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Thank you for providing us with the opportunity to offer a submission to Consultation Paper 381: ***Updates to INFO 225: Digital assets: Financial products and services.***

Contents of Submission

1. Executive summary

i. It is collectively agreed by all participating stakeholders that growth in Digital Asset Markets, and their associated connection to global financial markets, not only currently exists but is set to significantly increase in size in the coming decade.

The surge in adoption of cryptocurrencies by both retail and institutional investors is a significant factor propelling market growth. Bitcoin and Ethereum have become more accepted as a medium of exchange and a store of value. The rise in digital literacy among the global population and the increasing willingness of individuals to explore alternative investments, fuels this growth[1].

Australian investors participation in digital assets and cryptocurrency is significant and still growing. Twenty three percent (23%) of adults in the country today own digital assets. An estimated 350,000 Australians entered the digital asset markets over the last year and national confidence in the future of cryptocurrency has increased. Australia has the highest rate of cryptocurrency adoption among developed nations and the 8th highest in the world.[2]

A result of the growth in exposure by retail investors to crypto-assets has been a dramatic increase in retail investor losses amid regulatory non-compliance, financial crime, fraud, market manipulation, money laundering and other illegal crypto- asset market activity.

ii. While this exponential growth and "financialization" of digital assets has provided investors with further financial investment opportunities, it has also presented immense challenges for regulators around the world.

Given the similar economic functions and activities of crypto-asset markets and traditional financial markets, many of the existing international policies, standards and jurisdictional regulatory

[1] *https://www.ey.com/content/dam/ey-unified-site/ey-com/en-us/insights/financial-services/documents/ey-how-retail-investors-are-making-digital-assets-part-of-their-lives.pdf*
[2] *https://swyftx.com/wp-content/uploads/2024/08/Australian-crypto-survey-2023-1.pdf)*

frameworks that are in currently in place for traditional financial markets are also applicable to crypto-asset market based activities[3]

We agree with the government's proposed reforms to adopt a 'similar activity, similar risk, same regulatory outcome' approach. We also agree with ASIC that the regulation of digital assets can be facilitated under the existing regulatory regime as it is principles-based and provides sufficient flexibility to regulate digital assets that are financial products. These reforms are the most effective way to implement a governing regulatory framework that achieves the balance between market integrity, customer protection and product innovation.

Importantly, these reforms are consistent with IOSCOs overarching principle recommendations in relation to crypto- and digital assets. IOSCO applies a principle of 'same activity, same risk, same regulation/regulatory outcome'[4].Significantly, many international regulators have also applied this principle.

Implementing a regulatory framework for these emerging digital investment opportunities that is consistent with the current existing regulatory regime, ensures the key fundamental elements of regulatory oversight that apply to all financial product markets – including fair, orderly and transparent markets, the highest levels of protections for markets with retail participation and the management of conflicts of interest - are rigorously – and equitably - maintained.

iii. By bringing digital financial products under the existing financial markets regulatory umbrella in a measured and internationally uniform way, ASIC achieves several key objectives that provide benefits not only to financial markets regulators but also to other inter-connected satellite regulatory bodies and end customers who operate within these structures.

With the proposed reforms adopting a 'similar activity, similar risk, same regulatory outcome' proposition, the reforms are supported by the fact that the principles underpinning the Corporations Act are technology neutral. This flexibility allows for any innovations in the emerging sector to be provided for. This regulatory certainty allows for market providers, intermediaries and users to progress with confidence as they navigate their respective businesses forward.

A key objective realized by taking this approach is that consistency is maintained with foreign providers of financial facilities, services and products. The G20 has previously stated that: *"jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory, supervisory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulatory regimes[5]."* This deference allows authorities in jurisdictions with comparable regulatory, supervisory and/or enforcement standards to promote cross border market access while still effectively overseeing and regulating the cross-border activities of market participants.

