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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (REGULATING DIGITAL ASSET, AND
TOKENISED CUSTODY, PLATFORMS) BILL 2025

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

<i>Abbreviation</i>	<i>Definition</i>
Act	<i>Corporations Act 2001</i>
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
AFS	Australian financial services
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>
FSB	Financial Stability Board
IDPS	investor directed portfolio services
IDPS Instrument	<i>ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669</i>
IOSCO	International Organisation of Securities Commissions
MIS	managed investment scheme

Chapter 1: *Regulating Digital Asset, and Tokenised Custody, Platforms*

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Outline of chapter

- 1.1 Schedule # to the Bill implements the Government’s commitment to modernise Australia’s digital asset regulatory regime. Schedule # introduces amendments to:
- Define the core concepts around digital asset platforms and tokenised custody platforms;
 - Apply the financial services law in a tailored way to these platforms;
 - Provide targeted exemptions for certain digital token arrangements; and
 - Provide ASIC and the Minister with powers to regulate these platforms.

Context of amendments

- 1.2 Schedule # to the Bill implements the Government’s commitment in the 2024-2025 Budget to modernise Australia’s digital asset regulation. The amendments seek to address the current regulatory gaps and uncertainty when

dealing with digital assets and the infrastructure and arrangements that support them in the context of Australia's financial regulatory framework.

- 1.3 This framework is intended to address industry uncertainty, regulatory gaps, foster innovation, enhance competition and growth and strengthen Australia's position in the global digital asset ecosystem.

Background to reform

- 1.4 On 22 August 2022 the Government announced it was progressing work to improve the way Australia's regulatory system interacts with digital assets. Since that time the Government has progressed three consultations on its proposed approach to reform:
- In March 2022, Treasury released the 'Crypto Asset Secondary Service Providers' consultation paper. This paper sought stakeholder views on three alternative options for mitigating key harms in the digital asset space: (i) a bespoke framework for digital assets specifically; (ii) a framework that leveraged the existing financial services laws; and (iii) industry-led self-regulation. A review of the stakeholder response, including the legal industry, suggested that leveraging the existing financial services laws was the most appropriate avenue.
 - In February 2023, Treasury released the 'Token Mapping' consultation paper. This paper explained how the existing financial services laws currently apply to digital assets and digital asset businesses. It identified potential gaps in the financial services laws but recommended against solving this policy problem by defining digital assets under a new taxonomy. Stakeholders largely agreed with the conclusions of the Token Mapping consultation paper, including the recommendation against a bespoke 'digital asset' taxonomy.
 - In October 2023, Treasury released the 'Regulating Digital Asset Platforms' proposal paper. The proposal to regulate digital asset platforms—rather than expand the definition of 'financial products' to regulate digital assets themselves—was made because earlier consultation identified platforms as a key cause of consumer harms in the digital asset ecosystem. These platforms hold digital assets on behalf of customers in the digital asset space, usually to facilitate transactions on their behalf. The proposed method of implementing the Government's reforms involved a new type of financial product, originally called a 'digital asset facility', being defined in Chapter 7 of the Act to cover the act of holding third party digital assets for customers. The proposed reforms have broad stakeholder support.
- 1.5 These papers are available on Treasury's website.

Tokens and assets

- 1.6 Physical tokens have long been used to record who holds rights by reference to possession of a particular physical object. Historically, many different types of physical objects have been used as tokens. For example:
- metals and seashells have been used to create commodity money; and
 - paper, cardboard, and plastic disks have been used to identify a person with rights under an external arrangement.

Digital tokens

- 1.7 Until 2009, digital objects could not be used to create digital tokens with the same characteristics as physical tokens. However, the launch of the Bitcoin network in 2009 changed this. The Bitcoin network introduced a system that combined cryptography, distributed consensus, and economic incentives to generate digital objects that can be exclusively controlled and transferred. This was the first system to produce true digital tokens: data structures that function as tokens because they cannot be duplicated or shared without divesting the former holder of control.
- 1.8 Within the Bitcoin network, the digital token known as “bitcoin” was designed to operate as a currency — a unit of account and medium of exchange similar to commodity money such as gold or shells. This type of digital token has become known as a “cryptocurrency”.
- 1.9 Digital tokens are not only able to be used in the creation of commodity-like cryptocurrencies. They can be used in the same way as physical tokens to create the same range and variety of bearer-like assets.

Digital assets

- 1.10 The term “digital asset” is a term that has been used to describe the bundle of rights that accrue to the holder of a particular digital token. Like physical tokens, digital tokens can be used to create two broad categories of assets:
- **assets that are commodity-like or collectable** (e.g. bitcoin or non-fungible trading cards). Here, there is no counterparty issuer with obligations to token holders. The “asset” consists solely of the property rights associated with the digital token itself.
 - **assets that are bearer-like** (e.g. stablecoins or tokenised securities). Here, an issuing counterparty has obligations to token holders under an external arrangement (i.e. the token is used to identify the ‘holder’ of the relevant rights). The external arrangement may arise under contract, equity, or statute. The “asset” is all the rights associated with possessing the token (including the rights associated with the digital token itself).

- 1.11 **Table 1.1** provides examples of “assets” that comprise bundles of “rights” created under “arrangements” that place obligations on a counterparty “issuer”. Each asset listed has been created in the past using tokens (physical and digital) and using accounts.

Table 1.1

Asset	Right(s)	Arrangement(s)	Issuer
Movie ticket	Entry to specific movie theatre at a specific time (upon presentation of token)	Movie theatre’s terms of sale	Movie theatre operator
Casino chip	Receive a specific amount of money (upon redemption of token)	Casino control legislation for example paragraph 70(2)(e) of the <i>Casino Control Act 1992 NSW</i>	Casino operator
Bearer bond	Receive an amount of money at specific intervals (upon presentation of token)	<ul style="list-style-type: none"> Bond indenture (master agreement) Financial Services Laws 	Company raising funds
Lottery ticket	Subject to the outcome of an event (number draw), receive an amount of money (upon presentation of token)	<ul style="list-style-type: none"> Lottery’s Terms of sale/entry Lottery control laws 	Lottery operator
Video game ‘gold’	Receive in-game benefits (upon redemption of token at an in-game store)	<ul style="list-style-type: none"> Terms of sale or rules of the game 	Game developer
Intellectual Property licence	Commercially use an image	<ul style="list-style-type: none"> Terms of Intellectual Property licence 	Intellectual Property rights holder

Managing risks in digital asset markets

- 1.12 Digital assets are subject to the same general legal frameworks as other assets, including property, consumer laws, insolvency, criminal, family, and tax law.

