

Digital Assets Team
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001
digital.assets@asic.gov.au

Dear Digital Assets Team,

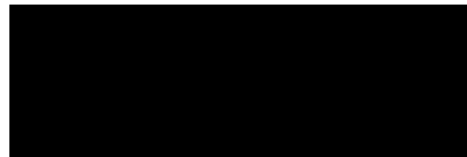
Thank you for providing us with the opportunity to provide feedback on the “Updates to INFO 225: Digital Assets: Financial products and services” Paper dated December 2024 (**Consultation Paper**). We welcome the ASIC’s continued engagement with the digital asset community in Australia and its commitment to ensuring the digital asset industry is safe for consumers and well-regulated. Independent Reserve Pty Ltd ([Independent Reserve](https://www.independentreserve.com)) is a Digital Currency Exchange that has been operating in Australia since 2013 and we have, for many years, been an active proponent of further regulation in the digital asset and cryptocurrency sector. We have in the past worked with AUSTRAC on the development of the AML/CTF framework for DCEs and were active contributors to all relevant initiatives and consultation papers issued by the Government in the past three years. We are committed to working with the current Government and ASIC to further the regulation process and are available at any time should the Digital Asset Team wish to clarify anything in this written response.

Independent Reserve services hundreds of thousands of Australian customers each year. In the financial year ending 2024, Independent Reserve’s total turnover on its platform exceeded AUD\$7.5 billion; and total assets in custody are in the billions of dollars. We take the responsibility of handling and holding large customer assets very seriously and we welcome advancements in regulation to provide greater certainty for service providers and greater protections for customers and their assets.

Warm regards,



Duncan Tebb
Chief Risk Officer



Adrian Przelozny
Chief Executive Officer

Responses to Consultation Questions

Proposal A1: We propose to update INFO 225, subject to feedback from this consultation. See draft updated INFO 225 in the attachment to this consultation paper

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.

In Part A: “When could a digital asset be or involve a financial product?” section of INFO 225, ASIC provides 13 examples where existing Australian rules apply. Nowhere in the 13 examples are the most basic of services covered for the most used tokens. The list focuses on issuers, staking, derivatives, MIS, and tokenisation.

In other words, the examples provided focus on where there is a readily identifiable issuer, or service providing a form of return/benefit to customers.

For the most commonly used, traded and well-known asset: Bitcoin, there is no issuer.

We request ASIC provided a detailed example that covers the buying and selling of commonly used assets where there is no known issuer.

We agree that it is important to cover many different aspects of the digital market to provide clarity for where the regulatory perimeter lies, however, failing to address the most used service for the most commonly used assets does not provide clarity to the industry.

We ask ASIC to clarify in simple terms if it deems the selling and buying of Bitcoin, and other commonly used tokens, is an example of “making a financial investment”.

Quoting ASIC in its Senate Submission 44 from December 2014

“Senate inquiry into digital currency

Submission by the Australian Securities and Investments Commission”

Paragraph 45: ASIC view is that digital currencies themselves do not fall within the current legal definition of a financial product. ASIC has communicated this view to industry participants

Paragraph 47: Digital currencies are not a facility through which a person makes a financial investment. ASIC notes that the definition of ‘making a financial investment’ does not include real property or bullion and we consider that it would similarly not include digital currencies.

We request ASIC clarify its view on the most common usage of digital currencies and provide clarity on whether the views submitted to the Senate inquiry December 2014 are still current.

If ASIC has changed its view in relation to the submissions made in December 2014, can ASIC please provide clarity on what has changed specifically relating to decentralised tokens and exchange activity?

A1Q2: Are there any topics or guidance that were included that you think should not have been included?

Yes, the guidance on payment stablecoins. Payment stablecoins should not be classified as financial products. The activity and the service providers should be the regulated activities and service providers rather than the underlying token itself.

Please provide details.

Treating "Payment Stablecoins" (as defined by Treasury in their industry consultation) as either a derivative or a non-cash payment facility is at odds with Treasury proposal to regulate the provider of activities (services), being the issuers of the stored value facility and the provider of the facilitation services (exchanges and DCEs).