IOSCO identifies that deference/equivalence supports the following core objectives:

- Maintaining the orderly functioning of markets,
- Mitigating systemic risk and supporting financial stability,
- Ensuring adequate investor protection
- Enhancing investor choice,
- Supporting cross-border markets and avoiding unintended and potentially harmful market fragmentation, and
- Ensuring a level playing field between domestic and foreign market participants.

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[3] *efaidnbmnnnibpcajpcglclefindmkaj/https://www.iosco.org/library/pubdocs/pdf/IOSCOPD747.pdf*
[4] *efaidnbmnnnibpcajpcglclefindmkaj/https://www.iosco.org/library/pubdocs/pdf/IOSCOPD747.pdf*
[5] *https://www.g20.utoronto.ca/2013/2013-0906-declaration.html*

ASIC currently regulates foreign providers of financial facilities, services and products. It is in ASICs, and the wider markets interest, to maintain a high level of equivalence/deference with international regulators in the emerging digital financial products space. This approach reduces the workload not only for ASIC and market end users, but also for government and other regulatory bodies that are captured within the peripheral financial markets scope.

Maintaining consistency with foreign regulators also:

- reduces the opportunities for regulatory arbitrage tactics, including restructuring transactions, financial engineering and geographic relocation to amenable jurisdictions.
- Ensures consistent retail regulatory protections, and
- provides an established, principles based regulatory framework under which further innovation in the digital asset space can be developed in a consistent fashion.

For Australian market participants, ASIC RG54 (54.1-54.6)[6] correctly highlights that maintaining consistency with foreign regulators can deliver significant economic benefits to Australian markets, investors and providers. The benefits include:

- enhancing competition and innovation in the financial industry; and
- increasing Australian investors' access to financial facilities, services and products that meet their risk and return preferences.
- facilitating access to a wider pool of investors to make it easier for Australian issuers to raise capital;
- providing Australian market intermediaries with access to a broader range of markets and clients; and
- facilitating more liquid Australian markets by increasing the number of investors in Australian facilities, services and products.
- Reduces the incidence of regulatory arbitrage tactics, including restructuring transactions, financial engineering and geographic relocation to amenable jurisdictions.

iv. ASICs contemplated approach in draft Info sheet 225, while vital to dealing with the current digital asset landscape, is even more critical in setting up the regulatory environment for the next decade.

The complexity and interconnectedness of financial markets both domestically and internationally requires a singular consistency in application. Any improper deviations from the current regulatory structures that appear as manageable minor fissures in the short term will in all likelihood, in the face of rapidly changing business models, turn out to be catastrophic chasms in the longer term

Any potential regulatory divergence increases the opportunities for "regulatory shopping". If allowed to pollinate, this activity will no doubt become endemic leading to suboptimal protections for investors, increased compliance costs for all market users and leaving regulators with two competing regulatory ecosystems which must be maintained.

The US Financial Stability Oversight Council (FSOC), established by the Dodd Frank Wall Street reform and consumer Protection Act, produced a report on Digital Asset Financial Stability Risks and Regulation in October 3, 2022[7].

[6] *efaidnbmnnnibpcajpcglclefindmkaj/https://download.asic.gov.au/media/1238990/rg54-published-29-june-2012.pdf*

[7] *efaidnbmnnnibpcajpcglclefindmkaj/https://home.treasury.gov/system/files/261/Fact-Sheet-Report-on-Digital-Asset-Financial-Stability-Risks-and-Regulation.pdf*

The report stated that *"Crypto-asset activities could pose risks to the stability of the U.S. financial system if their interconnections with the traditional financial system or their overall scale were to grow without adherence to or being paired with appropriate regulation, including enforcement of the existing regulatory structure"*

The FSOC report adds that " *The scale of crypto-asset activities has increased significantly in recent years. Although interconnections with the traditional financial system are currently relatively limited, they could potentially increase rapidly…..Compliance with and enforcement of the existing regulatory structure is a key step in addressing financial stability risks".*