- 1.13 Specialised regulatory frameworks also apply depending on the nature of the digital asset. This is because the term “digital asset” does not denote an asset category. The regulatory treatment of activities involving digital assets depends on the nature of the asset and the activity involved. In Australia, responsibility is shared across multiple regulators. For example:
- ASIC regulates activities involving financial products and services, including:
 - digital assets that *are* financial products (e.g. securities, derivatives, or interests in MISs); and
 - financial services that involve digital assets (e.g. operating a MIS that holds digital assets, and issuing derivatives that reference digital assets).
 - ACCC regulates consumer sales of non-financial products and services, which may include digital assets in certain circumstances.
 - APRA prudentially regulates authorised deposit-taking institutions, insurance businesses, or superannuation funds, which may include oversight of digital asset holdings in certain circumstances.
 - Intellectual Property Australia has a role in overseeing intellectual property licences or assignments, which could include tokenised copyright licences, patents, or trademarks.
 - ACMA regulates broadcasting, communications, and certain interactive gambling services, which may include oversight of digital assets that represent bets, lottery entries, or wagering products.

Digital assets under the financial services laws

- 1.14 The term “digital asset” is not currently used or defined in the financial services laws, despite those laws applying to digital assets in the same way as any other asset. These reforms will also avoid using or defining the concept of digital asset. As such:
- new and existing references to “asset” within the financial services laws will continue to cover bundles of rights, including rights that are legally recognised as being held by a person who *in fact* possesses a digital token; and
 - new references to “digital tokens” within the financial services laws signify that a provision is ambivalent to the type or class of asset being held by a person who *in fact* possesses a digital token.
- 1.15 Similarly, the existing financial services laws will continue to be used to determine whether an arrangement (such as a contractual agreement) is a financial product. In the context of digital assets, this may mean identifying whether a person who *in fact* possesses a digital token is *legally recognised as the* “holder” of a financial product. For example, a person who *in fact* transfers

a digital token will be legally recognised to have transferred a financial product where:

- a contractual agreement exists that meets one of the existing ‘financial product’ definitions; and
- the terms of that contractual agreement are such that a person in possession of that digital token is the “holder” of that financial product.

1.16 No new test will be introduced to determine whether activities involving digital assets are regulated under the existing financial services laws. Rather, the existing financial services law continues to apply, unless the reforms expressly relieve persons from specific obligations. For example:

- a person may be subject to obligations under the financial services law where they hold a financial product, including where the law recognises them as the ‘holder’ of a financial product *because* they possess a particular digital token; and
- a person operating a facility where offers to acquire or dispose of *digital tokens* are regularly made, will be a financial market operator – if the transfer of digital tokens between facility participants effects a transfer of financial products between those participants.

Regulating digital asset intermediaries

1.17 Treasury’s work over three public consultations identified that custodial arrangements are a key source of risk. These risks—credit, liquidity, counterparty, operational, fraud and cyber—mirror those that exist for custodial products under the existing financial services laws.

1.18 ‘Custodial arrangements’ are products and services that require clients to transfer assets to the intermediary business. They are central to most intermediary businesses, with trading products, wallet products, and lending and borrowing products being typically provided on this basis. Custodial arrangements are also central to certain ‘tokenisation’ products (e.g. tokenised gold and tokenised units in managed investment schemes).

1.19 The risks associated with these kinds of arrangements are already mitigated by the financial services laws in certain circumstances. For example:

- a person operating trading platform that facilitates the buying and selling of digital asset financial products between participants of the platform is regulated as a financial market operator; and
- a person operating a MIS that holds a basket of non-financial product digital assets is regulated as a financial services provider.

1.20 However, the financial services laws do not cover all instances of intermediaries pooling large volumes of clients’ non-financial product assets.

While this “gap” has not proven a problem outside of the digital asset space, the ease at which digital tokens can be pooled or held at scale has proven to be problematic in the digital asset space. This has permitted billions of dollars’ worth of client digital assets to be held by intermediaries without sufficient regulatory oversight.

- 1.21 Failures of these unregulated asset intermediaries have caused major losses for consumers, including in Australia. Common problems for consumers have included:
- assets not being adequately segregated or held in a bankruptcy-remote manner, leaving consumers exposed when the provider became insolvent;
 - withdrawal requests being frozen or rejected because the provider did not maintain sufficient reserves;
 - consumers’ assets being commingled with the provider’s own funds or used for undisclosed proprietary trading;
 - inadequate disclosure about the operations, financial position, or governance of the provider, leaving consumers unable to assess the risks of participation;
 - theft or misappropriation of assets by service providers or their employees;
 - theft of assets by third parties due to weak cybersecurity controls or poorly trained staff; and
 - losses from transactions that were processed irreversibly despite being sent without proper instructions or to the wrong address.
- 1.22 The amendments are intended to mitigate the risks and harms associated with custodial arrangements in the digital asset space by applying the well-understood frameworks that are currently employed to mitigate the risks and harms associated with similar products, such as IDPSs, registered managed investment schemes, and managed discretionary accounts.
- 1.23 As the use of digital assets continues to grow, the risks associated with custodial arrangements in the digital assets space (both regulated and unregulated) may become significant enough to impact financial stability. The framework is intended to provide a foundation for avoiding or addressing these future challenges as they arise.
- 1.24 This measure also aims to align Australia's digital asset regulatory framework with international jurisdictions where appropriate on the principles of ‘same activity, same risk, same regulation’.

Approaches in other jurisdictions

- 1.25 Peer jurisdictions have implemented (or are implementing) frameworks to address these risks by leveraging their domestic regulatory frameworks for financial services. Most justify this policy approach using a variation on the

“same activity, same risk, same regulation” principle. For example, the European Union created the “Markets in Crypto-Assets” framework, which regulates target intermediaries under provisions that replicate the European Union’s “Markets in Financial Instruments” framework. If a digital asset meets existing ‘securities’ definitions, the Markets in Financial Instruments framework applies to all activities involving that asset. If a digital asset does not meet existing ‘securities’ definitions, the Markets in Crypto-Assets framework would apply to the target activities only. The United Kingdom takes a similar approach. Its existing financial services framework will regulate digital asset securities. Its proposed new framework would apply to specific activities involving digital assets that are not securities. The United States of America House of Representatives has also passed the Digital Asset Market Clarity Act, which establishes a regulatory framework for digital assets and delineating which digital assets falls within the authority of particular regulators.

- 1.26 The Government’s proposed framework is designed to align with peer jurisdictions like the European Union and United Kingdom. It targets the same activities using our domestic concepts of ‘financial product’ and ‘financial service’—making only minor changes to how those existing laws would apply. Ideally, digital asset intermediaries would be regulated like providers of services in relation to IDPSs, registered MISs, and managed discretionary accounts. This is consistent with the endorsement of the ‘same risk, same regulation’ approach.

