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Digital Assets Team
Australia Securities and Investments Commission

By email: digital.assets@asic.gov.au

TITLE: HOLLEY NETHERCOTE'S RESPONSE TO ASIC'S CONSULTATION PAPER 381

Dear Digital Assets Team,

RE: Digital assets: Financial products and services – Consultation Paper

Thank you for the opportunity to provide feedback on ASIC's Consultation Paper 381 Updates to INFO 255: Digital assets: Financial products and services (**the Consultation Paper**).

The Consultation Paper aims to update ASIC's interpretation in INFO 225 of how the Corporations Act 2001 (**the Act**) applies to crypto and digital assets (**digital assets**). Information Sheets intend to provide concise guidance.¹ This proposed Information Sheet does not. Instead, ASIC's proposals:

1. **Provide uncertainty and erode confidence in the Australian market for both local and overseas digital asset participants.** For example, ASIC moves away from its previously published opinions² on whether BTC or similar digital assets are financial products - despite there being no change to the Act, no change to the underlying digital asset protocol (in the case of BTC), and no clarification from case law since ASIC's view was published in 2014. When performing its functions and exercising its powers, ASIC has a statutory mandate to "maintain, facilitate and improve the performance of the financial system and the entities within that system in the *interests of commercial certainty*, reducing business costs, and the efficiency and development of the economy."³ Instead, ASIC's proposed changed views creates uncertainty and erodes confidence.
2. **Are inconsistent with Treasury's proposals** – particularly in the case of regulating payment stablecoins, and the operation of Australian Market Licenses or Clearing and Settlement Facility Licences (**AMLs**). ASIC proposes that a payment stablecoin – including the underlying token – is a non-cash payment facility. This interpretation is highly controversial, conflates the operation of different elements within the digital asset

¹ [Information sheets | ASIC](#)

² [ASIC's submission](#) to the Senate inquiry into Digital Currency in December 2014 said "ASIC has considered whether digital currencies, such as bitcoin, are financial products. ASIC's view is that digital currencies themselves do not fall within the current legal definitions of a financial product...":

³ Sub-section 2(a) of the *Australian Securities and Investments Act 2001*.

eco-system, is not referenced against case-law and is not in alignment with global regulatory trends. In contrast, Treasury proposed the regulation of the payment “function” (eg. the issuer or exchanger of payment stablecoins) and says that the holder of a payment stablecoin’s entitlement to exchange it for fiat is an entitlement, and the “entitlement (and therefore the payment stablecoin token itself) would not comprise a financial product.”⁴ Also, Treasury’s proposed⁵ digital asset facility (**DAF**) financial product authorisation takes an activities-based approach, focusing on the regulation of the activity rather than the underlying digital asset.⁶

3. Suggest interim relief that **“shuts the door” to digital asset innovation in Australia**, for any digital asset business that was not operational as at 4 December 2024 – or for a digital asset business that restructure and creates a “newco” to provide digital asset services in 2025. Also, new digital asset businesses that launch after 4 December 2024, are required to wait until mid-2025 for finalised guidance, and then must apply for bespoke licenses that could take a further 12+ months to obtain.
4. **Impose a highly regulated framework that ASIC has not yet resourced.** ASIC’s licensing team will likely receive hundreds of AFSL and possibly some AML applications. We are currently assisting 37 AFSL applicants, and some applications have taken more than three months to be assigned to a licensing analyst. Whilst we have obtained many retail derivative market-maker AFSLs in the past (including last year), those applications are taking almost 2 years for ASIC to approve. ASIC’s Annual Report noted that ASIC had 113 AFSL applications⁷ in progress at the time the report was issued. We expect that number to more than double if ASIC’s new interpretations as set out in the draft INFO225 are implemented in their current form.
5. Expect digital asset market participants to apply for AFSLs **without providing tailored pathways** for:
 - a. nominated responsible managers with deep digital asset expertise but without regulated experience;
 - b. how applicants can meet client money and financial adequacy obligations, where the applicants cannot obtain bank accounts; and
 - c. meeting retail client compensation arrangements (such as professional indemnity (PI) insurance) where that type of insurance is not available.

Despite the above, we acknowledge that ASIC’s consultation has been extensive, and is ongoing. Some of its proposals in the draft INFO225 are, in our view, uncontroversial. We agree that some “wrapped” tokens do meet the Act’s definition of a derivative. We also agree that certain staking protocols do comprise a “managed investment scheme.” We also

⁴ Page 15 of <https://treasury.gov.au/sites/default/files/2023-12/c2023-469663-cp.pdf>

⁵ <https://treasury.gov.au/sites/default/files/2023-10/c2023-427004-proposal-paper-finalised.pdf>

⁶ On Page 12, Treasury says “Many digital assets are not financial products...”:

<https://treasury.gov.au/sites/default/files/2023-12/c2023-469663-cp.pdf>

⁷ https://download.asic.gov.au/media/nwridckz/asic-annual-report-2023-24_full.pdf

agree, however, with DECA's proposal that more guidance is needed about the nuance of both wrapped tokens and different staking arrangements.

