3 June 2022

Law Council
OF AUSTRALIA

Business Law Section

Director – Crypto Policy Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: crypto@treasury.gov.au

Dear Director

Response to Crypto Asset Secondary Service Providers (CASSPrs) Consultation Paper.

1. The Law Council of Australia's Business Law Section (**BLS**) appreciates the opportunity to comment on the proposed licensing and custody reforms outlined in the 21 March 2022 Treasury Consultation Paper 'Crypto asset secondary service providers: Licensing and custody requirements' (**Consultation Paper**). This submission has been prepared by members of the BLS's Financial Services, Corporations and Digital Commerce Committees (the **Committees**).

2. There are five key matters that the Committees wish to bring to the attention of Treasury:

   (a) First, as the starting point for regulatory intervention, one must identify the harms that the intervention is seeking to minimise and to consider these harms through a lens of broad policy reform across relevant legislative frameworks; not in isolation.

   In the case of crypto assets, the risk of harm arises from the activities carried out in respect of the tokens, rather than solely from the characteristics of the tokens. Turning then to the proposed regulation of crypto assets, the relevant harms should be identified through the token-mapping exercise as noted in the Senate Committee 'Australia as a Financial and Technology Centre' Final Report and 'Transforming Australia's Payments System' Report of October and December 2021, respectively.

   The Committees acknowledge that a completion date of late 2022 has been proposed by Treasury for the token mapping exercise. Completing that exercise should be a prerequisite to any further regulation in this area as completion of the token mapping exercise, and corresponding mapping of digital activities relating to tokens, will meaningfully inform the way that CASSPrs should be regulated.

   Furthermore, there is potential overlap between the scope of the Consultation Paper and the Australian Law Reform Commission (**ALRC**) inquiry into reform of corporations and financial services legislation in Australia.

   The ALRC terms of reference include consideration of whether the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**) could be simplified and rationalised, with a Final Report due in November 2023:

Telephone [redacted] • ***Fax*** +61 2 6248 0639 • ***Email*** [redacted]
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

> *The ALRC's task is not simply to 'tidy up' the legislative framework in service of theoretical objectives. At the core of this Inquiry is the importance of ensuring the law is fit for purpose for industry, recognising the dynamic nature of the financial services sector and its significant contribution to the Australian economy. Further, the regulatory framework must meet the needs of consumers of financial products and services in understanding and navigating the law to protect their legal entitlements. Finally, legislative simplification could reduce the amount of time and money that public institutions necessarily spend on administration, enforcement, and dispute resolution under the law*.[1]

Cyrpto assets will play a significant role in Australia's future financial system and broader economy. Australia should capitalise on this opportunity for law reform to harmonise and simplify our legal framework to promote Australia as a leader in the digital economy.

While it would not be realistic to delay development of the regulatory framework for crypto assets until the conclusion of the ALRC inquiry, the Committees recommend that observations made by the ALRC to date be taken on board in the law design process for regulating crypto assets with a view to avoiding unnecessary complexity and/or potential future duplication and overlap.

(b) Secondly, to support the identification of appropriate alternatives, the regulation of crypto assets should be primarily concerned with the available uses of particular crypto assets as opposed to their form. The Committees note that several of the questions in the Consultation Paper request responses pertaining to the form of asset, such as an exclusion from certain regulation for non-fungible tokens.

The Committees submit that Treasury should adopt a use-case focused, risk based regulatory approach, which would more directly address the harms that are the focus of regulation, and would satisfy the objective of technological neutrality.

While the risks and harms in each use case are different, the Committees are concerned that regulation concerned with the form of a specific crypto asset may lead to regulations being imposed on CASSPrs which may not be appropriate for the kind of business which they operate. The Committees also believe that adopting a use-case centric approach would further the regulatory objective of technological neutrality and a risk-focus.

By way of example, the approach to regulation should be different depending upon whether a CASSPr is operating:

- a centralised crypto asset exchange;

[1] Financial Services Legislation: Interim Report A (Report 137, 2021), tabled in Parliament by the Attorney-General of Australia, the Senator the Hon Michaelia Cash on 30 November 2021 <https://www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-FSL-A-Summary-Report.pdf>

- a decentralised crypto asset exchange (further, it should be clarified that a truly decentralised exchange is not a "secondary" service provider and is therefore outside the ambit of regulation as a CASSPr for the reasons set out on page 13 of the Consultation Paper); or

- a wallet service, either in conjunction with an exchange or directly for customers.