Recommendation of international bodies

- 1.27 International bodies, such as the FSB, which coordinates rules for the economies of the developed nations that constitute the G20, and IOSCO, have been guiding the development of digital asset regulatory frameworks globally.
- 1.28 Treasury considered the recommendations proposed by the FSB and IOSCO, and have been guided by them in developing the current reforms. The recommendations aim to ensure a level-playing field between traditional and emerging financial intermediaries. The FSB recommendations focus on potential risks to financial stability, market integrity, and consumer protection that may exist as digital assets become more widespread and interconnected with the existing financial system. The IOSCO guidance supports greater consistency of regulatory frameworks globally amongst member jurisdictions in relation to market integrity and investor protections arising from digital asset activities including disclosure, operational transparency, and market rules. Based on the principle of “same activity, same risk, same regulation/regulatory outcomes” IOSCO recommends regulatory outcomes for investor protection and market integrity that are the same as, or consistent with, those required in traditional financial markets.
- 1.29 Separately, there has been considerable international focus and coordination, particularly through the Financial Action Task Force, to ensure domestic legal

systems properly accommodate the financial crime risks posed by cryptocurrencies and other digital stores of value. The most concrete domestic effect of these evolving international standards is the amendments made by Schedule 6 of the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024*, relating to “virtual assets”.

- 1.30 Finally, to supplement general and specific arrangements within Australia’s tax law to clarify taxation arrangements for these assets (discussed below), the Organisation for Economic Co-operation and Development has developed a proposed Crypto Asset Reporting Framework. Treasury has been consulting on options to implement this framework domestically. Both this and the previous domestic developments overlap with, but are distinct from, these reforms.

Providing additional regulatory clarity

- 1.31 The breadth of existing financial product definitions creates significant uncertainty about the legal characterisation of digital assets and related facilities. This lack of clarity has left many market participants unsure how to operate within the Australian financial services regime. ASIC has provided guidance over the years, and is in the process of updating that guidance, but guidance is not able to resolve all issues.
- 1.32 The current regime is designed to impose obligations on intermediaries that make financial promises—such as issuers of financial products, providers of financial services, or scheme operators. In some cases, digital asset arrangements do not involve such persons, meaning that applying existing obligations may not address the real risks and can be difficult to reconcile with the unique features of these assets.
- 1.33 For example, digital assets and their associated rights can change without the involvement of the holder and often have no identifiable issuer or operator. Arrangements such as staking, or the technological “wrapping” of assets for interoperability, may not involve financial promises but can nevertheless fall within existing financial product definitions.
- 1.34 A common risk across these varied arrangements is the holding of digital assets. The proposed reforms aim to provide clarity by shifting the regulatory focus to these holding arrangements and applying the custodial framework (with adjustments for digital assets) to better manage risks than relying solely on existing financial product definitions.
- 1.35 This will largely not displace the current regime where it remains appropriate. Digital asset facilities that clearly meet existing financial product definitions, or that are better regulated under the financial markets or clearing and settlement regimes, will continue to be regulated under those frameworks.

Summary of new law

1.36 The amendments modernise Australia’s digital assets regulatory regime by:

- defining core concepts of “digital token”, “digital asset platform” and “tokenised custody platform”;
- subject to limitations, applying Australia’s financial services law to digital asset platforms and tokenised custody platforms by adding these platforms, where the platform is not a MIS, to the definition of a financial product in the Act and the ASIC Act;
- tailoring the meaning of conduct that constitutes the provision of a financial service with respect to digital asset platforms and tokenised custody platforms;
- subject to exemptions, requiring persons providing relevant financial services in relation to digital asset platforms and tokenised custody platforms to hold an AFS licensee authorising them to perform the financial service, with general obligations applying to the AFS licensee, including, among other things:
 - providing the services efficiently, honestly and fairly;
 - having in place adequate arrangements for the management of conflicts of interest;
 - taking reasonable steps to ensure its representatives comply with the financial services laws;
 - having available adequate resources to provide the services;
 - having a suitable dispute resolution system;
 - having appropriate compensation arrangements in place for losses suffered by retail clients due to breaches of the law;
 - complying with design and distribution obligations;
 - being subject to prohibitions on false or misleading representations, unconscionable conduct, misleading or deceptive conduct and unfair contract terms; and
 - being subject to supervision and enforcement by ASIC;
- in addition to general obligations, applying specific obligations to issuers of digital asset platforms and tokenised custody platforms, including:
 - minimum standards made by ASIC for asset holding functions and transactional and settlement functions;
 - platform rules that deal with activities or conduct of persons in relation to the platform; and

- tailored disclosure obligations, including the requirement to give clients a DAP/TCP Guide as a substitute for a product disclosure statement;
- exempting AFS licensees from certain fundraising, disclosure and anti-hawking obligations when providing financial services with respect to digital asset platforms and tokenised custody platforms;
- exempting issuers of digital asset platforms from holding an AFS licensee if the total market value of transactions across its platforms does not exceed \$10 million across a rolling 12-month period;
- exempting issuers from holding an AFS licensee that arrange for a person to use a digital asset platform or tokenised custody platform or give that person advice about its existence in the ordinary course of an otherwise primarily non-financial services business;
- providing ministerial powers to:
 - extend the meaning of financial market or clearing and settlement facility to include certain facilities that are digital asset platforms;
 - exempt certain facilities that are digital asset platforms from constituting a financial market or clearing and settlement facility; and
 - prohibit certain conduct authorised by an AFS licence from being provided through a digital asset platform or tokenised custody platform;
- applying ASIC’s existing powers relating to financial products, such as the power to make product intervention orders, to financial products that are digital asset platforms and tokenised custody platforms;
- exempting public digital token infrastructure and intermediated staking arrangements from certain regulation under the financial services law;
- clarifying the treatment of ‘wrapped’ digital tokens under the financial services law; and
- applying a transitional period in relation to the commencement and application of the new regime.

Detailed explanation of new law

Core concepts

1.37 A number of key terms used in the amendments are inserted into the Act. These are:

- ‘digital token’;
- ‘digital asset platform’; and
- ‘tokenised custody platform’.

[Schedule #, items 1, 23 and 28, sections 9 (definition of ‘digital asset platform’, ‘digital token’ and ‘tokenised custody platform’), 761GB, 761GC and 761GD of the Act]

1.38 These terms are fundamental to the operation of the regulatory framework and intend to provide clarity and certainty as to the digital tokens and related intermediary arrangements which are intended to be captured by the framework. The terms are important in determining whether a person needs to obtain an AFS licence, and if so, what obligations apply to that licence.

