the submission letter to which this document is attached.</p>
<p>A1Q2 Are there any topics or guidance that were included that you think should <i>not</i> have been included? Please provide details.</p>	<p>The Committees do not consider any of the topics or guidance ought to be removed.</p>
<p>A1Q3 Do you agree that the good practice guidance in INFO 225 directed to responsible entities is applicable to providers of custodial and depository services that provide custody of digital assets that are financial products? Are there any good practices that you would like added (e.g. on staking services)? Please provide details.</p>	<p>The Committees note that there is a specific legislative regime governing responsible entities of registered managed investment schemes in Chapter 5C of the <i>Corporations Act 2001</i> (Cth).</p> <p>The Committees submit that if any of the good practice guidance is provided solely to address a specific obligation of a responsible entity that arises under Chapter 5C, then the guidance should be confined to that context.</p> <p>Otherwise, the Committees believe that the guidance should be consistent for any arrangements that will involve the provision of financial services which include the holding of digital assets.</p> <p>The Committees note that this is a rapidly evolving industry, and therefore recommend that ASIC regularly revisit the guidance to ensure that relevant issues are being adequately addressed, particularly where those issues which are potentially systemic.</p>

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Consultation Questions	Response
<p>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.</p>	<p>The Committees wish to comment on the following worked examples provided by ASIC.</p> <p>Example 2 states that the company is facilitating native staking (akin to the access products considered in <i>ASIC v Web3 Ventures Pty Ltd</i> [2024] FCA 64) but then implies that the company is carrying out staking on behalf of its customers. The Committees recommend that this ambiguity is resolved.</p> <p>Example 3 considers ownership of in-game items. The Committees recommend that the guidance be expanded in two related areas. First, in-game cryptocurrencies (i.e., fungible tokens) used in “play to earn” models, where players can purchase, earn, sell, or trade tokens. Second, the provision of digital wallets that store both NFTs and in-game tokens.</p> <p>In Example 7, the Committees recommend that the guidance also cover whether the tokens could be considered to be any other kind of financial products. While tokens are not likely to be interests in a managed investment scheme (as is currently noted), the Committees believe it would be helpful for ASIC to articulate its view as to whether the token is a non-cash payment facility or any other kind of financial product.</p> <p>In Example 11, the Committees note that debentures must be issued by the company that borrowed the funds as part of its working capital – see paragraph [98] in <i>ASIC v Finder Wallet Pty Ltd</i> [2024] FCA 228. It is therefore not clear to the Committees how ASIC could form a view that Company K’s tokenised bonds are likely to be a debenture in circumstances where:</p> <ul style="list-style-type: none"> (a) the investors’ funds remain with the company that issued the bond; and (b) any funds paid to the company issuing the bond will never form part of Company K’s working capital. <p>The Committees therefore recommend that ASIC reconsider the analysis for Example 11.</p>

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Consultation Questions	Response
<p>A2Q2 Are there any <i>additional</i> 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.</p>	<p>Yes.</p> <p>The Committees recommend that the discussion in Example 9 include analysis of the permutation where:</p> <ul style="list-style-type: none"> the meme coin token is named after a new virtual character created by Ms I; after an initial sale of the meme coin tokens, Ms I uses the proceeds of sale to create games or media content about that character; and this results in an increase of the price of the meme coin even though the meme coin's white paper did not originally contemplate the launch of any game or media content featuring the virtual character. <p>The Committees would also welcome clarity as to whether a meme coin sold on a secondary market could be classified as a disposal of a financial product if the meme coin was not a financial product when it was originally purchased.</p> <p>The Committees also consider that an example involving a margin lending facility would be helpful.</p> <p>The Committees submit that the guidance should include decentralised finance (DeFi) arrangements, given recent ASIC regulatory enforcement action which led to the decisions in <i>ASIC v Web3 Ventures Pty Ltd</i> [2024] FCA 64 and <i>ASIC v BPS Financial Pty Ltd</i> [2024] FCA 457.</p> <p>As stated above, the Committees would also welcome ASIC to restate its long held view that decentralised digital currencies such as Bitcoin or Ethereum are not in themselves financial products.</p>
<p>A2Q3 For any of these examples, are there any unintended consequences? If so, what are these and what do you propose in response?</p>	<p>The Committees recommend that Example 13 include a statement to acknowledge the Federal Court decision in <i>ASIC v BPS Financial Pty Ltd</i> [2024] FCA 457 where Downes J held that the non-cash payment facility was the Qoin Wallet itself, and did not include other components including the Qoin Wallet App. Issuers of non-custodial wallets should have clear guidance that they won't require an AFSL (assuming they are not issuing their own proprietary crypto-token).</p>