The Committees submit that Treasury should consider whether a disclosure regime would be suited to address the serious disconnect between customer expectations and the services offered by CASSPrs. For example, utilising a centralised exchange or a wallet service where a customer is only entitled to the repayment of an equivalent item renders the customer an unsecured creditor of the CASSPr. The Committees anticipate that many customers of those services could be under the mistaken belief that they are the beneficial owner of the deposited crypto asset, or at least may be unable to differentiate between services that appear similar in their operation (from the customer's perspective). For example, the disclosure regime could require centralised exchanges to disclose: (a) whether or not they earmark/allocate particular private keys for crypto assets held on account of a particular customer; and (b) whether or not they hold particular crypto assets on trust for particular customers.

In general, customers of a CASSPr operating a "centralised" crypto asset exchange do not own an underlying asset they have deposited with, or bought through, the exchange. This structure is similar (but not identical) to a bank, where a customer's cash is the property of the bank and the customer has a right as an unsecured creditor to have an equivalent amount of cash transferred to the customer on demand. The centralised exchange model also allows the efficiency of trading by customers akin to an investor directed portfolio service (as different customers' trades can be netted off against each other), although the assets may not be held in trust for the customers. By contrast, where customers trade digital assets using a CASSPr operating a "decentralised" crypto asset exchange, they are stored outside the exchange in external wallets managed and controlled by the customer or another CASSPr, and trading by the customer does not have the benefit of the exchange being able to match trades within a centralised asset pool.

The Committees' view is that Treasury should consider if it would be appropriate to mandate certain disclosures and risk management functions, given the customers would bear significant counterparty risk:

- in the case of centralised exchanges, as noted above, it would be appropriate to require the CASSPr to clearly disclose to customers whether or not the assets are held on trust for the customers, so that customers understand their rights to specific assets in the event of the CASSPr's insolvency; and

- the CASSPr should disclose what it does with those underlying assets and the degree to which the CASSPr is hedged against its obligations to transfer assets to customers, in order for the customers to understand the prudential risk of investing through a centralised exchange. For example, customers should be made aware of the extent to which the assets may be lent to other customers, used in margin financing or even

used for the benefit of the exchange as opposed to customers of the exchange.

The treatment and storage of crypto assets is also critical to the regulation of stablecoins. The Committees understand that this is also under review by Australian regulators, including as part of the Council of Financial Regulators Stablecoin Working Group. While it is its own distinct topic, there are important adjacencies from a consumer protection and broader systemic standpoint.

(c) Thirdly, it is critical that any regulation clearly identify the appropriate jurisdictional nexus that must exist before a foreign CASSPr is subject to the proposed regulation. While this has not been an identified priority of the Consultation Paper, the Committees consider that having a clear jurisdictional test is essential for achieving certainty for businesses and in achieving adequate consumer protection.

The jurisdictional tests in the Corporations Act concerned with variations of 'carrying on a business in Australia' are not necessarily sufficient for CASSPrs given the already difficult application in the context of "carrying on a financial services business in Australia" by offshore providers of traditional financial services. The geographical links under the AML/CTF Act for digital currency exchanges are also manifestly inadequate – for example, many large global crypto asset exchanges have no "permanent establishment" in Australia, which means the services they provide to customers in Australia are not regulated in Australia. Identifying the jurisdictional nexus becomes increasingly difficult, but no less important where there are questions around the degree of centralisation of the CASSPr.

The Committees submit that one alternative approach may be for the Australian regime to regulate entities that publish advertisements in Australian media or direct advertisements to Australian audiences, similar to the jurisdictional approach at s 61CA of the *Interactive Gambling Act 2001* (Cth) and relevant exceptions such as those in s 61EA of that Act. Of course, some platforms do not advertise at all, simply relying on word of mouth or prominence in global media. Other jurisdictions such as the United Kingdom and Singapore provide comparative reference as to advertising standards and (especially in the case of Singapore) jurisdictional nexus triggers. Certain Hong Kong regulatory regimes also carry strong guidance on concepts such as when "active marketing" occurs under the securities and futures regime.