In its final recommendations the FSOC recommended that, when addressing financial stability risks arising from the increased presence of digital assets in the financial markets space, its members take into consideration a set of principles and emphasizes the importance of *"continued enforcement of existing rules and regulations".*

The Australian Government Treasury, in its 2023 proposal paper Regulating Digital Asset Platforms[8] sets out that *"The framework outlined in this paper proposes to regulate digital asset platforms within the existing Australian financial services laws, while ensuring all consumers and businesses have the opportunity to safely explore and share in any benefits of the technology".*

In reference to the higher levels of interconnectedness of financial investments such as securities and derivatives, the Treasury paper highlights that these instruments *"operate within a complex network of contractual obligations, creating multiple layers of embedded risks…". "Because they play an integral role in the financial system, financial investments present information asymmetries that can distort markets and jeopardise the interests of all investors. Regulation in this area is essential to mitigate these discrepancies and ensure a robust economy for all Australians."*

The next steps taken by ASIC in its approach to regulating digital assets that are financial products will be decisive in setting up the regulatory and business environment that will permeate Australian financial markets for participants operating in the space for at least the next decade.

If Australians market users want to maintain rigorous consumer protections, maintain access to - and receive access from - the global financial markets community - it would be logical to adopt the approach as set out by ASIC in in CP31.

2. Comments on Compliance issues.

Compliance helps protect consumers and investors from unlawful practices and scams. It also ensures that everyone is playing on a level field, which is essential for maintaining market integrity and investor confidence.

Compliance costs are usually comprised of two major components i) set up costs and ii) the ongoing costs of maintaining sufficient resources to ensure accordance with your obligations on a continuing basis.

Compliance set up costs are an obligation that all business, in particular entities that want to engage in the financial markets eco system, must accept. These set up costs are not "new & novel", nor have they been "specifically" created for digital asset classes. While the legislation does provide for some flexibility in its application, it is the responsibility of the entity applying for access to the ecosystem to ensure that its business is structured in a way that ensures these costs are as truncated as possible.

Ongoing Compliance costs are primarily made up of maintaining continuing compliance with a myriad of enterprise-wide obligations including conflicts of interest, client interests, risk management,

[8] *https://treasury.gov.au/consultation/c2023-427004*

financial reporting and financial resources among others. As with any entities potential compliance set up costs, these ongoing compliance costs (obligations) are levied on all entities and not just on the "digital asset classes"

It is also exceptionally important to acknowledge that embarking down a pathway of separate regulatory regimes for traditional financial markets and the emerging digital financial markets, will inexorably lead to the nightmarish scenario of dual set up and ongoing compliance cost. Segregated compliance regimes can only increase, if not double, an entities ongoing costs. Running two divergent streams will double the amount of compliance work entities will have to comply with.

While any proposed separate regulatory regime may presently look somewhat "parallel", with the rapid rate of innovation expected on these markets experience, it can be guaranteed that any small variance now will become a leviathan split later.

3. Comments on effects on competition

"True competition" in business refers to a market situation where companies actively strive to attract customers by offering similar products or services all while operating within equal regulatory, ethical and legal boundaries.

Equitable and safe competition in digital asset financial markets, and all Australian financial markets, needs to be - and must continue to be - predicated on consistent and equivalent regulatory applications for all participating market entities.

Competition cannot be born from unregulated market operators, advisors and other entities leveraging regulatory loopholes to drive business outcomes. This leads to attempts by unregulated market entities to challenge a competitors offering by sacrificing quality prudential standards, endangering end market users as consumer protections are compromised.

ASICs Market integrity rules for competition in exchange markets[9] seek to address issues raised by competition ***between*** exchange markets. The rules look to harmonise the key elements of exchange operations – especially regulatory responsibilities - in order to mitigate any issues that arise as a result of having more than one exchange market operating in the same jurisdiction.

ASICs Market integrity rules ***do not*** look to promote competition by offering "different levels of regulatory oversight". Trying to promote competition by way of regulatory imbalance will only lead inevitably to a "race to the bottom" by some market operators.

