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The Treasury
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By email: crypto@treasury.gov.au

Dear Treasury

Crypto asset secondary service providers: Licensing and custody requirements consultation paper – Swyftx submission

We welcome this opportunity to provide a submission to Treasury's *Crypto asset secondary service providers: Licensing and custody requirements* consultation paper (the **Paper**). As the global race to attract crypto talent and investment intensifies, so too does competition among crypto service providers to meet Australian investor demand. In this context, determining appropriate regulatory settings for this sector is the most pressing challenge for policy makers in the modern financial services landscape. As a clear leader within the Australian crypto industry, Swyftx provides this submission along with our commitment to lend our voice to the important discussions ahead. We do so to help Australia meet this challenge and, in doing so, become a global leader in growing and regulating crypto businesses.

I. Who is Swyftx?

Swyftx Pty Ltd (**Swyftx**) is an Australian-born, Brisbane headquartered cryptocurrency trading platform. Established in 2018 by Alex Harper and Angus Goldman, Swyftx has grown to become a clear leader in a crowded industry. Our last public submission was on 30 June 2021 to the Senate Select Committee on Australia as a Technology and Financial Centre ([Submission 21](#)). At the time of that submission, we had a verified customer base of over 300,000 and employed over 100 staff in Australia. In less than a year, those figures have grown to over 600,000 customers and over 275 staff. All available information indicates Swyftx is now the second largest and fastest growing Australian cryptocurrency trading platform.

In addition to continuing to grow our Australian operations and customer base, we have global ambitions. In August 2021, we launched our business in New Zealand, and in March of this year we filed an application with the Financial Conduct Authority to operate in the United Kingdom. We continue to evaluate expansion opportunities in a number of other jurisdictions.

Given that Swyftx is now a clear industry leader in Australia, we think it is important to play a leading role in the design of Australia's crypto asset regulatory framework. We seek to ensure that our customers receive a high level of security and appropriate safeguards, and that the innovative business models which have attracted numerous Australians to the crypto asset space can continue in a manner which gives the investing public a high degree of confidence.

II. Swyftx's business model

Swyftx's perspective on the Paper's questions is informed by our business model. In this regard, we would highlight the following features:

- First, Swyftx is a broker, not an exchange. Although "exchange" and "broker" are often used synonymously in the colloquial sense, they both provide differentiated and important services that benefit Australian consumers. Crypto is a global market, and the ability for a broker to facilitate access to liquidity on a global scale makes it viable to offer a wide range of crypto assets, while

maintaining highly competitive spreads and fees. In contrast, the current liquidity of the Australian market is insufficient on its own to support competitive spreads and fees and would limit the viable range of crypto assets. In the infancy of crypto exchanges and brokerages, this limitation led to the wide variance in price between geographic locations (eg, the high price of Bitcoin in Korea and Japan relative to the United States in 2018).

As an Australian broker, Swyftx provides its customers with a secure gateway to this global crypto market, offering more than 300 crypto assets at internationally competitive spreads and fees. At the same time, our customers are dealing with an Australian-based company of substance, with the ability to offer them best-in-class security, reliability and 24/7 customer service. The role of brokers in financial markets is by no means novel, and Swyftx seeks to fulfil that role to the benefit of our customers in the Australian crypto space.

- Secondly, looking ahead, whilst Swyftx prides itself on its 'crypto first' heritage, we recognise that evolving our product offering to best service our customers means that future Swyftx products and services may well fall within the traditional financial services landscape. Consequently, while Swyftx was "crypto first", we do not expect to remain "crypto only".

III. Responses to consultation questions

Against this backdrop, we provide the following responses to the questions in the Paper. In responding, we emphasise the issues most relevant to Swyftx's business and group certain questions thematically.

Proposed terminology and definitions

1. Do you agree with the use of the term Crypto Asset Secondary Service Provider (CASSPr) instead of 'digital currency exchange'?
2. Are there alternative terms which would better capture the functions and entities outlined above?

We think CASSPr is preferable to "digital currency exchange" because it can more accurately capture the range and nuance of crypto service providers. While the general public may refer colloquially to "crypto exchanges", we would expect definitions which carry legal significance to account for this nuance.

3. Is the above definition of crypto asset precise and appropriate? If not, please provide alternative suggestions or amendments.

We suspect many submissions will be made on this point, but we consider the proposed definition to be fit for Swyftx's purposes.

4. Do you agree with the proposal that one definition for crypto assets be developed to apply across all Australian regulatory frameworks?