1.39 Scenarios demonstrating the intended application of these terms are in the Appendix to this Explanatory Memorandum.

Meaning of digital token

1.40 A digital token is defined as a digital object over which one or more persons are capable of exercising control. A person who is capable of exercising control of a digital object is generally taken to have possession of the digital token.

[Schedule #, items 1 and 27, section 9 (definition of “possession”) and subsections 761GB(1) and (4) of the Act]

1.41 The component parts of the meaning of digital token have been informed by international work including the United Kingdom Law Commission’s Final Report on Digital Assets, the International Institute for the Unification of Private Law Principles on Digital Assets and Private Law and the US Uniform Law Commission’s Uniform Code Amendments 2022.

Control of digital objects

1.42 A digital object includes electronic records such as documents, photographs or music files. Digital objects are also intangible things (including notional things), information about which is recorded in an electronic record.

[Schedule #, items 1 and 23, section 9 (definition of ‘digital object’) and subsection 761GB(5) of the Act]

- 1.43 Most digital objects are capable of being freely copied, shared and accessed by multiple people at once. These objects are information only; they cannot be exclusively used or transferred. Digital tokens are different. They are digital objects that comprise information that can be controlled.

Example 1.1 Non-rivalrous and unprotected objects

Jazz receives an emailed PDF concert ticket (barcode + link). The email, the PDF, and the barcode are digital objects. Paragraph 761GB(2)(b) is satisfied because Jazz can use the barcode to gain entry. However, paragraph 761GB(2)(a) is not satisfied because anyone with a copy of the barcode can also redeem it, so Jazz cannot exclude others. None of the three digital objects are digital tokens.

- 1.44 This was considered by the Victorian Supreme Court in *Re Blockchain Tech Pty Ltd* [2024] VSC 690 (*Blockchain Tech*). In finding that an interest in bitcoin constitutes property, the Court observed at [388] that:
- “...a person’s interest in Bitcoin may be readily distinguished from a mere interest in information, including electronic data. This is because an interest in Bitcoin includes the power:
- (a) to undertake transactions on a network by the use of a public key and a private key; and
 - (b) to exclude third parties from accessing or dealing with the Bitcoin.”
- 1.45 In coming to its finding, the Court in *Blockchain Tech* applied the four indicia for a right or interest to be property, as set out by Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] 2 All ER 472 at 494. The four indicia are that the right or interest must be definable, identifiable by third parties, capable in their nature of assumption by third parties, and have some degree of permanence. The elements of the definition of digital token, as discussed below, are intended to capture digital objects in the same way. That is, the definition should only capture digital objects in which a person can have a proprietary interest through control of it. The intention is for the definition to capture digital tokens such as those considered by the Court in *Blockchain Tech* and not digital objects that are mere information.
- 1.46 A digital object is capable of being controlled by a person if the following three elements are satisfied:
- The person can exclude others from controlling the digital object;
 - The person can use, transfer or otherwise dispose of the digital object; and
 - The person can identify themselves as the person capable of either excluding others from controlling the digital object or using, transferring, or otherwise disposing of the digital object.

[Schedule #, item 1, subsection 761GB(2) of the Act]

- 1.47 The first element refers to the rivalrous nature of digital tokens. A digital object is rivalrous if its use by one person prevents its use by another, subject to the concept of joint control. The second element refers to the functional nature of digital tokens. A digital object is functional if it can be used for the same range of purposes as a physical token. The third element refers to the identifying nature of digital tokens. A digital object is identifying if a person can demonstrate to others (through cryptographic signatures, system credentials, or other means) that they are the person capable of doing the first two elements.
- 1.48 Any legal rights granted to, or obligations imposed on, a person with respect to their control of a digital object are not relevant to determining whether a person satisfies any of the three elements. This is because the three elements set up a factual test that underpins the ability of digital tokens to be used as assets (e.g. capable of being sold to a willing buyer, accepted as payment by a willing merchant, and used as collateral by a willing lender). Accordingly, it does not matter if another person also satisfies the test with respect to the digital token.

[Schedule #, item 1, subsection 761GB(3) of the Act]

- 1.49 The amendments do not prescribe a detailed or exhaustive set of technical criteria for establishing control of a digital object. The concept of control is framed broadly to allow for flexibility as technology evolves and new forms of digital tokens emerge.
- 1.50 Scenarios demonstrating the intended application of this definition appear in the Appendix.

Possession of a digital token

- 1.51 ‘Possession’ has a specific meaning in the reforms, differing from the meaning of ‘possession’ in section 86 of the Act. Where a person is capable of exercising control of a digital object, the person is generally taken to have possession of the digital token in question, unless both paragraphs (4)(a) and (b) are satisfied.

[Schedule #, items 1 and 27, subsection 761GB(4) section 9 (definition of ‘possession’) of the Act]

Example 1.2 Possession by a custody service provider

Muhammad buys digital tokens from a broker. The digital tokens remain in the custody of the broker after the purchase. Muhammad has a contractual right to request delivery to his private wallet. The broker controls and possesses the digital tokens. Muhammad does neither.

- 1.52 A person that merely has a legal right to direct the person who is capable of controlling a digital object does not themselves possess the digital token. Conversely, a person that is capable of controlling a digital object possesses that digital token even if they are subject to a legal obligation to not exercise control over that digital token.
- 1.53 The amendments recognise that digital tokens are *functionally* equivalent to physical tokens in that they can be used and valued in the same ways (as bearer instrument, credentials, tallying devices, collectibles, etc). The need for a concept to describe the factual state of “holding” a digital token was considered in detail by the United Kingdom Law Commission in its consultation process on digital assets and property law (Consultation Paper 26, 2022 and Final Report, 2023).
- 1.54 Scenarios demonstrating the intended application of the definition of possession are in the Appendix.

Joint control

- 1.55 The amendments recognise that, differing from the possession of a physical object, control of a digital object can be shared with others in many different ways, as a function of technology.
- 1.56 The amendments do not seek to prescribe a detailed or exhaustive set of permissible joint control scenarios. Rather, control of a digital object is generally equated to possession of the object. The exception is an explicit carve out of the situation where a person can only control a digital object if another person exercises control concurrently, and that other person can exercise control unilaterally.
- [Schedule #, item 1, subsection 761GB(4) of the Act]**

Example 1.3 A 2-of-2 multi-signature wallet

Clare and Toby each hold one of two keys needed to transfer a token. Neither can move the token unilaterally. Because no other person can act alone, both Clare and Toby control and possess the token jointly.

- 1.57 Scenarios demonstrating the intended application of the definitions to situations of joint control are in the Appendix.