Noting that there is substantial demand by Australia-based customers to access foreign CASSPrs, many of which will not choose to become licensed in Australia, the Committees' view is that Treasury should determine:

- whether the proposed licensing regime will prohibit unlicensed CASSPrs providing services to customers in Australia or promoting their services into Australia;
- whether a licensee will need to be an Australian company; and
- whether Australian based customers will have the ability to choose between using licensed or unlicensed CASSPrs, including unlicensed foreign CASSPrs.

If the first option is adopted, this raises a further question as to whether the Australian government should take steps to prevent foreign CASSPrs providing their services to customers in Australia similar to the measures taken in relation to interactive gambling to prevent foreign gambling sites accessing Australian based customers.

The Committees also believe that refinement of the financial services regime for the crypto industry would be beneficial for the financial services industry, given its increasingly digital nature.

(d) Fourthly, the Consultation Paper focuses on a proposal to regulate centralised secondary service providers. It is important for Treasury to adequately consider where the line between centralised and decentralised service providers will be drawn and the regulatory consequences. Importantly, Treasury's policy objective of ensuring any market for crypto assets is operated in a fair, transparent and orderly manner will necessarily require a broader assessment of the crypto ecosystem including the role of Decentralised Autonomous Organisations (**DAOs**). DAOs will increasingly play a significant role in the issuing of tokens and by the nature of these arrangements (e.g. that they may not be subject to control by an identifiable entity), regulation of CASSPrs dealing in these tokens may need to be considered differently.

(e) Finally, the Committees strongly recommend that an efficient regulatory architecture be adopted for crypto assets and related digital activities that warrant regulation, bearing in mind the significant risk of overlap and inconsistency. The Committees submit that an expansion of the Chapter 7 Corporations Act regime, for crypto asset related activities that are assessed to require oversight and regulatory standards consistent with the existing objectives of Chapter 7, would be preferable to a distinct regime in supporting the development, retention and attraction of innovation in the Australian market provided necessary flexibility, nuanced standards and resolution of inconsistencies can be achieved.

3. What follows is a list of responses to some of the specific questions posed in the Consultation Paper. The Committees do not propose to respond to every question in the Consultation Paper and those questions are marked accordingly.

4. Please contact the Chair of the Financial Services Committee Pip Bell (pbell@pmclegal-australia.com) and the Chair of the Digital Commerce Committee Susannah Wilkinson (Susannah.Wilkinson@hsf.com) if you wish to discuss any aspect of this submission.

Yours faithfully

Philip Argy
Chairman
Business Law Section

Law Council
OF AUSTRALIA

Business Law Section

Responses to questions posed in Consultation Paper

Question	Response
Proposed Terminology	
1. Do you agree with the use of the term Crypto Asset Secondary Service Provider (CASSPr) instead of 'digital currency exchange'?	The Committees agree with Treasury's view that digital exchanges are only a subset of the relevant service providers and is supportive of a broad definition. "Token" is arguably a better term than "asset" as it is value neutral. Tokens have broad application and may have zero or negative financial value.
2. Are there alternative terms which would better capture the functions and entities outlined above?	The Committees suggest that the word "secondary" be removed from a plain language perspective, noting that activities such as safekeeping may be involved at primary issuance without any secondary market component. Further, the term "Crypto Asset Service Provider" would also better align with terms such as "Virtual Asset Service Provider" that are used at a transnational level and in other markets. The Committees also suggest that the scope of providers caught ought to be expanded beyond those currently proposed, to align with the scope proposed by the Financial Action Task Force in its Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (published in October 2021).[2] Please also refer to comments made below in response to questions 5 and 15.
3. Is the above definition of crypto asset precise and appropriate? If not, please provide alternative suggestions or amendments	The Committees believe that a broad definition that captures a large number of use cases would be appropriate, provided that regulations only address specific use cases and risks of harm.