One definition across all regulatory frameworks would provide clarity and certainty for our business. However, we are mindful of the risk of unintended consequences that may result. To the extent that further work is required to navigate around those consequences, we are eager and well-placed to assist, as our business model covers the gamete of compliance regimes in the space (eg, AML/CTF, corporations law, privacy, modern slavery).

5. Should CASSPrs who provide services for all types of crypto assets be included in the licensing regime, or should specific types of crypto assets be carved out (e.g. NFTs)?
9. Should CASSPrs that engage with any crypto assets be required to be licensed, or should the requirement be specific to subsets of crypto assets? For example, how should the regime treat non-fungible token (NFT) platforms?

We think that CASSPrs who provide services for all types of crypto assets should be included in the licensing regime.

Swyftx's long-term vision is to help retail investors achieve financial wellness by offering them a holistic financial ecosystem. This will always include cryptocurrencies, but may soon include other forms of crypto assets and traditional financial products. On a principled level, carving out specific types of crypto assets jeopardises the regulatory certainty that is a key benefit of introducing licensing. This risks creating the regulatory duplication of separate regimes that may apply to certain CASSPrs (ie, the financial services regime, a separate CASSPr licence, and one or more other regimes applicable to any crypto assets carved-out from the CASSPr licence).

We expect there will be a number of submissions made on the question of carve outs for particular types of crypto assets, and also recognise this is closely related to the questions on token mapping. However, when viewed from a consumer behavioural perspective, to the extent a CASSPr provides a platform through which consumers engage in investment activities (ie, dealing with a crypto asset with the expectation of generating a profit), we do not see a principled reason why that CASSPr should not be subject to the same regulatory licensing obligations as a pure cryptocurrency exchange or broker.

Proposed principles, scope and policy objectives of the new regime

6. Do you see these policy objectives as appropriate?
7. Are there policy objectives that should be expanded on, or others that should be included?
8. Do you agree with the proposed scope detailed above?

Swyftx is highly supportive of the stated policy objectives and is keen to contribute to the process of finding the appropriate balance between them.

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)?
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?

Swyftx is in favour of CASSPrs being regulated under the current financial services licensing regime in a manner that accounts for their idiosyncrasies and various use cases. We think this is the best way to minimise regulatory duplication, maximise certainty for CASSPrs and provide a signal of confidence to the Australian investing public.

This approach would have the added benefit of maintaining simplicity and uniformity throughout the broader financial services sector, in line with the commendable aims of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation. Should CASSPrs fall under an entirely separate and novel regime, we worry that the costs of compliance under two separate regimes would create unintended challenges – even for CASSPrs with the best intentions of complying with both.

Rather than a CASSPr licence which adopts many of the Australian Financial Services Licence (**AFSL**) obligations (as was done with 7 out of the 13 obligations proposed in the Paper), we think the better approach would be to start with a traditional AFSL and consider which requirements should be adapted to the particular features of specific CASSPr business models. We make suggestions on AFSL obligations that may be inappropriate for CASSPrs, and at least one additional obligation that may be appropriate, in our response to question 11 below.

At least at a conceptual level, it may be consistent with this approach that crypto assets be classed as “financial products” under the *Corporations Act*, with the caveat that care should be taken to assess the various natures and use cases of crypto assets such that they are not inappropriately shoehorned into existing categories of financial products. That would be a sure-fire way to stifle the businesses of many Australian CASSPrs. From Swyftx's perspective as a broker, any classification that would materially limit the variety of tokens we could offer to our customers would be unwelcome. We look forward to contributing to the token mapping exercise as it progresses.

Proposed obligations on crypto asset secondary service providers

11. Are the proposed obligations appropriate? Are there any others that ought to apply?

Swyftx agrees with the majority of these proposed obligations, at least in the high-level form in which they are stated. As we take a forward-looking approach to regulation, we are already striving to meet the majority of these standards. However, we query the appropriateness of proposed obligations 1, 5 and 8:

- Proposed obligation 1 includes two separate requirements taken from the financial services regime. While we agree with the requirement to provide services “efficiently, honestly and fairly”, we think that the requirement to “ensure that... any market for crypto assets is operated in a fair, transparent and orderly manner” is likely to be inappropriate for most CASSPrs. As a crypto asset broker, and not a

market maker, Swyftx is not in a position to ensure the “fair, transparent and orderly” operation of crypto asset markets.