Meaning of digital asset platform and tokenised custody platform

- 1.58 Two other core concepts define two new facilities with respect to digital tokens to be regulated under the financial services law. The operator of these new facilities is a custodian, and through these facilities, digital tokens are either possessed, or are used to record holdings of assets or other digital tokens. Specifically:

- a digital asset platform possesses digital tokens, and records clients' interests in an account; and
- a tokenised custody platform holds assets or possesses digital tokens, and records clients' interests as digital tokens.

Meaning of digital asset platform

1.59 A digital asset platform is defined as a non-transferable facility under which a person, defined as the operator, possesses one or more digital tokens on trust for or on behalf of another person, defined as the client, or another person nominated by the client.

[Schedule #, items 1, 20, 23 and 26, subsection 761GC(1) and section 9 (definitions of 'client', 'digital asset platform' and 'operator') of the Act]

1.60 For the purposes of the definition of digital asset platform, a digital token is referred to as an underlying asset. The 'asset' being held by the digital asset platform (for the purposes of section 9AB of the Act) is the bundle of rights that accrue to a person in possession of a token (including rights under an arrangement, or the proprietary interest in a digital token a person has when they possess it).

[Schedule #, item 28, section 9 (definition of 'underlying asset') of the Act]

1.61 The note under subsection 761GC(1) clarifies that the operator is the issuer of the platform. As mentioned below, a digital asset platform is issued to a person when, if the facility is an arrangement, the person enters into the arrangement as a client of the facility, or if the facility is not an arrangement, when the person becomes a client of the facility. This means that, for practical purposes, a person only becomes a client of a digital asset platform when it is issued to them upon entering into the facility constituting the platform. In practice, this occurs when a person accepts the terms of the facility and opens an account for the digital asset platform with the issuer.

1.62 The definition of digital asset platform is intended to also cover the situation where the facility authorises the operator or another person to engage in conduct in relation to a digital token for, or on behalf of, clients or client nominees. This ensures that the definition is flexible enough to capture digital asset platforms that only provide custody of digital tokens, and those that also facilitate the use of a client's digital tokens within the platform. The latter may be where either an operator or third party can use the digital tokens in a particular way on behalf of the client or their nominees, such as to buy, sell, transfer, lend, or stake the possessed digital tokens, or exercise voting or governance rights attached to the digital token.

[Schedule #, item 1, subsection 761GC(2) of the Act]

1.63 The requirement that the operator possess the underlying assets on trust for, or on behalf of, the client reflects similar language used in the Act to define when a person provides a custodial or depository service. It reflects the intent that the operator of a digital asset platform is a custodian of the underlying assets of the

platform, but incorporating the new concept of possession to reflect that control of digital tokens is analogous to possessing physical tokens. The amendments update the definition of ‘custodian’ in section 9 of the Act to reflect this.

[Schedule #, item 22, section 9 (definition of ‘custodian’) of the Act]

Meaning of tokenised custody platform

1.64 A tokenised custody platform is a non-transferable facility under which:

- a person, defined as the operator, identifies one or more assets, defined as the underlying assets; and
- for each underlying asset, the operator creates a single digital token, possession of which confers a right to redeem, or direct the delivery of, the underlying asset; and
- the operator holds each underlying asset on trust for, or on behalf of, a person who possesses that digital token.

[Schedule #, items 1, 26 and 28, subsection 761GD(1) and section 9 (definition of ‘operator’, ‘tokenised custody platform’ and “underlying asset”) of the Act]

1.65 Imposing a requirement that there be a right to redeem or direct the delivery of the underlying asset does not preclude the redemptions to be cash settled.

1.66 As with the definition of digital asset platform, a note to subsection 761GD(1) clarifies that the operator is the issuer of the platform. As mentioned below, a tokenised custody platform is issued to a person when, if the facility is an arrangement, the person enters into the arrangement as a client of the facility, or if the facility is not an arrangement, when the person becomes a client of the facility. In practice, this occurs when a person accepts the terms of the arrangements and opens an account for the tokenised custody platform with the issuer. This means that, for practical purposes, even if a person acquired the relevant digital token from the client or any other person, for example on a secondary market, that person only becomes a client when it is issued to them upon entering into the facility constituting the platform.

1.67 The definition of tokenised custody platform also covers where the facility authorises the operator or another person to engage in conduct in relation to the underlying asset for, or on behalf of, the person who both possesses the digital token created through the facility, and is a client of the facility. This is intended to capture circumstances where either the operator or a third party can use the underlying asset in a particular way on behalf of their client, such as to buy an asset to tokenise it, sell an asset upon redemption, transfer, lend or stake the asset or exercise voting rights attached to the asset. This means the definition is flexible enough to capture both tokenised custody platforms that only provide custody and tokenisation of underlying assets as well as those that facilitate the purchase or sale of underlying assets or other use of underlying assets within

the platform.

[Schedule #, item 1, subsection 761GD(2) of the Act]

- 1.68 The requirement that the person both possesses the digital token and is a client of the facility reflects the fact that a person does not become the client of the facility because they possess the digital token but must also have the facility issued to them. This is addressed in a note to subsection 761GD(2).
- 1.69 An “asset” that becomes the underlying asset under the facility can be a digital token, which includes the bundle of rights that accrue to a person in possession of a digital token (including rights under an arrangement, or the proprietary interest in a digital token a person has when they possess it). It is also intended that any other asset, including a financial product not in tokenised form, can be an underlying asset of a tokenised custody platform. As is clarified in a note to the subsection, “asset” covers property, or a right, of any kind, and includes:
- any legal or equitable estate or interest (whether present or future, vested or contingent, tangible or intangible, in real or personal property) of any kind; and
 - any chose in action; and
 - any right, interest or claim of any kind including rights, interests or claims in or in relation to property (whether arising under an instrument or otherwise, and whether liquidated or unliquidated, certain or contingent, accrued or accruing); and
 - any capital gains tax asset within the meaning of the *Income Tax Assessment Act 1997*.

[Schedule #, item 1, subsection 761GD(3) of the Act]

- 1.70 The issuance of any financial product held under the tokenised custody platform is subject to the existing laws that apply to the issuance of financial products, subject to targeted exemptions, as discussed below, to certain disclosure and fundraising provisions to avoid regulatory overlap.
- 1.71 Where an underlying asset is a digital token, the operator is taken to hold that digital token if the operator possesses that digital token.
- [Schedule #, item 1, subsection 761GD(3) of the Act]***
- 1.72 A facility is a tokenised custody platform only if there is a one-to-one relationship between the underlying asset and the digital token. This is because, for a facility to be a tokenised custody platform:
- the operator must identify assets;
 - for each asset so identified, a single token is created; and
 - the right to redeem or direct delivery conferred by possession of the token is of that asset.
- 1.73 The requirement that underlying assets must be redeemed on a one-to-one basis reflects that it is not intended for tokenised custody facilities to be used as

a vehicle to issue fractionalised interests in underlying assets. Amongst other things, this ensures that facilities through which fractional interests in assets are issued continue to be regulated as MISs. As mentioned below, this intent is also reflected by:

- excluding tokenised custody platforms with specific features from the definition of MIS; and
- only treating a tokenised custody platform as a financial product if it is not a MIS.

