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Australian Treasury Digital Asset Platforms Consultation

Yesterday, the Treasury released a new policy proposal aimed at regulating and licensing digital asset platforms in Australia. Michael Bacina, Steven Pettigrove, Luke Higgins and Jake Huang of the Piper Alderman Blockchain Group provide a summary of the key points in the consultation paper. Consultation responses are due by 1 December 2023.

Australia has had a number of digital asset reviews since 2015 and yesterday Treasury released a comprehensive proposal aimed at regulating digital asset platforms within Australia which goes beyond what would traditionally be seen as digital currency exchanges under the AML/CTF Act.

Stephen Jones, Assistant Treasury and Minister for Financial Services, unveiled the long-awaited Proposal Paper yesterday morning at the AFR Crypto Summit (**Proposal Paper**).

With approximately 25% of Australians now owning some form of digital asset, and with the primary means of accessing these assets being through "digital asset platforms", the Government's proposal seeks to safeguard investors and the broader financial system.

Need for Regulation

Treasury's paramount concern is to mitigate the risks associated with digital asset platform collapses (e.g. FTX) which have caused significant losses for Australians in recent times. By implementing the reforms outlined in the Proposal Paper, the Australian government aims to raise the operational standards of these platforms and to otherwise increase regulatory oversight. The proposed regulations are designed to achieve three key objectives:

1. introduce a framework that fosters industry innovation and growth;
2. protection of consumers and their assets; and
3. providing clarity and certainty for industry participants.

The Proposal Paper contemplates a broadly based framework that would encompasses a wide variety of custody and trading activities in relation to so-called "non-financial product assets". The Government proposes to regulate those activities by creating a new class of financial product called a "digital asset facility".

Digital Asset Platform Licensing

The heart of the proposal involves the licensing of "digital asset platforms", being a "multi-function platform that holds assets for customers". These platforms, which hold substantial assets for Australian users, would be required to obtain an Australia Financial Services Licence (**AFSL**) if they exceed certain asset holding thresholds, being:

- $1,500 for an individual; or
- $5,000,000 in aggregate holdings.

Under this new proposed regulatory model, the asset holding arrangements used by digital asset platforms would be regulated as a new "digital asset facility" financial product. Both issuers and those arranging or dealing in digital asset facilities, such as brokers, arrangers, agents, market makers and advisers would all be required to hold an AFSL.

By leveraging the existing Australian financial services laws, Treasury believes this approach is well-established and

reliable in mitigating risks associated with businesses holding and managing client assets. According to the Proposal Paper, the benefit of this approach is that it is much easier to implement than a stand-alone regulatory regime.

Financialised functions and non-financial instruments

While the existing financial services laws already apply to any transactional functions built into an asset holding arrangement where the underlying asset *is* a financial product, the proposed regime will extend these obligations where the underlying assets are *not* financial products, taking aim at the "financialisation" of non-financial instruments (e.g. entitlements to data storage or video-game entitlements).

An important feature of Treasury's Proposal Paper is that platform entitlements (being the right to receive assets from a digital asset platform) to non-financial product assets do not *become* financial products. Treasury provides the following example:

…a producer of non-financial products (e.g. fine wine or collectables) could engage a digital asset platform to hold those assets and issue platform entitlements recorded using a token-based system (i.e. create asset-backed digital assets). However, those digital assets themselves would not be financial products. In this way, the future token holders and the original producer are protected by the financial services laws, but there will be minimal impact on how the producer can distribute the *digital* versions of their non-financial products.

Accordingly, the financial services laws would only apply where a digital asset platform is holding these non-financial product digital assets in excess of the aforementioned digital asset facility thresholds, on an individual or aggregate basis, but this may be viewed as placing non-financial products which have never been the subject of regulation, being receipts for entitlements, into a financial product.

Asset holding as key regulatory anchor

Noting that the holding of digital assets has long been an unregulated service, Treasury believes that asset holding services should act as the key regulatory anchor point going forward:

> In financial services, asset holders are regulated to mitigate conflicts of interest, credit risk, fraud risk, performance risk, and technology risk. Holding digital assets, or holding assets backing digital assets, is largely unregulated…
>
> …asset holding arrangements are pivotal points of vulnerability from a technology, counterparty, and fraud risk perspective. [As] digital asset platforms are the primary gateway between the digital asset ecosystem and the broader economy…[t]his places digital asset platforms in a position akin to financial service providers. Accordingly, it is appropriate to apply the financial services laws to their activities.

Digital asset platforms will be obligated to meet general licence requirements consistent with other AFSL holders, including:

- providing financial services efficiently, honestly, and fairly;
- managing conflicts of interest;
- establishing a dispute resolution system;
- meeting solvency and cash reserve requirements;
- maintaining and submitting financial records;
- producing product disclosure statements; and
- monitoring and preventing market misconduct.

Other obligations for platform providers are proposed to apply including:

- requirements to report to and assist ASIC;
- notification requirements for reportable situations;
- financial reporting and auditing;
- prohibitions on conflicted remuneration;
- prohibitions on unconscionable conduct;
- prohibition on hawking financial products; and
- requirements for providing financial product advice.