- Turning to proposed obligation 5, we agree that it is appropriate for CASSPrs to “maintain minimum financial requirements including capital requirements”. However, the form and amount of these requirements should be carefully considered and calibrated. Capital, insurance, and other financial requirements that are onerous may have the effect of impeding competition and favour larger, more established entities. In addition, care should be taken in imposing insurance requirements, in circumstances where such insurance may not be available (or not available at sufficient scale).
- Proposed obligation 8 imposes a “true to label” obligation. While we agree with the underlying intention to ensure consumers are properly informed and to avoid them being misled, we think this is not the appropriate mechanism. CASSPrs are already under the general prohibitions against misleading and deceptive conduct and, in a practical sense, are required to provide appropriate disclaimers and risk disclosure. For example, Swyftx:
 - has its own internal policies about not listing high risk assets (eg, we do not list privacy coins due to heightened AML/CTF risk); and
 - tries to encourage its customer base to conduct their own research and seek advice (eg, our Swyftx Learn initiative and our sponsored podcast, *Tapping Into Crypto*, are attempts to provide customers with accessible starting points in their crypto asset education).

Additionally, this “true to label” obligation may not achieve its aim in the context of crypto assets. Instead of targeting an explanation of the crypto asset itself (which may be highly technical and undigestible), it would be more effective to provide adequate risk disclosure. For example, Australia recently permitted the launch of BTC and ETH ETFs. Our perspective is that the risk disclosure documents around those ETFs were more appropriate than any explanation of the Bitcoin and Ethereum blockchain technologies.

Finally, we think that an additional obligation ought to apply in respect of foreign providers. Internationally, it is common for CASSPrs to service jurisdictions in which they are not licensed (or in some cases, even where they have been rebuffed by domestic regulators). We think that this practice would put Australian consumers at risk and be anti-competitive to domestic CASSPrs, like Swyftx, who intend to comply with licensing requirements at significant cost.

As for an appropriate test, the touchstone of whether or not a CASSPr is “carrying on business” seems to us to be too uncertain, particularly with the global reach and marketing of certain CASSPrs, who may have no substantive presence in Australia, but with whom consumers in Australia may deal. This is evidenced by the recent case law. We think that the following combination of negative and positive obligations may provide more certainty and clarity in determining if a foreign CASSPr requires an Australian licence:

- if a foreign CASSPr induces Australians to use its platform; and/or
- if there is a reasonable likelihood that Australians will use that CASSPr’s platform, and that CASSPr does not take reasonable steps to prohibit such use.

12. Should there be a ban on CASSPrs airdropping crypto assets through the services they provide?

As a crypto asset broker, Swyftx facilitates customer ownership of those assets. Ownership of certain crypto assets leads to the availability of airdrops from time to time for our customers. Accordingly, we think that a ban would be inappropriate as it would deprive our customers of a key benefit that may be available to them.

Moreover, a blanket ban would deprive Australian consumers from a particular aspect of the crypto asset economy. To the extent that there are material concerns with passing on particular airdrops, it would be more proportionate for an appropriate regulator to issue directions regarding those airdrops. We have not encountered such concerns to date in our business.

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)?

As stated above, Swyftx's vision is to create a holistic financial ecosystem through which its customers can achieve financial wellness. We may wish to provide an advice service in future as part of this ecosystem. Accordingly, we oppose a ban on providing personal advice in respect of crypto assets. We sympathise with the present difficulty financial advisors are facing because of the regulatory uncertainty surrounding crypto assets. However, we think this can be overcome by accommodating crypto assets within the current regulatory framework, thereby enabling financial advisors to become qualified in the space and to advise their clients on crypto assets (just as they do with other regulated asset classes).

The current threshold for what constitutes the provision of general or personal advice under Chapter 7 of the *Corporations Act* is relatively low, which creates an aversion on the part of consumer-facing businesses from making suggestions or recommendations which may well constitute the provision of such advice. Accordingly, this leaves many consumers unable to obtain information that might benefit them. As a principle, we consider that regulation should encourage consumers to be informed. A situation where consumers who are practically prevented from getting advice that takes into account their personal circumstances is the antithesis of that principle and is likely to disadvantage those consumers.

Swyftx currently provides factual information to its customers through its Learn platform, to get them started on their crypto education journey. We would welcome the opportunity, in future, to leverage our industry-leading approach to customer education and support to advise customers on how to build their own balanced portfolios and investment strategies, according to their particular objectives and risk appetite, with a mix of crypto and traditional financial assets.

