Response to CP 381 Updates to INFO 225: Digital assets: Financial products and services

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We write as researchers and policy experts in financial regulation and emerging technologies. We have deep and longtime expertise in regulatory and technology policy in Australia, including regular appearances and submissions to inquiries at the federal level. Please find below our concerns about the CP381 updates to INFO 225. While we understand that many of our concerns are outside of ASIC's control, our aim here is to point attention to a deeper problem in Australia's slow and contradictory regulatory approach. Years of inquiries and lack of legislative action has left Australia behind in a time of rapid technological acceleration.[1]

Today we are living through a deep shift in our digital economic institutions. Crypto and digital assets might look like an isolated example, but they underpin a broader stack of innovations and technological trajectories. We have written widely about the opportunities from artificial intelligence, advanced cryptography and the low earth orbit economy. Each of these technologies are reshaping markets and spawning new industries. A diversity of digital assets will play an important role in accelerating, funding and governing their development.

In the absence of legislative clarity — *or even non-binding guidance clarity* — Australians will not capture these opportunities. We are not raising some hypothetical concern. While Australia debates how a regulator *might* interpret traditional financial law for crypto assets, other nations are establishing clear, forward-looking regulatory frameworks. The risk is not just that Australia will fall behind — we have already done that — it is that our approach is destined to become obsolete in real time.

We conclude that:

- Guidance is a poor substitute for clear legislation and that ASIC should use their position to advocate for timely, clear legislation.

[1] See, for instance, Aaron M. Lane and Darcy W.E. Allen (2025) "Australia Remains in Regulatory Purgatory After a Decade of Crypto Policy Discussion", TechREG Chronicle, available online: https://competitionlab.gwu.edu/sites/g/files/zaxdzs6711/files/2025-02/4-AUSTRALIA-REMAINS-IN-REGULATORY-PURGATORY-AFTER-A-DECADE-OF-CRYPTO-POLICY-DISCUSSION-Aaron-M-Lane-Darcy-WE-Allen%20%281%29.pdf

- There are fundamental limits on regulatory enforcement in a permissionless, decentralised, global and open economy.
- Trying to squeeze digital assets into existing regulatory frameworks distorts the economy and incentivises regulatory arbitrage.
- Investors in digital assets have specific needs that have not been contemplated by current practices under the Corporations Act.

1. Guidance is a poor substitute for clear legislation

Rather than legislating, Australia has fallen into a cycle of regulatory guidance — industry reacts, then guidance is revised, then industry reacts again. This is an unstable and poor environment for entrepreneurs and investors. ASIC's guidance is not law, yet businesses are already making decisions based on speculation about its final form. The moment actual legislation is introduced — which we hope will occur within the next year — this guidance will be obsolete. The result is regulatory churn: businesses waste time and resources adjusting to rules that are constantly shifting. A stable investment environment requires clear, legislated rules. We recommend that ASIC uses its position to advocate for timely, clear legislation that establishes long-term certainty for the industry.

2. ASIC's enforcement strategy has added to regulatory uncertainty

ASIC's "test the regulatory perimeter" strategy has exacerbated, rather than alleviated, the uncertainty facing the digital assets industry. Rather than setting clear and predictable rules, ASIC has pursued enforcement actions that function as retroactive regulatory tests, leaving businesses guessing about compliance. This approach has created a landscape where companies do not know whether their products are lawful until after a costly legal battle.

A stark example of this problem is the Block Earner case. ASIC initially succeeded in arguing that Block Earner's fixed-yield crypto product was a financial product requiring a licence. However, the court ultimately excused Block Earner from any penalty — a rare outcome that suggests the breaches were not egregious but rather the result of regulatory ambiguity and good faith on behalf of the regulated entity. Yet ASIC is appealing the penalty decision.

This raises a fundamental contradiction in ASIC's enforcement approach: if crypto regulation is in a discovery phase, then punitive enforcement is inappropriate. The industry is being penalised for failing to comply with rules that are still being defined through litigation. This creates a first-mover penalty — where companies that innovate in good faith are punished simply for being among the first to navigate an unclear regulatory landscape.

ASIC's litigation strategy is a piecemeal attempt to regulate crypto via court decisions rather than proactive guidance or legislative reform. The result is a de facto regulatory framework built on shifting judicial interpretations rather than stable, legislated rules. This uncertainty discourages investment and innovation in Australia's digital economy, ultimately pushing businesses offshore to jurisdictions with clearer frameworks.

3. The ability of regulatory enforcement to govern digital assets is inherently limited

If ASIC wants to regulate crypto effectively, it must acknowledge that enforcement is inherently limited. Regulatory frameworks should be built with this in mind, rather than relying on a financial regulation model designed for a pre-digital economy.