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Consultation Questions	Response
<p>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?</p>	<p>Yes. Wrapped token and stablecoins are essential to digital asset ecosystems providing interoperability and liquidity. Due to their importance and prevalence the Committees recommend that they be made the subject of standalone worked examples rather than the current dot point examples listed on page 15.</p>
<p>A3Q2 What are the practical implications for businesses (e.g. for issuers or intermediaries) in providing services in relation to wrapped tokens and/or ‘stablecoins’ that are financial products? Please give details.</p>	<p>The Committees have not responded to this question, as this is more a question for businesses operating in the industry who provide the relevant services.</p> <p>It is also not entirely clear what ASIC might have meant by “practical implications”.</p>

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Consultation Questions	Response
<p>A3Q3 Would any transitional provisions or regulatory relief be needed to facilitate transition from regulation of a wrapped token or a ‘stablecoin’ as a financial product under the current law to the Government’s proposed approaches to ‘stablecoins’ and wrapped tokens? Please give details.</p>	<p>The Committees note that paragraph 11 of CP 381 states that:</p> <p>“...the Government is currently progressing with law reforms in relation to licensing payment service providers under the Corporations Act: see Payments system modernisation (regulation of payment service providers). This includes a proposed regulatory regime for ‘payment stablecoins’. INFO 225 is intended to provide guidance about the current regime and, as such, we recognise that it will need to be updated to reflect changes to the proposed licensing of payment service providers, and ‘payment stablecoins’ in particular, if those reforms are implemented.”</p> <p>The Committees generally do not seek to comment on the merits of policy.</p> <p>However, the Committees understand that Treasury has already undertaken significant work on the Payments System Modernisation Reforms (PSM Reforms), which could potentially come to fruition in the foreseeable future. In those circumstances, the Committees submit that it may be appropriate for ASIC to provide some limited conditional licensing and disclosure relief to providers of wrapped tokens or stablecoins, pending the introduction of the PSM Reforms. A sunseting date would ensure the relief was not open-ended. The conditions of the relief could include minimum disclosure requirements (generally analogous to paragraphs 9(4) and (5) of <i>ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211</i>) as well as appropriate financial requirements.</p>

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Consultation Questions	Response
<p>B Licensing of digital asset businesses and their ongoing obligations</p>	
<p>B1Q1 Do you agree that ASIC should progress with a class no-action position as proposed here? If not, please give reasons.</p>	<p>The Committees are not opposed to the principle of ASIC granting relief to encourage digital asset firms to apply for an AFSL.</p> <p>However, the Committees note that a class no-action position would have the following limitations, as noted in ASIC Regulatory Guide 108 <i>No-action letters</i>:</p> <ul style="list-style-type: none"> • no-action relief is not binding on ASIC and is only a statement of present intention (RG 108.20); • ASIC may withdraw or revise no-action letters "at any time" (RG 108.21-22); and • no-action relief is not binding on third parties (including the Commonwealth DPP) who are not precluded from taking legal action (RG 108.23). <p>The third-party point is of particular concern given that subsection 911A(1) of the Corporations Act (requiring a person who carries on a financial services business in the jurisdiction to hold an AFSL) is a provision is an offence provision (and thus one that engages the Commonwealth Director of Public Prosecutions) and a civil penalty provision.</p> <p>While there is no explicit statutory cause of action for damages for a person suffering loss through a contravention (subsection 911A(1) not being among those categories of civil penalty provision for which damages lie under Part 9.4B), nevertheless, third parties are entitled to apply for a restraining injunction under section 1324, a declaration of contravention under section 1317E, and there could be liability for breach of statutory duty under common law. There might also arise arguments about the proper scope of s. 1101H (Contravention of Chapter [7] does not generally affect validity of transactions etc.) which could render some arrangements void as against public policy.</p> <p>For these reasons, the Committees therefore submit that relief via an exemption made using ASIC's power under subsection 911A(2) of the Corporations Act would provide digital asset firms with greater protection and certainty than the proposed class no-action position.</p>
<p>B1Q2 Are the proposed conditions appropriate? Are there any additions or changes to the proposed conditions that will be more effective for investor protection?</p>	<p>The Committees generally do not comment on the merits of policy. However, ASIC may wish to consider whether, if an AFSL application is made the 6-month grace period, the no-action relief or class exemptive relief should apply retrospectively from the start of the grace period.</p>