Consistency in top tier regulation reduces the of danger of arbitrage. Regulatory arbitrage threatens three key strategic regulatory goals – fair and efficient markets, confident and informed investors, and a reduction in systemic risk. The intricate interconnections in local and global financial markets are only as strong and resilient as their weakest link. It is untenable to leave open the possibility of a race to the "regulatory bottom".

Strong, fair, transparent and equitable competition is best promoted by the presence of a "level playing field" - where all stakeholders are offered the same opportunities while concurrently being provided with equivalent customer protections.

[9] *https://asic.gov.au/regulatory-resources/markets/market-structure/market-competition/*

4.

B1Q1	Do you agree that ASIC should progress with a class no-action position as proposed here? If not, please give reasons.	The rationale for a class no-action position includes that digital asset financial services businesses (DAFS businesses): - need time to comply with the law,[10] and - have concerns regarding 'lack of clarity'.[11] The rationale for a class no-action position is not well supported in all cases, given the following circumstances: - Updates to INFO 225 do not impose any new regulatory obligations.[12] ASIC has been clear and consistent in communicating that digital assets and related products and services are regulated by ASIC to the extent they fall within the existing regulatory perimeter of financial products and services.[13] - ASIC released guidance on digital assets in 2017 (as INFO 225). INFO 225 was updated in 2018 and further updated in 2019 and 2021.[14] INFO 225 covers matters, such as - when a digital asset could be, or involve, a financial product (encouraging DA businesses to perform an analysis), - how the existing law may apply, and - encouraging a DA business to engage with ASIC and/or a professional advisor – including in circumstances where the conclusion of any analysis is unclear and/or untested. - ASIC has published various items[15] which cover ASIC's views in relation to digital assets. ASIC has been clear and consistent in encouraging digital asset business to consider matters, such as whether: - A digital asset offered by a DA business is or involves a financial product[16] or is a credit facility,[17] - a DA business is required to meet disclosure obligations, including issuing a compliant Product Disclosure Statement (PDS),[18]

[10] CP 381 para. 28
[11] CP 381 para. 31
[12] CP 381, pg.14.
[13] See: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-153mr-asic-consults-on-crypto-asset-based-etps-and-other-investment-products/?altTemplate=betanewsroom
[14] CP 381 para. 2-5
[15] See: https://asic.gov.au/newsroom/search/?keyword=crypto
[16] See: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-121mr-asic-updates-information-for-businesses-on-icos-and-crypto-assets/?altTemplate=betanewsroom
[17] See: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-256mr-asic-sues-crypto-exchange-alleging-design-and-distribution-failures/?altTemplate=betanewsroom
[18] See: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-274mr-asic-acts-against-misleading-initial-coin-offerings-and-crypto-asset-funds-targeted-at-retail-investors/?altTemplate=betanewsroom

		- a DA business is required to meet design and distribution obligations (DDOs) including issuing a compliant target market determination (TMD)[19] - a DA business is required to hold a licence, for example, an AFS licence,[20] or Australian market licence,[21] and - it may be appropriate for a DA business to register with an external dispute resolution scheme, such as AFCA.[22] - ASIC has been clear and consistent in communicating its enforcement priorities,[23] (which are relevant to DAFS businesses) and in taking enforcement action against non-compliant DAFS businesses, including: - enforcement action targeting poor design and distribution of financial products, - misconduct involving high risk products including crypto assets, - misconduct damaging market integrity, - misconduct involving a high risk of significant consumer harm, and - new or emerging conduct risks within the financial system. We acknowledge however, that it may be appropriate for ASIC to take a class no-action position on the basis that ASIC may otherwise need to consider an increased number of individual no-action applications – in relation to circumstances or conduct that (similarly) applies to or affects other applicants/persons.[24] In considering a no-action position, key elements emphasized in ASIC RG108 come into practical application, including: • **Rg108.16** *It is important to note that applying for a no-action letter does not substitute for carefully considering your actions and their consequences. We will not give a no-action letter simply for the convenience of applicants who have not taken all reasonable measures to avoid the need for a no-action letter.* It would appear that any granting of a class no-action position is explicitly for the convenience of applicants. As set out in above, we believe it has been clear to these entities what compliance actions they were required to take