It is not clear from the Consultation Paper or Infosheet 225 why ASIC is taking a different approach to the proposed legislative reforms. Treating payment stablecoins as financial products for a short period of time would create regulatory uncertainty. It would potentially require hundreds of businesses to apply for AFS licenses, Australian Markets Licences, until the proposed Treasury framework is put in place. Rendering the application and revised interpretation for a short time period, redundant. This approach appears to contradict the ASIC mandate to promote "commercial certainty, reducing business costs" (s1(2) ASIC Act)

Classifying payment stablecoins as financial products would also position Australia as an international outsider in its approach to digital asset regulation. The proposed approach is out of step with global developments. The EU is treating "(payment) stablecoins" as a form of e-money. Simply a digital version of an underlying currency. Imposing a materially different regulatory regime will risk the exclusion of Australia, and Australian businesses from the global digital asset industry, and push service providers offshore to avoid the heavy regulatory burden in Australia.

The prevailing legal view in Australia, sought independently by DCEs and other companies offering services relating to the acquisition and disposal of payment stablecoins, is that many payment stablecoins are not financial products. There is a genuine concern that ASIC's altered interpretation of the treatment of payment stablecoins may cause protracted legal action to determine whether a certain characteristic or characteristics of a payment stablecoin would deem it a financial product or not. And this action would need to be repeated for each new type of payment stablecoins offered.

We request ASIC exclude this revised view of payment stablecoins from the proposed Infosheet 225 and to work with Treasury to provide guidance that can be meaningfully implemented prior to the Treasury legislative agenda being put in place. The alternative is a potentially very costly, disruptive, and uncertain period for the industry to navigate in the interim, for no clearly articulated benefit for consumers or service providers.

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?

Broadly, yes, we agree.

Two items in the proposed list stand out for attention:

1. The requirement to segregate customer assets on the blockchain.
There are wallet management practices that involve incidental intermingling of customer and principal assets. Much the same as CHES operates now, where a house trade is included in the general clearing and net settlement obligations of the participant, and only once a trade and reconciliation process has been completed, can the true segregation occur. In addition, some operators have house accounts in the same digital security infrastructure as customer accounts (as the security applied to customers is the best-practice, and service providers apply that level of security to house assets). In this instance, house assets are treated like 'customer' assets for the purpose of segregation.
In these instances, mandating blockchain segregation increases complexity and cost for the DCE. Allowance should be made for incidental intermingling and holding house accounts in the same security and wallet-management infrastructure.
There are simple methods of demonstrating segregation of assets, such as: a daily customer Trust reconciliation and sign off process. The same that occurs daily in existing AFS licensees that handle customer monies.
2. Compensation Scheme:
We request additional details from ASIC on what it deems "appropriate" in this regard. The insurance markets for digital assets are still emerging and they are cost-prohibitive when available; and often coverage is not available at all. At present, we cannot see a viable arrangement where all customer assets can be included in any insurance/compensation scheme. Further guidance on what is "appropriate" is requested.

Are there any good practices that you would like added (e.g. on staking services)? Please provide details.

No additional practices to add.

Proposal A2: We propose to include the worked examples as set out in draft updated INFO 225

A2Q1: Do you have comments on any of the proposed worked examples?

In Part A: "When could a digital asset be or involve a financial product?" section of INFO 225, ASIC provides 13 examples where existing Australian rules apply. The 13 examples do not cover the most basic of services for the most used tokens. The list focuses on issuers, staking, derivatives, MIS, and tokenisation.

In other words, the examples provided focus on where there is a readily identifiable issuer, service provider and an obvious form of return/benefit to customers. It does not cover the issues of digital assets not displaying these properties.

Please give details, including whether you consider the product discussed may/may not be a financial product.

For the most used, traded and well-known asset: Bitcoin, there is no issuer.

We agree that it is important to cover many different aspects of the digital market to provide clarity for where the regulatory perimeter lies, however, failing to address the most common services for the most used assets does not provide the required clarity to the industry.