[2] https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets-2021.html

Telephone +61 2 6246 3737 • *Fax* +61 2 6248 0639 • *Email* jessica.morrow@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Question	Response
	The Committees note that some foreign jurisdictions use the term 'virtual asset' or 'digital asset' and submits that Treasury should consider whether any foreign definitions meet Treasury's objective of a precise definition, given international harmonisation of terms is beneficial in regulating cross-border activities. On the proposed definition itself, the Committees understand that a cryptographic proof does not strictly delineate ownership but rather it delineates 'control' of a crypto asset. Similarly, the inclusion of 'contractual' in the definition may lead to certain rights such as those afforded to controllers of governance tokens being excluded from the definition of crypto asset. Adopting these proposed amendments would lead to the following alternative definition: *"…a digital representation of value or ~~contractual~~ rights that can be transferred, stored or traded electronically, and whose ~~ownership~~ control is either determined or otherwise substantially effected by a cryptographic proof"* In adopting this definition for any given legal or regulatory purpose, it will be important to ensure that the principle of technological neutrality is taken into account. For example, there should be good reasons to treat a bundle of rights represented by a blockchain-based token differently to how that same bundle of rights recorded on a centralised ledger is treated. Relatedly, exemptions will be important to prevent overreach – for example, a seller of intellectual property rights in a digital artwork (say, a personal use licence) represented by a non-fungible token (**NFT**) may not require the same level of regulatory supervision and oversight as one selling an algorithmic stablecoin. See further, the response to question 5 below.

Question	Response
4. Do you agree with the proposal that one definition for crypto assets be developed to apply across all Australian regulatory frameworks?	Yes, as a general principle, the Committees support consistency and harmonisation within Australian regulatory frameworks as well as in the broader international context. Clarity around what a crypto asset is, having regard to its technical characteristics, will assist with clarity across different regulatory frameworks. It will be a matter for each law to appropriately regulate or address relevant risks in respect of the standard definition on a case by case basis. There can be cogent reasons for the differential application of rules to different types of crypto assets depending on their inherent features, use cases and risks. On that basis, the Committees strongly support: (a) a core definition that is the same across all instances of its appearance in Australian legislation and regulatory standards; *with* (b) contextual exemptions or conditions to address differences in the treatment of certain assets, or related products or activities for purposes such as licensing, taxation, consumer protection or other standards.
5. Should CASSPrs who provide services for all types of crypto assets be included in the licencing [sic] regime, or should specific types of crypto assets be carved out (e.g. NFTs)?	The Committees are of the view that a 'one-size fits all' licensing regime could lead to an inappropriate regulatory burden for low-risk products and submits that Treasury should consider implementing a tiered licensing regime, for example a regime such as the existing two-tier market operator licence in Parts 7.2 and 7.2A of the Corporations Act. Please refer to comments made in response to question 15 below in relation to potentially leveraging the Corporations Act framework to avoid unnecessary complexity and duplication in regulation.

Question	Response
	On the issue of whether a CASSPr should be exempted from the requirement to be licensed when dealing in specific crypto assets, the Committees recommends that the use-case (and associated activities that create a risk of harm) be the focus of exclusions rather than the crypto assets themselves, which it considers would be consistent with the objective of technological neutrality. Key policy objectives here are appropriate risk-based consumer protection, clarity, simplicity and harmonisation. Further, a risk-based approach should be adopted in determining how to govern or treat a particular class of crypto assets in a given legal or regulatory context. Key exemptions from the regime which the Committees considers would be broadly appropriate include: • Fiat currency in tokenised form that is issued by a commercial bank or market infrastructure for settlement or general account management purposes. • Central bank digital currencies (**CBDCs**) that are issued by a central bank or a government. • Certain NFTs, depending on their precise features (see above comments at question 3), noting that an NFT can represent anything from a digital baseball card to a bespoke company share. • Similarly, tokenised representations of 'real world' assets such as physical diamonds, vehicles or real estate, assuming no fractionalisation / managed investment scheme or other financial product is involved.