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Consultation Questions	Response
B1Q3 Do you agree that the class no-action position should be dependent on a person lodging an AFS licence application or written intention to apply for a market and/or CS facility licence? If not, please explain and suggest an alternative.	The Committees have not responded to this question.
B1Q4 Should there be a deadline for applying for an AFS licence or commencing pre-lodgement discussions in relation to a market and/or a CS facility licence? Please provide reasons.	The Committees have not responded to this question.
B1Q5 For product issuers, should the no-action position extend to other obligations—for example, to prepare a Product Disclosure Statement (PDS)? Why or why not?	The Committees do not ordinarily seek to comment on the merits of policy. However, the Committees consider that it may be appropriate for the no-action position to extend to all aspects of the Chapter 7 regime that are predicated on a product being a financial product, including the design and distribution obligations (DDO) in Part 7.8A. There appears to be no policy rationale to distinguish between the application of different provisions of Chapter 7 which all stem from ambiguity or uncertainty as to the financial product / non-financial product regulatory perimeter.
B2Q1 Do you agree that the same regulatory obligations should apply to digital asset and traditional financial products of the same category (e.g. securities, derivatives)? Please explain your response and provide specific examples.	As a matter of general principle, the Committees agree with this statement. However, the Committees note that some digital assets may have some nuances which may require a more tailored approach to ensure that the regulatory regime operates as intended in its application to digital assets.
B2Q2 Are there any aspects of ASIC's guidance that may need to be tailored for digital assets that are financial products?	The Committees consider that, where there are significant points of difference between digital assets and more traditional financial products, then the ASIC guidance should be tailored to ensure that the regulated population knows how to apply that guidance in the context of a digital asset.

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Consultation Questions	Response
<p>B2Q3 Do you agree that the approach proposed for custodial and depository services is appropriate for holding custody of digital assets?</p> <p>Do you agree that extending the omnibus client accounts is appropriate for digital assets that are financial products?</p> <p>Please explain, providing examples, if relevant.</p>	<p>The Committees are generally comfortable with the approach that ASIC has proposed and agree with ASIC that custody arrangements should address the unique custody issues that arise with respect to digital assets.</p> <p>The Committees consider that it would be in keeping with the regulatory approach of consistent treatment between digital and traditional financial products of the same kind to permit the use of omnibus client accounts for financial products which are digital assets.</p>
<p>B2Q4 In relation to organisational competence, what are your views on what ASIC could consider in applying Option 5 in Regulatory Guide 105 <i>AFS licensing: Organisational competence</i> (RG 105) for entities providing financial services in relation to digital assets that are financial products?</p>	<p>The Committees submit that ASIC should adopt a principles-based approach in applying Option 5 of RG 105 when assessing organisational competence for entities providing financial services in relation to digital assets. ASIC's assessment should be focused on whether the proposed responsible manager has sufficient knowledge, skills and experience to understand how the relevant digital asset operates, to put in place and oversee appropriate compliance risks and to manage risks appropriately to avoid or minimise consumer harm. It may be appropriate to impose higher standards of competence if authorisations are sought to provide financial services to retail clients.</p>
<p>B3Q1 In relation to the authorisations sought during an AFS licence application, do you agree that the existing authorisations are generally appropriate to digital asset service providers?</p>	<p>The Committees consider that:</p> <ul style="list-style-type: none"> • if ASIC is comfortable for a digital asset service provider to issue a particular kind of financial product, irrespective of whether it is a digital asset, then the standard form authorisation for that kind of financial product is appropriate; and • if ASIC is only comfortable authorising a digital asset provider to provide financial services relating to a particular kind of financial product if it is a digital asset, then a more tailored, restricted authorisation would be more appropriate.

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Consultation Questions	Response
B3Q2 Do you agree with the proposal to tailor the derivatives and miscellaneous financial investment products authorisations? Are there any others that you would recommend?	Please refer to the response to B3Q1.