1.74 As with digital asset platforms, the requirement that the operator of the tokenised custody platform hold the underlying assets on trust for or on behalf the client reflects similar language used in the Act to define custodians, most obviously when a person provides a custodial or depository service. The amendments update the definition of “custodian” in section 9 of the Act to reflect this.

[Schedule #, item 22, section 9 (definition of ‘custodian’) of the Act]

1.75 It is not intended for tokenised custody platforms to be used to create payment stablecoins by tokenising money. These types of platforms are subject to the separate stored value facility framework, as introduced by the broader payments licensing reforms.

Applying the financial services law to digital asset platforms and tokenised custody platforms

1.76 The amendments apply Australia’s financial services law to the issue of digital asset platforms and tokenised custody platforms, with appropriate adjustments to reflect the nature of these platforms and their inherent risks.

1.77 The financial services law is defined in section 761A of the Act. It covers, among other things, the parts of the Act that deal with MISs and financial services and markets – such as the single licensing regime for dealing in financial products, and financial products and services disclosure. The unconscionable conduct and consumer protection provisions related to financial services in the ASIC Act are also covered under the term.

1.78 The financial services law is applied to digital asset platforms and tokenised custody platforms by bringing these platforms within the definition of a financial product in the Act and the ASIC Act. That is, digital asset platforms and tokenised custody platforms, that are not MISs (mentioned further below), are added as new kinds of financial products.

[Schedule #, items 2 and 69, paragraph 764A(1)(la) of the Act and paragraph 12BAA(7)(lb) of the ASIC Act]

1.79 Licensees intending to provide financial services in relation to these platforms are subject to the same licencing and other obligations with respect to:

- who can apply for and hold a licence; and
 - the requirement to comply with the general conditions of an AFS licence.
- 1.80 Platforms are also subject to tailored disclosure and other obligations under the framework of the financial services law, including under minimum standards made by ASIC, to address the specific characteristics of digital assets platforms and tokenised custody platforms.
- 1.81 Leveraging the existing established concepts in financial services regulation is intended to provide clarity for industry and regulators while reducing complexity and compliance and implementation burdens. However, the amendments adjust the framework to reflect the specific risks and functions of digital asset platforms and tokenised custody platforms, drawing on established models for custody-based products.
- 1.82 The adjustments to the financial services framework address key risks identified in Treasury’s token mapping exercise and the Regulating Digital Asset Platforms Proposal Paper, and mirrors approaches that have proven effective for similar custodial arrangements where operators manage both platform-level and asset-level obligations. This ensures adequate investor protection while supporting the benefits of digital assets in financial markets.
- 1.83 Where an underlying asset of a digital asset platform or tokenised custody platform is a financial product, the operator of the platform may need additional authorisations on its AFS licence where it is providing financial services with respect to those financial products.

Priority with respect to MISs

- 1.84 As mentioned above, a digital asset platform or tokenised custody platform is only a financial product if it is not a MIS.
[Schedule #, item 2, paragraph 764A(1)(la)]
- 1.85 Given the scope of the definition of MIS, the amendments provide regulatory clarity through targeted exclusions of certain digital asset platforms and tokenised custody platforms from treatment as MISs if certain requirements are met. Digital asset platforms and tokenised custody platforms that are not MISs are regulated as financial products under the financial services law, as amended by this Schedule. The definition of MIS in section 9 is amended so that a digital asset platform or tokenised custody platform is not a MIS if, under the platform:
- as common requirements:
 - clients of the platform have the right to redeem, or direct the delivery of, the underlying assets of the platform;

- the operator of the platform acts only on lawful client instructions in relation to any decisions about the acquisition, disposal or use of the underlying assets; and
 - the operator cannot negotiate or determine, to a material extent, any rights of the clients relating to the underlying assets; and
- additionally, for tokenised custody platforms:
 - all of the underlying assets belong to the same class of asset; and
 - the digital token created for an underlying asset can only be divisible to the same extent that the underlying asset is reasonably capable of being divisible in a way that each part can be physically delivered.

[Schedule #, item 25, section 9 (paragraphs (mc) and (md) of the definition of ‘managed investment scheme’) of the Act]

- 1.86 If these conditions are not made out, then the platform is only regulated as a financial product if the platform is not otherwise a MIS. If it is a MIS, then it is regulated as a MIS, and interests, rights and other things with respect to the MIS, which may include digital tokens or rights attaching to digital tokens, may be financial products, according to existing law.
- 1.87 This is intended to reflect that certain features of digital asset platforms and tokenised custody platforms make the application of the MIS regime inappropriate. The rationale for relieving certain digital asset platforms and tokenised custody platforms is similar to the rationale for relieving IDPSs from the MIS regime. The features of these platforms that may cause them to be MISs are generally incidental to the services being offered through the platform. For this reason, it is more appropriate that they be regulated as financial products, as amended by the Schedule. These common requirements broadly reflect the basis on which IDPSs are granted targeted relief from the MIS regime under the IDPS Instrument.

Example 1.4 MIS carve-out and safe-harbour for digital asset platforms

An arrangement meets the definition of a digital asset platform because it holds digital tokens on behalf of others. However, digital tokens are held on behalf of person who contributed money for the acquisition of a variety of different digital tokens in a manner that meets the definition of a MIS. The platform clients cannot direct the delivery of the underlying assets but they can sell their interest in those underlying assets to other platform clients. In this case, the arrangement is not regulated as a digital asset platform because:

- a digital asset platform is only recognised as a financial product in section 764A(1)(la) if it is not MIS; and
- the arrangement does not satisfy the criteria to be excluded from the definition of an MIS in section 9 (mc) of the Bill because clients do not have the right to redeem, or direct the delivery of, the underlying assets of the platform.

1.88 Scenarios dealing with the MIS priority rule and tokenised custody platforms are outlined in the Appendix.

Requirements for tokenised custody platforms

1.89 The requirements for tokenised custody platforms further supplement the requirement, mentioned above, that there be a ‘one to one’ relationship between the underlying asset and the relevant digital token under a tokenised custody platform. This further ensures these platforms cannot be used to issue interests in mixed pools of assets, or fractionalised interests in assets.