[19] *See: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-278mr-asic-places-interim-stop-orders-on-holon-crypto-funds/?altTemplate=betanewsroom*

[20] *See: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-274mr-asic-acts-against-misleading-initial-coin-offerings-and-crypto-asset-funds-targeted-at-retail-investors/?altTemplate=betanewsroom*

[21] *See: https://asic.gov.au/about-asic/news-centre/news-items/warning-trading-crypto-asset-related-financial-products-through-unlicensed-entities/?altTemplate=betanewsroom*

[22] *See: https://asic.gov.au/about-asic/news-centre/news-items/warning-trading-crypto-asset-related-financial-products-through-unlicensed-entities/?altTemplate=betanewsroom*

[23] *See: https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/*

[24] *RG 108.33*

		yet they just found it more "convenient" to grow their business rather than to take any reasonable measures to avoid the need for a no-action letter. • **RG108.32.Table 1: Factors making it more likely ASIC will give a no-action letter** *Third Parties: The adverse effects on third parties are minimal. The contravention does not appear to reduce investor protection or the credibility or efficiency of the financial system.* Almost all activity in the Digital markets space involving financial type products involves third parties, especially market-based trading activities. Clearly the adverse effects on third parties, especially retail participants, has the potential to be devastating. As demonstrated, exposure of retail investors to crypto-assets has resulted in dramatic increases in retail investor losses amid regulatory non-compliance, financial crime, fraud, market manipulation, money laundering and other illegal crypto- asset market activity. Interactions with third parties are inescapable, it is clear that any contravention of the current applicable regulations will reduce investor protections and negatively impact the credibility and efficiency of the financial system.
B1Q2	Are the proposed conditions appropriate? Are there any additions or changes to the proposed conditions that will be more effective for investor protection?	If ASIC decides to progress with a class no-action position. ASIC should apply the principles contained in RG 108, including a class no-action position not restricting ASIC's right to take action against a DAFS business.[25] Particularly in circumstances where:[26] - any contravention is not rectified as soon as practicable, - any contravention suggests internal compliance controls are inadequate, - any contravention is deliberate or careless (including in circumstances where appropriate (alleviating) action has not been taken or is delayed), and there are serious consumer protection and/or market integrity failures (for example, a DAFS business engages in conduct designed to avoid existing laws and/or deny its clients important consumer protections).[27]
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	We believe that having the class no-action position dependent on a person lodging an AFS license application, or written intention to apply for a market and/or CS facility license, creates a situation where an opaque deliverable can lead to gross manipulation and abuse of the true intent of the ASIC instruction. **CP 381.29** states that :

[25] *CP 381 para. 33*

[26] *RG 108.32*

[27] *See: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-283mr-asic-sues-crypto-company-binance-australia-derivatives-for-consumer-protection-failures/?altTemplate=betanewsroom*