Question	Response
	The Committees suggest two key motivating factors should be whether (1) existing regulatory frameworks sufficiently address any assessed risks; and (2) broader consumer protection laws are enough to mitigate harm. A nuanced approach to any in-scope assets is also necessary. For example, crypto assets which are used to settle a commercial transaction should not be treated in the same way as a crypto investment product. Similarly, investment products in which the claim represented is fully backed by a holding of the underlying product should not be regulated in the same way as (for example) algorithmic stablecoins. Finally, the Committees recommend that the law makes it very clear whether / when technology providers are caught as CASSPrs. This is especially important in the context of self-custodial wallets and self-directed technology tools.
Proposed Principles	
6. Do you see these policy objectives as appropriate?	Yes, however they need to be considered holistically with other regulatory priorities across financial services, web3 and crypto assets more generally.
7. Are there policy objectives that should be expanded on, or others that should be included?	The Committees' view is that a policy objective of pursuing international consistency should be included, with a proposed objective as follows: • minimise unnecessary Australian regulatory idiosyncrasies and seek to achieve consistency with international regulatory regimes and transnational standard-setters on a dynamic basis.

Question	Response
	The Committees also consider that a policy objective of promoting Australia as a attractive jurisdiction for the digital economy should be included, with a proposed objective as follows: • promote Australia as a digital economy jurisdiction of choice through promoting a clear, simple and safe regulatory framework for the web3 ecosystem.
8. Do you agree with the proposed scope detailed above?	Yes, with appropriate carve outs. See the response to question 10 below.
9. Should CASSPrs that engage with any crypto assets be required to be licenced [sic], or should the requirement be specific to subsets of crypto assets? For example, how should the regime treat non-fungible token (NFT) platforms?	The requirement to be licensed should be specific to certain uses of, and activities in relation to, crypto assets. Generally speaking, specific subsets of crypto asset type should not receive an exemption.
10. How do we best minimise regulatory duplication and ensure that as far as possible CASSPrs are not simultaneously subject to other regulatory regimes (e.g. in financial services)?	The Committees believe that adopting a consistent definition of crypto assets across relevant legislation would permit those Acts to exclude CASSPrs from duplicate obligations. The relevant regulators should have the power to exclude CASSPrs from legislation or specific obligations within applicable legislation. In respect of financial services, for example, ASIC may declare certain things to be specifically excluded from the definition of *financial product* under s 765A of the Corporations Act. In line with its role as regulator of a new CASSPr licensing regime, ASIC would then be able to amend the scope of the exclusion if inappropriate regulatory overlap occurs, and is conceivably best placed to monitor the operation of the two licensing regimes (financial services and crypto asset related services).

Question	Response
Proposed Obligations on CASSPrs	
11. Are the proposed obligations appropriate? Are there any others that ought to apply?	The obligations are appropriate. An obligation to manage conflicts of interest, similar to 912A(1)(aa), should be incorporated into proposed obligation (2). The Committees also suggests that market surveillance, market misconduct prevention and intervention expectations be made more explicit.
12. Should there be a ban on CASSPrs airdropping crypto assets through the services they provide?	No response provided.
13. Should there be a ban on not providing advice which takes into account a person's personal circumstances in respect of crypto assets available on a licensee's platform or service? That is, should the CASSPrs be prohibited from influencing a person in a manner which would constitute the provision of personal advice if it were in respect of a financial product (instead of a crypto asset)?	No response provided.
14. If you are a CASSPr, what do you estimate the cost of implementing this proposal to be?	No response provided.
15. Do you support bringing all crypto assets into the financial product regulatory regime? What benefits or drawbacks would this option present compared to other options in this paper?	No. Not all crypto assets should be subject to the financial product regulatory regime. As Treasury notes, key market failures intrinsic to financial products are not necessarily intrinsic to all crypto assets and much of the need for regulatory recourse required for financial products does not necessarily exist for many crypto assets (unless a centralised CASSPr is involved).[3]

[3] Consultation Paper, p13

Question	Response
	The Committees support bringing certain crypto assets (as an asset class) into the Corporations Act regulatory regime, but providing clearly articulated exceptions to ensure that crypto assets which should not be subject to that form of regulation (because the risk of consumer harm is not sufficient) are not inadvertently captured. Where there is a clear case for regulation of crypto assets as financial products in order to protect investors, ensure that markets are fair, efficient and transparent, and reduce systemic risk. The Committees are of the view that such crypto assets should be regulated under the existing regulations[4] for the following reasons: • The Corporations Act provides a sophisticated existing structure to regulate intermediaries. • The Corporations Act already covers a number of crypto assets and related activities. For example, when assessing local and international crypto asset exchanges and service providers, members of the Committees find that many of them already tip into the financial product regulatory regime by virtue of the crypto assets or crypto asset-related products traded or the services provided. This is further exacerbated by the expansive "derivative" definition in Australia. • A single regulatory framework that can avoid or resolve overlap in a self-contained manner is preferable to multiple regulatory frameworks and is more likely to attract and support innovation in the market.