We ask ASIC to clarify in simple terms if it deems the selling and buying of Bitcoin, and other commonly used tokens, is an example of “making a financial investment”.

Quoting ASIC in its Senate Submission 44 from December 2014

“Senate inquiry into digital currency

Submission by the Australian Securities and Investments Commission”

Paragraph 45: ASIC view is that digital currencies themselves do not fall within the current legal definition of a financial product. ASIC has communicated this view to industry participants

Paragraph 47: Digital currencies are not a facility through which a person makes a financial investment. ASIC notes that the definition of ‘making a financial investment’ does not include real property or bullion and we consider that it would similarly not include digital currencies.

We request ASIC clarify its view on the most common usage of digital currencies and provide clarity on whether the views submitted to the Senate inquiry December 2014 are still current.

If ASIC has changed its view in relation to the submissions made in December 2014, can ASIC please provide clarity on what has changed specifically relating to decentralised tokens and exchange activity?

If ASIC is unable to provide guidance on specific tokens, then it should provide more detailed explanations on the attributes of the most commonly held and traded digital assets, so that industry has a clear pathway for determining whether the regulatory perimeter extends to these tokens.

Overall, the 13 examples are all generally niche examples and the major use cases have not been covered.

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.

Example 2 ASIC details a specific staking case that appears to rely entirely on a low-balance threshold for there being a ‘common enterprise’ offered by the company. And in this example, it is

not clear whether this constitutes an MIS or a facility as the language used in the example says “may” and “potentially”.

A common form of staking is pass-through staking where customer-supplied assets are staked by a company on the customers’ behalf. The arranging company collects a fee for providing access to the staking service. In this case, there is no pooling of funds for a common enterprise; supplied assets are then staked by the company.

The recent case between Block Earner and ASIC [ASIC v BE] in February 2024, the proceedings related to the “Access” product were dismissed.

Can ASIC please provide clear guidance on whether a pass-through staking arrangement is now viewed as a “Facility” or a “managed investment scheme”.

A2Q3: For any of these examples, are there any unintended consequences?

Yes.

If so, what are these and what do you propose in response?

The provided definition “financial return, or other benefit” that is used in the broader definition of a facility for making a financial investment, is too broad to be practical.

There is extensive case law around these concepts. We are concerned that under the revised interpretation, some non-financial assets currently considered well outside the regulatory perimeter would now be considered financial products because of how the business describes the activity.

A very common example is wines or whiskey, where currently in Australia many companies offer the opportunity to buy casks/barrels. The ‘performance’ of this investment is outside the control of the customer and relies on the reputation, marketing, and performance of the company offering the wine/whiskey barrel. If the company offers this service and uses the term “invest” in its marketing to give the impression that there may be a gain to be made, it would now be deemed an investment facility. Whereas, if the company does not use the word “invest”, it would no longer be a facility.

Can ASIC please provide additional clarity on why “general sentiment towards” a company is now included in the determining if an offering is a facility for making a financial investment. In practical terms, this could mean forces outside an issuer or service-provider’s control could bring one of its products inside the regulatory perimeter and therefore require licensing.

Similarly, we request further guidance from ASIC on whether this mean an asset purchase made through a facility that is not for the purposes of making a financial investment could then become a facility for making a financial investment if public perception of the issuer changes? And therefore, require the facility provider to now hold an AFS licence?

We propose ASIC relies on established case law and does not alter the definition of a “facility” in the manner proposed.

Proposal A3: We are considering whether to develop additional examples for INFO 225 on wrapped tokens and 'stablecoins' that may be financial products. We are seeking feedback on the practical implications for businesses.

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?

In line with our feedback in Question A1Q2, we disagree with the concept that a token in of itself should be classified as a "financial product". In this context, additional examples will not provide additional clarity for the industry.

A3Q2: What are the practical implications for businesses (e.g. for issuers or intermediaries) if wrapped tokens or 'stablecoins' with these features were classified as financial products? Please give details.