We acknowledge that where an underlying digital asset meets the definition of a financial product, the service provider who is in the business of allowing Australians to buy, sell, hold or transfer that digital asset – should be appropriately licensed. However, because of the inappropriateness of the AML regime⁸, we think **ASIC should provide relief** from these activities requiring an AML until:

- Treasury and Government finalise their proposals regarding Digital Asset Facilities and Payment Stablecoins⁹; or
- ASIC designs from the ground up, a fully bespoke "Tier 3" AML which is designed in collaboration with industry. It would provide a special type of exchange licence that, if designed properly, would not result in regulatory arbitrage whereby holders of Tier 1 or Tier 2 AMLs move to a Tier 3. It will not be "less safe". Rather, it will be "fit for purpose."

We acknowledge that ASIC has the rule-making power to create a fit-for-purpose "new" category of AMLs – but that would take a number of years to finalise, and ASIC should grant appropriate relief if it wishes to take that path, should Treasury and Government not proceed with the DAF proposal.

Suggested solutions

In light of the above issues, our suggestion is that, with respect to the controversial elements of INFO225, ASIC should:

1. Confirm its stated 2014 interpretation for traditional digital assets, such as BTC and digital assets with similar characteristics. This would restore some clarity, given that BTC represents more than half of global digital asset market capitalisation.
2. "Shelve" its view on payment stablecoins, and instead provide broad relief to businesses who register with AUSTRAC as Digital Currency Exchanges (or Virtual Asset Service Providers next year), until Treasury and Government have finalised their reforms, and the digital asset industry has had time to understand and apply for appropriate licenses.

⁸ For example, digital assets exchanged via central limit order books exchange atomically. The clearing and settling framework currently governed by the AML regime is not fit-for-purpose for these digital asset technologies.

⁹ Our understanding is that Treasury may propose in its exposure draft – or flag as a future consideration – that if an AFSL holder obtains a DAF authorisation, it will be exempt from complying with the AML regime where the underlying digital assets are financial products. Treasury could create a rule-making power, allowing ASIC to work with industry to create fit-for-purpose market integrity-style rules for operators of digital asset exchanges who operate a central-limit orderbook (CLOB). This would be a better outcome than requiring digital asset service providers to apply for traditional AMLs, and would be a better outcome than building a new Tier 3 AML.

3. Extend relief to cater for new entrants in the digital asset market, and to provide time for a fit-for-purpose AML-equivalent regime.
4. Direct any digital asset-related enforcement action towards fraud and scam-related activities.
5. Extend its relief to cater for a lack of resources in its licensing team – and to provide bespoke pathways for licence applicants who cannot locate responsible managers with regulated experience, who cannot hold bank accounts, and who cannot obtain PI insurance.

ABOUT US

Holley Nethercote is one of the world's leading law firms in distributed ledger technologies so far as they impact on the financial services and credit sectors in Australia. We act for some of the world's largest digital asset groups. We also helped draft the Commonwealth Model Law on Virtual Assets¹⁰, which is currently being implemented by 20+ countries.

One of the authors is also Chair of the Digital Economy Council of Australia¹¹ – Australia's peak industry body representing the digital asset sector.

Established since 1995, Holley Nethercote Lawyers are experts in Australian financial services law and regulation. We are also experts in credit, financial crime and commercial law. Employing 37 staff across Melbourne, Sydney, Adelaide and Port Macquarie, our firm has a preventative-law focus and deep regulatory expertise. We were also heavily involved in consulting with AUSTRAC on the creation of Australia's current Digital Currency Exchange regime, were primary authors of DECA's Code of Conduct for Digital Currency Businesses. We were also the only private practice law firm that presented in person in February 2023, on behalf of IDAXA,¹² to the Financial Stability Board in response to its consultation paper proposing global regulation, supervision and oversight of crypto-asset activities and markets.

Holley Nethercote also provides non-legal services, including Australian Financial Services Licence (**AFSL**), Banking Licence, and Australian Credit Licence (**ACL**) application support, as well as training, template compliance documents and regulatory updates via the HN Hub.¹³

RESPONSE TO CONSULTATION PAPER QUESTIONS

¹⁰ [The Commonwealth Model Law on Virtual Assets | Commonwealth](#)

¹¹ [Digital Economy Council of Australia | Australia's Peak Blockchain Industry Body](#)

¹² <https://www.idaxa.org/>. IDAXA represents some of the world's largest digital asset service providers, as well as many of the world's in-country digital asset industry bodies who in turn represent digital asset service providers.

¹³ <https://hnhub.com.au/about/>

Our firm has worked collaboratively with Australia's top digital asset law firms – facilitated by working groups within DECA. DECA has also consulted widely with Australia's leading digital asset service providers. So, we have considered the legal and operational issues presented by ASIC's Consultation Paper, and have contributed to detailed responses to ASIC's specific questions, in DECA's response. Holley Nethercote supports those responses, and has not replicated them all in this response.

We look forward to continuing discussions with ASIC as it considers the issues raised in this response, and those issues raised in the DECA and other industry responses.

Kind regards,

Paul Derham, Jesse Vermiglio, Michael Mavromatis and the team at Holley Nethercote Lawyers.

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