1.90 The first requirement – that all of the underlying assets belong to the same class of asset – ensures that the platform is only excluded from the definition of MIS if all the underlying assets are of the same class. If, for example, the underlying asset for each token created under the platform was only gold, this requirement is satisfied. However, a tokenised custody platform is not excluded from the definition of MIS if, for example, the underlying assets for each token were a mix of assets, such as gold and silver, or shares and debentures. This is consistent with the intention that tokenised custody platforms be used to create digital representations of underlying assets and not interests in pools of mixed assets.

[Schedule #, item 25, section 9 (definition of ‘managed investment scheme’) of the Act]

1.91 The second requirement – that the digital token created for an underlying asset can only be divisible to the same extent that the underlying asset is reasonably capable of being divisible in a way that each part can be physically delivered – addresses circumstances where persons are able to trade in and possess parts of the digital tokens under a tokenised custody platform (such as one hundredth of a token) but where it is not possible to split the underlying assets into those same parts and physically deliver them. For example, this requirement is not met where the digital token created under a tokenised custody platform as an underlying asset of a piece of artwork, and that digital token is able to be traded in fractions on an open market (for example, in units as small as one hundredth of the token). This is because it is not possible to deliver one hundredth of the piece of artwork. However, this requirement is satisfied if, instead, the underlying asset were capable of being divided into one hundredths, such as petroleum or bitcoin.

[Schedule #, item 25, section 9 (definition of “managed investment scheme”) of the Act]

- 1.92 This requirement is necessary as the one to one requirement in the tokenised custody platform definition may not preclude an operator from holding an asset that is not divisible, such as a piece of valuable art, creating a single digital token possession of which conveys a right to the possessor (subject to becoming a client) to have the artwork physically delivered, but also allowing fractions of that digital token to be traded and possessed on the open market. Without this requirement, a tokenised custody platform could be used to issue fractionalised interests in assets outside of the managed investment scheme regime, as the fractions of the digital tokens would each represent a fractional interest in that artwork, despite a person being able to have the artwork physically delivered if they possessed the entire digital token.
- 1.93 The concept of physical delivery is a well understood concept in financial markets, particularly in the context of derivatives markets. Despite referring to delivery being “physical”, both tangible and intangible property can be physically delivered. Physical delivery simply refers to settling obligations by providing the actual thing, whether gold, shares or bitcoin, rather than its value.

Example 1.5 Tokenised Custody Platforms – Physical delivery of non-divisible intangible assets

A person holds 1000 units in an MIS under a facility and creates 1000 fungible tokens which are not able to be divided into parts. Each digital token represents a beneficial interest in one MIS unit. This facility is a tokenised custody platform because each unit is capable of being physically delivered on redemption of the token by person that possesses it. If the digital token was able to be divided into parts, the facility would be a MIS for the same reasons as in the artwork example above.

- 1.94 Scenarios demonstrating how the concept of physical delivery is intended to operate are in the Appendix.

Limitations on conduct with respect to digital asset platforms and tokenised custody platforms

- 1.95 Any conduct purported to be regulated as a financial service with respect to digital asset platforms or tokenised custody platforms is only so regulated if the conduct is engaged in by, or on behalf of, a constitutionally-covered corporation.
[Schedule #, item 8, section 766K of the Act]
- 1.96 A constitutionally-covered corporation means either:
- a corporation to which paragraph 51(xx) of the Constitution applies; or

- a body that is a corporation within the meaning of section 57A of the Act as originally enacted, which includes a company, any body corporate, and certain unincorporated bodies.

[Schedule #, item 21, section 9 (definition of ‘constitutionally-covered corporation’) of the Act]

- 1.97 The amendments limit the carrying on of certain conduct to constitutionally-covered corporations. Only a constitutionally-covered corporation can provide financial product advice, deal in a financial product, or engage in conduct prescribed by regulations (under paragraph 766A(1)(f) of the Act) relating to digital asset platforms or tokenised custody platforms through a postal, telegraphic, telephonic or other like service (within the meaning of paragraph 51(v) of the Constitution). Failure to comply with this limitation is a contravention of a civil penalty provision.
[Schedule #, items 8 and 34, subsection 766M(1) and the table in subsection 1317E(3) of the Act]
- 1.98 A person that is not a constitutionally covered corporation can only provide the above-mentioned services in the above mentioned way if they are an agent or representative of a constitutionally-covered corporation. Failure to comply with this limitation is contravention of a civil penalty.
[Schedule #, item 8 and 34, subsection 766M(2) and the table in subsection 1317E(3) of the Act]
- 1.99 Corresponding amendments are also made to align these limitations on conduct in relation to digital asset platforms or tokenised custody platforms for the purposes of the unconscionable conduct and consumer protection provisions in the ASIC Act.
[Schedule #, items 70 and 73 to 77, paragraph 12DK(6)(d), subsections 12BAB(1AA), 12BF(1), (2A), (2C) and (9) and 12BLC(3) and section 12BAC of the ASIC Act]
- 1.100 A similar amendment is made to limit the application of Part 7.10 of the Act (concerning prohibited conduct) in relation to digital asset platforms and tokenised custody platforms. This Part only applies with respect to platforms issued by or on behalf of constitutionally-covered corporations or in certain other circumstances. To avoid doubt, this is not intended to limit how the Part applies in relation to a platform that is not a financial product (for example, because it is a financial market or clearing and settlement facility – see subparagraphs 765A(1)(i) and (ii)). Additionally, this limitation is also not intended to apply to prohibited conduct engaged in in relation to financial products *through* a digital asset platform or tokenised custody platform.
[Schedule #, item 54, subsection 1040C of the Act]

Limitations on powers with respect to digital asset tokens and tokenised custody platforms

- 1.101 The Minister and ASIC have existing powers in both the Act and the ASIC Act with respect to financial products and financial services. Consistent with other financial products, these powers apply with respect to digital asset platforms and tokenised custody platforms.
- 1.102 To align with the limitations on conduct, the amendments insert limitations on the application of these powers with respect to these platforms. This includes the product intervention powers in Part 7.9A of the Act, ASIC's power to authorise the provision of personal financial product advice by an individual, ASIC's exemption and modification powers, ASIC's power relating to disclosure of acquisitions and disposals of financial products and the Minister's power to direct ASIC to investigate a matter relating to the giving of advice, analyses or reports about financial products.
[Schedule #, items 39, 40, 52, 53, 78 and 79, paragraph 921C(1)(d), subsections 926A(5A) and 1023B(2) and section 1023B of the Act and subsections 14(5) and 41(2A) of the ASIC Act]
- 1.103 A corresponding amendment is made to limit the scope of the regulations-making power related to exemptions and modifications for Part 7.6 of the Act.
[Schedule #, item 41, subsection 926B(6) of the Act]