	licence? If not, please explain and suggest an alternative.	*"…, we are considering providing a no-action position in relation to firms that are actively and in good faith applying for a licence, or licence variation".* How will ASIC determine that an applicant is *"actively and in good faith applying*" for their licence or licence variation? What percentage of resources will an applicant be required to allocate to its application as opposed to building its business. How will ASIC have visibility into this? Unfortunately past behaviours would indicate that a lack of transparency in this process will lead to widespread abuse The concept of "convenience" as defined in Rg108.16 comes directly into focus. Any applicant that is actively allocating resources to aggressively build its business rather than using those same resources to further its application is in effect using the ASIC instruction for its "convenience". We agree with paragraphs 30 & 31 of CP381.Market activities around crypto lending/earn-type products and derivatives referencing digital assets need to be excluded due to their intrinsic higher levels of risk and sophistication. In the event that a class no-action position is taken by ASIC we believe the potential for an abuse of process due to the lack of a definitive interpretation - and hence enforceability - of what "actively and in good faith" actually requires an applicant to do. Therefore any such position should directly consider the below: • consider restricting an applicant from engaging in onboarding any new customers during the application period • consider restricting an applicant from actively engaging in publicly promoting their business during the application period • consider restricting an applicant from actively engaging in promoting or offering any new products or services during during the application period The limiting of the above activities by any applicant is consistent with ASICs key goals of; - protecting end consumers - ensuring any potential applicant is "actively" focused on its application and not using the no action letter as a convenient way to "buy time" while they grow their businesses. - maintaining the lowest levels achievable of potential harm to third parties*(* RG108.32.) A further instrument available to ASIC that can be used in concert with, or in place of, the above considerations are ASIC Stop Orders.

		These orders can be targeted at specific entities to enforce the curtailment of specific activities without having to include the specific activities in the wider class no-action letter. ASIC has previously placed a Stop Order prohibiting Bitcoin Group Limited (a proposed Bitcoin 'miner' in Australia) from publishing any statements concerning its intention to make an initial public offering of its shares until the lodgement of a prospectus. https://asic.gov.au/about-asic/news-centre/find-a-media-release/2015-releases/15-025mr-asic-issues-stop-order-on-pre-prospectus-publications-by-bitcoin-group-limited/ ASIC also introduced interim stop orders preventing Holon Investments Australia Limited (Holon) from offering or distributing three funds to retail investors because of non-compliant target market determinations (TMDs). The interim orders stopped Holon from issuing interests in, giving a product disclosure statement for or providing general advice to retail clients recommending investments in the Funds. https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-278mr-asic-places-interim-stop-orders-on-holon-crypto-funds/
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.	Yes. See B1Q3 response above.
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?	No. ASIC should consider whether a retail client can make an informed decision about whether to purchase a financial product if the retail client is not provided with a PDS[28] (or other summary document, such as a short-form PDS).[29] Particularly in circumstances where a retail client may be offered a high-risk financial product.

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.	Yes. This approach is consistent with: - IOSCO's principle of 'same activities, same risks, same regulation/regulatory outcomes',[30] and - the Government's 'similar activity, similar risk, same regulatory outcome'[31] approach to digital asset regulatory reform.

[28] *RG 168.39*
[29] *RG 168.112*
[30] *See: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD747.pdf*
[31] *See: https://treasury.gov.au/sites/default/files/2023-10/c2023-427004-proposal-paper-finalised.pdf*

		Further, the application of financial services laws (i.e. traditional financial product categories) to digital asset products has been tested in the Federal Court of Australia. Judgements include: - *ASIC v BPS Financial Pty Ltd* [2024] FCA 457, 205.[32] – in relation to non-cash payment facilities, and *ASIC v Web3 Ventures Pty Ltd* [2024] FCA 64, 1-2.[33] – in relation to managed investment schemes.
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?	ASIC should apply the principles contained in RG 105.8(b) and 105.78 – RG 105.79 and in the B2Q1 response above. A manager responsible should have the appropriate knowledge and skills to provide the financial services and products contained in the AFS licence (or application). For example, consistent with the principles contained in CP 381 para. 35 and para. 41 – where a party carries on a business to deal in a particular digital asset that is, for example, a security under the Corporations Act, responsible managers should have the appropriate knowledge and skills to provide financial services in relation to securities. The same principles should be applied to a party that carries on a business to deal in a particular digital asset that is, for example, a managed investment scheme, a derivative and/or a non-cash-payment facility under the Corporations Act.

[32] *See: https://download.asic.gov.au/media/4myffyny/24-090mr-asic-v-bps-financial-pty-ltd-2024-fca-457.pdf*
[33] *See: https://download.asic.gov.au/media/gejnbox2/24-119mr-penalty-judgment_2024-06-04.pdf*