In addition to the feedback provided in A1Q2, classifying the tokens themselves as financial products rather than the activity brings in Markets licensing. As of 24 February, there were 10 x Tier 1 Markets licence holders, and 16 x Tier 2 Markets licence holders. Of these, only Finclear have a Tier 2 licence that can trade in "securities".

In the limited guidance provided in the Consultation Paper and the Infosheet, it is not clear whether ASIC also requires trading services that facilitate settlement with customers to also be licensed to provide a clearing and settlement service.

Moving forward with the proposed changes detailed in Infosheet 225 will mean one of two things:

1. Hundreds of Australian businesses will need to apply for, and be granted, a markets licence in one form or another.
2. Businesses in Australia will simply stop offering services in stablecoins, and Australian consumers will use overseas-based exchanges to access these tokens and services.

We do not believe it is desirable, or practical to have hundreds of Tier 1 or Tier 2 market operators in Australia simply to provide services for a relatively small subset of digital tokens.

We request ASIC exclude this revised view of payment stablecoins from the proposed Infosheet 225 and to work with Treasury to provide guidance that can be meaningfully implemented prior to the Treasury legislative agenda being put in place.

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

It is very likely that any proposed transitional provisions will be rendered redundant when the proposed Treasury framework is put in place. We do not believe ASIC should pursue this arrangement given the views put forward by Treasury in how this class of assets will be handled.

Proposal B1: We are considering a class no-action position for digital asset businesses that are in the process of applying for or applying to vary an AFS licence, Australian market licence or clearing and settlement (CS) facility licence.

B1Q1: Do you agree that ASIC should progress with a class no-action position as proposed here?

Yes, there should be a class no-action position. ASIC has formally provided guidance to DCEs and the Senate stating that the regulatory perimeter for much of the digital asset sector does not apply. To change position and commence immediate enforcement action would not benefit consumers, businesses, or the courts.

If not, please give reasons.

N/A

B1Q2: Are the proposed conditions appropriate?

Yes.

Are there any additions or changes to the proposed conditions that will be more effective for investor protection?

No.

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.

With respect to applications, the proposed time for lodging a formal application is potentially quite short considering the open questions about what ASIC's position is in relation to RMs, specifically their applicable experience, and what products are, or are not considered a "Financial Product".

If ASIC will clarify all the outstanding items prior to the official publication of Infosheet 225, then six months is appropriate to have the licence application prepared and lodged.

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.

We do not believe ASIC should be pursuing the markets licence requirements until the Treasury proposals have been finalised.

B1Q5: For product issuers, should the no-action position extend to other obligations—for example, to prepare a Product Disclosure Statement (PDS)?

More information and clarity is required from ASIC regarding mandatory documentation, and what documentation and disclosures will apply to which tokens.

Why or why not?

Chapter 7 of the Corporations Act is crafted in such a way that it is built on the assumption there will be an “issuer” of a product in all instances. For a large number of tokens currently available to Australian customers, they are centralised and there is an issuer that can be researched and a disclosure document prepared. However, for Bitcoin, for example, there is no issuer and Bitcoin is the most widely-traded and held digital asset in Australia. It is not clear how a PDS would be applicable for tokens without a readily identifiable issuer.

Can ASIC please provide guidance on how disclosure documents can be prepared in such instances?

Proposal B2: The existing AFS licence processes, regulatory guides and conditions will apply to persons providing financial services in relation to digital assets, including those that are based on the type of financial product involved

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)?

Yes

Please explain your response and provide specific examples.

N/A – we agree.

B2Q2: Are there any aspects of ASIC’s guidance that may need to be tailored for digital assets that are financial products?

No.

B2Q3: Do you agree that the approach proposed for custodial and depository services is appropriate for holding custody of digital assets?

Yes. Specifically, the usage of omnibus accounts must be preserved for digital assets.

Do you agree that extending the omnibus client accounts is appropriate for digital assets that are financial products?

Yes

Please explain, providing examples, if relevant.