[4] Objectives and Principles of Securities Regulation, International Organization Of Securities Commissions, May 2017 <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>

Question	Response
	• A single regime can promote a "same risks, same activities, same regulation" approach, particularly when overseen by a single regulator. This supports a level playing field. • This approach can lend itself to switching on / off certain licensing, conduct or prudential requirements depending on the nature of the activities, assets and products involved. • Initiatives such as the product design and distribution obligations in Part 7.8A of the Corporations Act can be more readily applied *where appropriate*. • Speed and clarity are important to ensure Australia keeps pace with international developments. A distinct framework is likely to pose hurdles to both. This is particularly the case as there could to some extent be a need to resolve various areas of overlap including financial product, digital currency exchange and stored value regulation in Australia. To the extent the policy objectives require licensing of providers of services relating to crypto assets that are non financial products, especially where CASSPrs introduce risk to consumers, appropriate licensing obligations which are proportionate to the risk of consumer harm should be considered . In addition to exceptions to crypto assets which should not be subject to a licensing regulatory framework at all, the Committees believes that the industry would benefit from leaner, lighter regulatory requirements being applied to certain classes of crypto assets that have sufficient track record and can demonstrate robustness over time.

Question	Response
	Finally, the Committees strongly suggest that clear regulatory guidance is used to support the newly regulated sector. This should cover at least the following: • Key indicia of when the Australian jurisdictional nexus is met, having regard to digital platforms and targeting mechanisms. • Steps expected when the Australian jurisdictional nexus is met unintentionally (immediate offboarding vs no new products etc). • Plain language and scenario-based guidance on meeting regulatory requirements, having regard to different asset types. • Guidance on whether / when technology providers are caught as CASSPrs – see above comment in question 5. • Good practices based on local and international market developments. • Clear regulatory consultation mechanisms and criteria.
16. If you are a CASSPr, what do you estimate the cost of implementing this proposal to be?	No response provided.
17. Do you support this approach instead of the proposed licensing regime? If you do support a voluntary code of conduct, should they be enforceable by an external dispute resolution body? Are the principles outlined in the codes above appropriate for adoption in Australia?	No – the proposed licensing regime is the most appropriate alternative. Self-regulatory organisations and voluntary codes of conduct can have a role to play in the overall framework, but largely in the area of good practices or informing good regulation through consultation, rather than foundational principles. A consideration of markets such as Japan (recognition of self-regulatory cryptocurrency organisations), Hong Kong (banking sector rule-making) and Gibraltar (crypto market integrity rules formed in collaboration with industry) may shed light on possible models for productive industry engagement.
18. If you are a CASSPr, what do you estimate the cost and benefits of implementing this proposal would be? Please quantify monetary amounts where possible to aid the regulatory impact assessment process.	No response provided.

Question	Response
Proposed Custody Obligations for Private Keys	
19. Are there any proposed obligations that are not appropriate in relation to the custody of crypto assets?	No response provided.
20. Are there any additional obligations that need to be imposed in relation to the custody of crypto assets that are not identified above?	The Committees suggest considering the inclusion of a requirement to have regard to the "state of the art" or similar best practice benchmarks. This is consistent with the principles-based approach and ensuring that custody providers keep up to date with rapidly evolving technology changes. However, this need not be entrenched in law – it can be in guidance materials (see above response to question 15).
21. There are no specific domestic location requirements for custodians. Do you think this is something that needs to be mandated? If so, what would this requirement consist of?	By their nature, custodians have the ability to control assets and transactions. Their location, local regulatory treatment and enforcement considerations in a default scenario should be factored into any assessment of their appropriateness.
22. Are the principles detailed above sufficient to appropriately safekeep client crypto assets?	No response provided.
23. Should further standards be prescribed? If so, please provide details	No response provided.
24. If you are a CASSPr, what do you estimate the cost of implementing this proposal to be?	No response provided.
25. Is an industry self-regulatory model appropriate for custodians of crypto assets in Australia?	The Committees do not believe that a self-regulatory model would provide sufficient consumer protection. Further, some members of the Committees have observed that the crypto asset industry appears largely unwilling to self-regulate, with strong support for government-led regulation. However, please see comments in response to question 17 above regarding where industry self-regulation may have a role to play.