14. If you are a CASSPr, what do you estimate the cost of implementing this proposal to be?
16. If you are a CASSPr, what do you estimate the cost of implementing this proposal to be?
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.

Swyftx is a values driven business, with Acting Securely and Upholding Integrity being two of our core values. In terms of how this relates to our approach to regulatory compliance, Swyftx views the design, implementation of, and ongoing compliance with, a regulatory compliance framework as an ongoing journey rather than a box-ticking exercise. Indeed, this is what we already do in respect of other statutory obligations, including upholding our risk-based AML/CTF Program or, in the case of expanding to the United Kingdom, orienting our business toward compliance with the GDPR.

In this respect, we think it appropriate to represent the estimated cost of implementation in terms of the number of staff maintained on an ongoing basis to ensure our obligations are met (noting that this would not include the additional costs of external engagements and systems). Of the over 275 Swyftx employees at present, around 60 play a direct and significant role in ongoing compliance. We expect that this would increase as crypto asset licensing is implemented. A further 55 Swyftx employees are dedicated to customer support. Swyftx was founded, in part, as a response to the lack of customer support and attention in the crypto industry. Regardless of the outcome of this crypto asset licensing process, Swyftx will continue to uphold an industry-leading standard of customer support.

As for the licensing options presented in the Paper, it is difficult to compare the cost of licensing implementation under the existing financial services regime, as opposed to a standalone CASSPr licence, given the obligations are only stated at a high level of generality. However, we envision that under a standalone CASSPr licence, additional costs would need to be expended to:

- determine the applicability between that regime and the existing financial services regime; and
- navigate the operation of an entirely new framework.

Alternative options

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?
25. Is an industry self-regulatory model appropriate for custodians of crypto assets in Australia?
 26. Are there clear examples that demonstrate the appropriateness, or lack thereof, a self-regulatory regime?
 27. Is there a failure with the current self-regulatory model being used by industry, and could this be improved?
 28. If you are a CASSPr, what do you estimate the cost of implementing this proposal to be?

Swyftx is not supportive of an industry self-regulatory approach. While we support advocating for sensible policy as an industry, in coordination with peak bodies that represent the interests of Swyftx and its customers, we do not think a self-regulatory approach is preferable when it comes to the regulation of CASSPrs. This is for a few reasons:

- First, given the diverse range of providers in our industry, it is difficult to obtain consensus on a common set of standards. We have materially different business models, and therefore different views on particular obligations and how they should be calibrated.
- Secondly, industry codes have received mixed success in providing consumer confidence. Taking the most recent FinTech industry code to be published in Australia, the Buy Now Pay Later Code of Practice, we continue to see a sustained campaign against its efficacy by consumer advocates and financial counselling groups. We would not want the same outcomes to befall our industry. We think it is important that consumers have full confidence in whatever regulatory settings are ultimately adopted. In our view, a regulatory licence backed by the Government provides for that level of confidence.
- Thirdly, as we look to expand globally, we think a robust, thoughtfully-designed regulatory licence which is issued by the Australian Government would send a much stronger signal of quality to overseas regulators evaluating our business model for authorisation in their respective jurisdictions. In this way, providing an appropriate regulatory licence can help to spur the growth of Australian-grown companies like Swyftx.

Proposed custody obligations to safeguard private keys

19. Are there any proposed obligations that are not appropriate in relation to the custody of crypto assets?
20. Are there any additional obligations that need to be imposed in relation to the custody of crypto assets that are not identified above?
22. Are the principles detailed above sufficient to appropriately safekeep client crypto assets?
23. Should further standards be prescribed? If so, please provide details.

On a principled level, Swyftx acknowledges the importance of robust custody protection in the crypto asset industry. Insofar as the proposed obligations above seek to achieve principles of: security of assets (proposed obligations 4, 5, 6, 7, 8, 10 and 11), segregation of customer assets from business assets (proposed obligations 1 and 2) and recourse for lost assets (proposed obligations 3 and 9), we think that these are appropriate aims for consumer protection.

Turning to the specifics of the proposed obligations, we would be grateful for clarity on where these particular obligations are being drawn from. It seems to us that they may have been drawn, in part, from ASIC's INFO 225 which applies to the responsible entity of a registered scheme (as detailed in Appendix 2 to the Paper). If an analogy is being drawn between custody of crypto assets generally and custody of scheme assets, this may be appropriate for certain crypto asset use cases, but it would be inappropriate for application across the board. This is because the range of use cases for crypto assets available to customers is at least as broad as the use cases for traditional financial products, and we think a risk-based approach should be taken in selecting the custody obligations appropriate for each of these use cases.