Every transfer of assets between digital wallets attracts a fee of some kind, and this fee is variable based on the applicable blockchain at any given time. From a practical standpoint, and from a

customer benefit perspective, forcing digital asset custodians to create individual wallets for every customer simply adds cost and complexity, for no benefit. Omnibus accounts and wallets are able to be readily reported on, externally confirmed and maintained separately from all house assets (please refer to response to A1Q3 for some more details on where there may be incidental overlap). We cannot see why an omnibus structure should not be permitted.

B2Q4: In relation to organisational competence, what are your views on what ASIC could consider in applying Option 5 in Regulatory Guide 105 AFS licensing: Organisational competence (RG 105) for entities providing financial services in relation to digital assets that are financial products?

We strongly believe that the executives and senior staff members that are in place, and managing, the DCEs in Australia now are highly skilled, competent, and able to manage all obligations under any proposed licensing regime.

The way the current RM skill and experience tests are set, the longer a person who has had a significant background in traditional financial services has worked in a DCE, the less qualified they are to meet the requirements under options 1-4 for RMs. A person with a history in traditional finance that has been operating in a key role in a DCE for 5+ years is likely among the most qualified persons in Australia to run and manage a DCE. However, under options 1-4, their relevant experience would not be considered, and their DCE experience would not be considered “relevant”.

We recommend ASIC either provides more detailed guidance on “option 5” or revises its view of what “Relevant experience” is in relation to operating a DCE. Specifically, recognising tenure in a well-run organisation as “relevant experience” for the purposes of options 1 - 4.

If there is any deemed shortfall, short-courses or personal assessments can assist in closing any gaps.

Proposal B3: We propose to tailor licence authorisations in relation to certain digital assets that are derivatives, and for digital assets that are ‘miscellaneous financial investment products’.

We do not see how ASIC is able to tailor licenses in this fashion if ASIC does not explicitly state which products/tokens it deems to be a financial product.

As a DCE operator, how are we to structure the business and arrange licence applications if there is uncertainty about what authorisations the business will need when determining the product strategy of the business?

To this end, the majority of legal advice in Australia we are aware of concludes that payment stablecoins are not financial products. ASIC has taken a different view. So we can only conclude that it is no longer possible to rely on independent legal advice to manage authorisations and potential regulatory requirements. To proceed under the proposed tailoring of authorisations, ASIC would need to provide a list of tokens deemed financial products and maintain this list to provide certainty for DCEs seeking to operate in full compliance with the law.

The contra to this, is each token in question requiring a determination in a court on whether it is, or is not, a financial product.

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?

No.

While individual tokens are deemed by ASIC as being financial products in of themselves, we do not believe the authorisations are appropriate.

We encourage ASIC to work with Treasury and look at approaches globally on the payment stablecoin regulation. We believe ASIC should regulate the activity/service, and not the underlying tokens.

B3Q2: Do you agree with the proposal to tailor the derivatives and miscellaneous financial investment product authorisations?

No, please see comments provided under "Proposal B3" above.

Are there any others that you would recommend?

No.

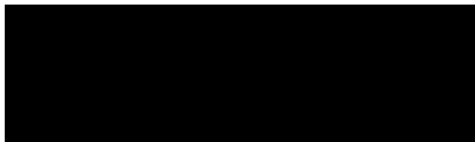
Follow Up

We thank the Digital Assets Team from ASIC for the opportunity to participate in the consultation process. We have been active contributors for a number of years in all efforts to introduce appropriate crypto legislation in Australia and are excited about continuing progression of the regulatory regime.

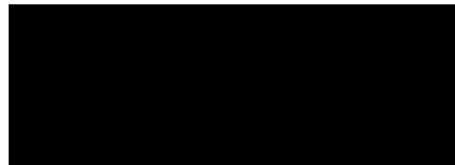
We acknowledge the process is not easy and may yet take some to get the position right, in relation to customer protection, international competitiveness, and supporting investment in Australian businesses. We are happy to provide further clarification to the ASIC on the content of this response. If the Digital Assets Team requires any additional clarifications, feedback or engagement, we are more than happy to assist where we can.

We look forward to reviewing the next iteration of the proposed changes to Infosheet 225.

King Regards,



Duncan Tebb
Head of Risk and Operations



Adrian Przelozny
Chief Executive Officer