Question	Response
26. Are there clear examples that demonstrate the appropriateness, or lack thereof, a self-regulatory regime?	The Committees are concerned that Australian-based CASSPrs which comply with a self-regulatory regime may place themselves at a disadvantage vis-a-vis foreign entrants which are not under the same commercial and regulatory pressures to comply with an Australian self-regulatory regime.
27. Is there a failure with the current self-regulatory model being used by industry, and could this be improved?	See responses to questions 25 and 26 above.
28. If you are a CASSPr, what do you estimate the cost of implementing this proposal to be?	No response provided.
Early views on token mapping	
29. Do you have any views on how the non-exhaustive list of crypto asset categories described ought to be classified as (1) crypto assets, (2) financial products or (3) other product services or asset type? Please provide your reasons.	No response provided.
30. Are there any other descriptions of crypto assets that we should consider as part of the classification exercise? Please provide descriptions and examples.	The Committees suggest adding "tokens used to secure a network through staking".
31. Are there other examples of crypto asset that are financial products?	Generally speaking, members of the Committees have found that most common examples of financial products involved are derivatives and managed investment schemes. Ultimately, each crypto asset should be assessed on the basis of its unique features (in particular what it can be used for).
32. Are there any crypto assets that ought to be banned in Australia? If so which ones?	In general, the Committees recommend an open-minded and non-moralistic approach to crypto asset regulation.

Question	Response
	Parameters will undoubtedly be appropriate. However, a principles-based approach is recommended, in the sense of providing guidance to service providers on the due diligence that they should undertake on assets prior to making them available or using them as a reference or investment asset – rather than an outright ban. Members of the Committees are aware of examples of prescriptive markets such as Thailand, which in 2021 banned its digital asset exchanges from trading NFTs, meme / fan-based tokens and exchange tokens. The Committees do not consider this type of prescriptive approach to be necessary for the Australian regulatory environment at this time. Examples of principles-based scenarios that may assist service providers to determine when non-admission, de-listing or suspension occurs, include the following: • Crypto assets that are associated with criminal and/or fraudulent activity. • Crypto assets that are associated with the failure or exploit of smart contract protocols, such that they no longer function as intended, • Crypto assets with privacy-preserving features, **but** only where there is no reasonable prospect of compliance with financial crime and other laws. To clarify, not all "privacy coins" are problematic – in fact, many embody innovative technologies such as zero-knowledge proofs combined with appropriate levels of data insight that can support both privacy and financial crime compliance. • Crypto assets that infringe or incite the infringement of other laws. For example, tokens that have no other purpose than to access child abuse material would be a clear example. In our experience, such infringing assets are rare.

Question	Response
	There are multiple other parameters that will be more or less relevant depending on the context – for example, thin liquidity would inform selection as a reference asset for a managed investment scheme; pre-platform launch / early stage tokens may require enhanced diligence and restriction to certain categories of the investing public. Any restrictions should take into account the downside risks – for example, the likelihood that a person may still access it from an unregulated actor, leading to shadow markets outside the purview of any supervision at all. Finally, members of the Committees are aware of proposals in certain markets to ban the circulation of certain offshore CBDCs. However, the Committees suggests that this be considered separately given it relates more to monetary policy and national sovereignty considerations, and that the Committees have recommended that CBDCs be out of scope of crypto asset regulation, That being said, there may be other assets over time which may be considered a threat to national sovereignty or security, so provision for designation as a banned or regulated asset may be beneficial to ensure sufficient flexibility in standards.