In embarking on this risk-based approach, our position is that the custody obligations for CASSPrs should not be more restrictive than the obligations imposed on analogous traditional finance use cases. For example, the custody obligations applicable to an authorised deposit-taking institution licence differ from those that apply to a registered scheme, which again differ from those that apply to a "custodial or depository" service under s 766E of the *Corporations Act*. Those separate tiers of custody obligations facilitate different use cases of customer assets including, with appropriate disclosure, rehypothecation and yield generation.

This approach should also account for the idiosyncrasies of crypto assets and the particular business models within the crypto industry:

- Using ordinary shares as an example, customers cannot self-custody shares, but it is a common and easily-accessible process for customers to withdraw their crypto assets to their own personal hardware “cold” wallet. Swyftx provides the ability for our customers to do this on our platform (if it is consistent with their aims), as well as educational materials regarding storage options and wallet security. The severity of custody obligations on brokers and exchanges should reflect the fact that their customers can always take custody into their own hands, should they wish.
- As a broker, Swyftx requires a proportion of customer assets to be liquid to facilitate the execution of orders with our liquidity providers. This is because unlike the traditional equities markets, which operate during specific day-time hours and provide for a two-day (“T+2”) settlement of transactions, crypto asset markets operate 24/7 and transactions are required to be settled immediately (or, “T+0”). Accordingly, in order for the benefits offered by the broker model to continue (ie, prompt execution across a wider range of assets at more competitive spreads), its underlying mechanics must be properly understood and accounted for in any crypto asset custody regime.

This approach is consistent with the through line of our submission, being that it is appropriate for crypto assets to form part of the existing financial regulation infrastructure since we believe they are an evolution of that infrastructure. This framework of a tiered, risk-based approach for custody might also resemble recommendation 9 of Treasury’s Payments System Review (June 2021), which recommends:

A single, payments licensing framework in line with a defined list of payment functions should be introduced. There should be separate authorisations for the provision of payments facilitation services and the provision of stored-value facilities, and two tiers of authorisations based on the scale of the activity performed by the payment service provider

Whilst still protecting consumers, such an approach would also facilitate consumer choice and the flexibility for CASSPrs to offer a range of products to the market.

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?

As a crypto asset broker, Swyftx aims to facilitate choice for our customers. This includes choice with regards to best-in-class custody solutions. At least in the current state of the crypto asset custody market, those custody solutions are overseas. For example, Swyftx partners with the industry-leading custody provider Fireblocks, based in New York. Accordingly, we would not be supportive of a requirement that custodians must be located in Australia. To the extent there may be a concern regarding heightened risk in certain jurisdictions, we see this as a worthwhile consideration and one that might warrant interaction with AUSTRAC to achieve the “regulatory efficiencies” described in page 15 of this Paper.

24. If you are a CASSPr, what do you estimate the cost of implementing this proposal to be?

From our perspective, without further detail on each of the proposed obligations, there are too many variables to provide an accurate estimate of implementation cost. This being said, we consider proposed obligations 4, 5, 6, 7, 8, 10 and 11 to relate to the security of assets. In this respect, Swyftx has 20 full-time employees at present in a dedicated security department. We envision that this is likely to be sufficient, at least at our current scale, to comply with those obligations.

Early views sought 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.
30. Are there any other descriptions of crypto assets that we should consider as part of the classification exercise? Please provide descriptions and examples.
31. Are there other examples of crypto assets that are financial products?
32. Are there any crypto assets that ought to be banned in Australia? If so which ones?

We understand there will be many views expressed about how particular tokens should be classified.

Swyftx's ethos has always been to provide our customers with a choice of many crypto assets. We see this industry as being driven by innovation and see many investors looking for novel projects not otherwise available to them. We would not want to see the choice of our customers being restricted by crypto assets being classified in a manner that would materially restrict the number of tokens in which they might invest.

We think a requirement to conduct a reasonable amount of due diligence prior to listing a particular token is sensible for CASSPrs like exchanges or brokers. We would also be open to additional risk disclosure requirements for more volatile or speculative assets. One iteration of this might be a "ring-fenced" version of the platform, which requires additional disclosure and customer consent to be accessed.

Swyftx appreciates the opportunity to provide this submission. Please do not hesitate to contact our Head of Legal, Adam Percy, at [REDACTED]

Yours sincerely



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