Decentralised digital assets exist beyond national borders. At best, regulators can control on-ramps and off-ramps — the points where users exchange crypto for traditional currencies. But once assets are withdrawn, users can access permissionless alternatives that ASIC has no clear path for enforcement.

This permissionless nature is not just a niche concern for crypto — it is an emerging trend across digital industries. For instance, we have seen many artificial intelligence models released open-source and globally distributed. There is a pertinent risk that the more regulators enforce restrictions, the more users and businesses will seek decentralised or offshore alternatives.

Excessive regulatory controls does not eliminate crypto activity, or barely even impact the existence of any given crypto asset — rather it moves activity deeper into the permissionless internet, where users need to bear more personal responsibility and education. Consumers can access overseas markets if they want to. They can use VPNs, offshore exchanges, and decentralised protocols with no intermediaries. Stricter domestic regulations will not prevent this. In fact, they may increase consumer exposure to risk by pushing them toward unregulated alternatives.

4. Unintended consequences and market distortions

The guidance as drafted will not just fail to protect consumers — it will actively create perverse incentives that distort the market.

A clear example is memecoins, which the guidance suggests are not securities. This creates an obvious loophole: projects now have every reason to brand themselves as memecoins to escape regulation. We expect to see a rise in projects that deliberately avoid demonstrating financial legitimacy or consumer value — not because they lack it, but because doing so would risk regulatory scrutiny.

This is not to say that memecoins should be classified as securities. Rather, it is to identify that non-binding guidance can incentivise regulatory arbitrage, where businesses shift their behaviour to comply with temporary understandings, all while undermining the intent of the laws themselves.

5. Decentralised digital assets are sufficiently distinct from centralised digital assets as to warrant a new legislative regime

The range of risks faced by decentralised digital asset investors are sometimes contiguous with traditional assets but sometimes discrete and novel. Digital asset investors seek a depth

and breadth of information that goes beyond traditional financial product disclosures. There is a role for the regulator to investigate and specify the crypto-unique disclosures that would need to be made for informed investment, rather than rely on the facial "technological neutrality" of the Corporations Act. The Corporations Act assumes issuer-controlled, centralised financial structures, meaning it struggles to capture decentralised products where there is no single responsible party or where governance is distributed via smart contracts.

For crypto-assets, an informed investor should be able to navigate:

- *Smart contract details and code transparency*: Smart contracts require discrete forms of disclosure, including its address, source code, and dependencies.
- *Tokenomics and supply dynamics:* Investors need to understand the "monetary policy" of the token - such as mechanisms for increasing or decreasing supply, total supply, circulating supply, and token release schedule.
- *Privileges and rights of token holders*: Investors need to know the rights and utilities associated with holding a token, such as governance voting power, revenue sharing, or access to services.
- *Underlying asset or reserve information*: For tokens backed by other assets, investors need to know what backs the token's value, such as reserve management and audit information.
- *Technical architecture and dependencies:* Investors need to understand the technical environment of a crypto asset, including the blockchain it runs on, oracles it relies on, and any dependencies.
- *Security and audit reports:* Investors value evidence of security audits and information on past security incidents. Traditional disclosures may not consider smart contract hacks, so this information may not be included in a PDS.
- *Governance and voting rights:* The governance rights accruing to tokens are highly heterogeneous, varying to how proposals are made, votes are counted, and who the initial governors are.
- *Exit, redemption, and custody options:* Investors need to know how they can exit the investment, including trading options, liquidity, and redemption policies. Traditional disclosures cover liquidity and withdrawal rights, but crypto has unique issues like trading suspensions and network outages.

Crypto-assets are an institutional technology that provide space for experimentation with economic structure and governance far beyond that of traditional markets.[2] As such they present potentially heavier burdens on disclosure, while reducing the necessity for more traditional disclosures that assume centralised control of funds. The discrete nature of these risks further demonstrates the need for legislative, rather than regulatory, action.

Conclusion

ASIC's approach to crypto asset regulation is a symptom of a deeper issue: Australia's regulatory system is not keeping pace with the digital economy. We cannot afford to

[2] Berg, Chris, Sinclair Davidson, and Jason Potts. *Understanding the Blockchain Economy: An Introduction To Institutional Cryptoeconomics*. Edward Elgar Publishing, 2019.

approach every new technology with slow-moving consultations on guidance that will be outdated before they are even finalised.

ASIC should be advocating for proper legislative reform, not issuing guidance that will be redundant in months. Australia needs a regulatory framework that acknowledges the speed, decentralisation, and global nature of emerging technologies — not one that tries to fit them into rules designed for a different era.

We welcome further discussion on these issues.

Sincerely,

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