What constitutes holding of Digital Assets?

Treasury has acknowledged some of the unique issues relating to digital assets, namely the inherent difficulty in determining whether a person is "holding" a digital asset in a distributed ledger technology (i.e. blockchain) context. To combat this, Treasury aims to take a "factual control" approach:

> The proposed framework would leverage broad concepts around 'control' to identify the holding arrangements to bring within the regulatory perimeter. For example, businesses with the ability to exercise, coordinate, or direct 'factual control' over the assets in a real and immediate sense.

Treasury aims to provide regulators with an avenue for enforcement action against fraudsters and scammers:

> …many of which label themselves 'decentralised finance' but retain (and exercise) the ability to steal customer tokens.

This broad approach is intended to be technologically agnostic, aiming to capture the risks that consumers are exposed to when relying on third parties to hold their assets. The framework is focused on being complementary to the existing financial services laws, and provides for a new facility to allow existing assets to be held or tokenised safely, within the bounds of the existing regulations.

Specific obligations for Digital Asset Platforms

In addition to the general obligations under the existing financial services regime, digital asset platforms will need to fulfill specific obligations tailored to the unique nature of their operations, tokens, and associated risks. These specific obligations are inspired by regulatory frameworks in the EU, UK, Canada, and Singapore, and include:

- standardising platform contracts;
- establishing minimum standards for token custody (e.g. holding the financial products on trust for customers, maintaining records of customer entitlements using either a token-based system or account-based system);
- implementing standards for custody software; and
- enforcing standards for token transactions.

These obligations are intended to account for the distinct characteristics of digital assets, networks, and tokens provided by these platforms.

Additional obligations for certain "financialised" activities

Further obligations will be imposed on four specific non-financial product activities facilitated by digital asset platforms, namely:

1. Trading: being the exchange of digital asset platform entitlements between account holders. These obligations include procedures and minimum standards for liquidity thresholds, market making, efficient execution of trades; and system infrastructure;
2. Staking: being the participation in validating transactions on a public network. Obligations include allowing customers with a direct entitlement to end staking of any of their assets;
3. Tokenisation: being the creation and exchange of entitlements backed by tangible and intangible assets. Asset tokenisation functions must use token standards that can be programmed to comply with and enforce AML/CTF laws. These obligations are intended to mimic the EU's MiCA framework for asset-referenced tokens; and
4. Fundraising: being the sale of entitlements to fund the development of products and services. Obligations include standard fundraising disclosure documentation.

These obligations are tailored to address the unique risks associated with these digital asset platform business models and the nature of the tokens they support.

Under the Proposal Paper, non-custodial and decentralised services would appear to fall to be regulated under existing financial services and other laws to the extent that they apply, which is a matter of considerable debate.

Fit-for-Purpose Regulations

The Proposal Paper focuses on service providers who hold digital assets on behalf of users, rather than the tokens themselves. Treasury believes that this approach minimises the potential exploitation of regulatory gaps and allows for adaptation as new products are tokenised in the future. The regulations are intended to be technologically neutral,

ensuring flexibility for ongoing technological innovation.

Where digital assets are already regulated as financial products, these existing regulations will remain in place, ensuring comprehensive and coherent oversight in the digital asset space.

What is next?

Treasury is seeking feedback on questions raised throughout the Proposal Paper, with the closing date for written submissions set for **1 December 2023**. A copy of the Proposal Paper and accompanying Fact Sheet can be found here.

The exposure draft legislation based on the proposal is expected to be released in 2024. If legislation is passed, Treasury has proposed a 12-month transition period upon Royal Asset that is intended to allow industry participants to plan and make changes to ensure compliance and obtain a licence where required.

Conclusion

The Treasury's proposal aims to establish a comprehensive regulatory framework for digital asset platforms that balances industry innovation, consumer protection, and risk mitigation, while also staying adaptable to the evolving landscape of digital assets and financial technologies. The emphasis on establishing a strong regulatory framework is promising, although the full detail of this framework is unknown until the release of the exposure draft legislation scheduled for 2024.

The Proposal Paper contemplates an ambitious framework for regulating digital asset custody and a variety of intermediary services in relation to non-financial product assets. The proposal pays regard to the unique features of digital assets in a number of respects.

This broad scope gives rise to a number of threshold questions that will need to be addressed through the consultation process:

- Given the broad definitions, how many businesses will be caught as digital asset facilities?
- What non-custodial facilities will fall still within the definitions?
- Is the boundary between what is a financial product and non-financial product sufficiently clear to know whether something is a traditional financial service or digital asset asset facility?
- How does this proposal sit alongside legislation and reform proposals in other jurisdictions?
- Will ASIC be properly resourced and have the expertise to process the expected numbers of licence applications?

The Proposal Paper suggests that the Government is thinking seriously about these questions and how to harness the economic benefits of blockchain technology, while mitigating consumer harms. With further submissions and industry input, a robust framework can be established, offering the potential for a thriving and secure digital asset ecosystem in Australia.