General adjustments

Dealing in a financial product that is a digital asset platform or tokenised custody platform

- 1.104 The conduct set out in subsection 766C(1) of the Act constitutes dealing in a digital asset platform or a tokenised custody platform. This includes applying for, acquiring, issuing, varying or disposing of a digital asset platform or tokenised custody platform.
- 1.105 However, the amendments clarify that any conduct of a client under either a digital asset platform or tokenised custody platform, and where that conduct is after the platform has been issued to the client, constitutes dealing in a financial product. Because of subsection 766C(2) of the Act, this includes where the client arranges for a person to engage in that conduct. Accordingly, a client is taken to be dealing in the platform where they engage in conduct for the benefit of their own customers, such as arranging for their customers to make deposits into, or withdrawals from, the platform.
[Schedule #, items 4 and 5, paragraphs 766C(1)(ca) of the Act]
- 1.106 Because of subsection 766C(3) of the Act, conduct of the client under the platform for their own benefit, whether directly or through an agent or other representative, does not constitute dealing by the issuer of the platform. The

amendments intend to capture a common business model where some clients of a platform may also be operating similarly to a broker and use that platform other than for their own benefit.

- 1.107 Corresponding amendments are made to align what conduct constitutes dealing in a digital asset platform or a tokenised custody platform for the purposes of the unconscionable conduct and consumer protection provisions related to financial services in the ASIC Act.

[Schedule #, item 71, paragraphs 12BAB(7)(ca) of the ASIC Act]

When a digital asset platform or tokenised custody platform is issued

- 1.108 A digital asset platform or tokenised custody platform is issued to a person when the person enters into an arrangement with the facility as a client of the facility or otherwise becomes a client of the facility.

[Schedule #, item 29, item 5 in the table in subsection 761E(3) of the Act]

- 1.109 A digital asset platform or tokenised custody platform is issued to a person at the point they become a client of that platform. For example, this could be when a client in the process of opening an account with the platform, reads and accepts the platform's terms and conditions. This action is the beginning of the person's use of the facility, regardless of whether any transactions have occurred yet.

- 1.110 Any conduct of a client under a digital asset platform or tokenised custody platform is not taken to give rise to the issue of a financial product to a client after the platform has already been issued to the client.

[Schedule #, item 30, paragraph 761E(3A)(da) of the Act]

- 1.111 This reflects that a client may engage in conduct under the platform after the platform has originally been issued, such as by buying, selling, depositing, or withdrawing digital tokens or assets through the platform, and that this subsequent use should not result in the issue of another platform each time, especially given the product disclosure obligations that arise each time a financial product is issued.

- 1.112 Further, the amendments contemplate circumstances where a digital asset platform or tokenised custody platform is jointly issued by 2 or more issuers. This is discussed below under disclosure obligations.

Meaning of custodial or depository service in relation to a digital asset platform or tokenised custody platform

- 1.113 Depending on the legal nature of the assets held by the operator of a digital asset platform or tokenised custody platform, the issue of either platform, or the holding of assets under the platform, may meet the meaning of providing a custodial or depository service in section 766E of the Act. The amendments clarify that the following conduct in relation to a digital asset platform or

tokenised custody platform does not constitute providing a custodial or depository service:

- dealing in a digital asset platform, or the possessing of digital tokens under such a platform; and

[Schedule #, item 7, paragraph 766E(3)(cb) of the Act]

- dealing in a tokenised custody platform, or the holding of assets or digital tokens under such a platform.

[Schedule #, item 7, paragraph 766E(3)(cc) of the Act]

- 1.114 Without this carve out, an operator of a digital asset platform or tokenised custody platform is providing a custodial or depository service if the operator holds financial products on behalf of its clients. This may arise where possessing a digital token causes them to also hold a financial product, or in the case of a tokenised custody platform, where the operator simply holds a financial product. Accordingly, obligations that apply to providers of a custodial or depository service do not apply to issuers of a digital asset platform or tokenised custody platform in these circumstances. This provides clarity to issuers as to what obligations they must meet when issuing such a platform.
- 1.115 In practice this will mean that custodians, if they are holders of financial products *because* of the digital tokens they possess, will be providing the financial service of issuing a digital asset platform (instead of providing the financial service of custodial and depository service). Further, the Corporations Regulations may exempt such issuers of digital asset platforms from certain requirements under the financial services law. Consistent with the reform's foundation of technology neutrality, this allows the ability for the Government to align exemptions that apply to persons providing a custodial or depository service with those that apply to issuers of such digital asset platforms.
- 1.116 Corresponding amendments are made to reflect that certain conduct in relation to a digital asset platform or tokenised custody platform does not constitute the meaning of providing a custodial or depository service for the purposes of the unconscionable conduct and consumer protection provisions related to financial services in the ASIC Act.
- [Schedule #, item 72, paragraphs 12BAB(14)(ca) and (cb) of the ASIC Act]*

When a digital asset platform is a financial market or clearing and settlement facility

- 1.117 Depending on the nature of a facility, it may constitute both a digital asset platform and a financial market or clearing and settlement facility under the Act. Because of subparagraphs 765A(1)(i) and (ii) of the Act, such a facility (or a component of it) is not considered a financial product, despite these amendments.

- 1.118 The law relating to financial markets or clearing and settlement facilities in Chapter 7 of the Act applies in these cases instead of the law relating to financial products. Accordingly, the operator of the facility, if it is operated in Australia, must obtain an Australian market licence under Part 7.2 or an Australian CS facility licence under Part 7.3 (as applicable) instead of an AFS licence under Part 7.6. This is consistent with how the financial services law currently operates.
- 1.119 However, the operator may still need an AFS licence for financial services not incidental to the operation of the financial market or clearing and settlement facility (because these services are not covered by the AFS licence exemptions in subsection 911A(2) of the Act). This means that, to the extent the facility does not constitute a financial market or clearing and settlement facility (because, for example, the facility also possesses non-financial products), the facility remains a financial product and dealing in the facility may still require an AFS licence.
- 1.120 The amendments do not alter the ordinary operation of Chapter 7 of the Act as it applies in relation to financial markets and clearing and settlement facilities. However, new Ministerial powers (for a detailed explanation of these new powers, see section *New powers of Minister*) are inserted in Part 7.1 of the Act to:
- deem a facility that is otherwise a digital asset platform to be a financial market or clearing and settlement facility under the Act; and
 - exempt a facility from being a financial market or clearing and settlement facility under the Act if the facility is otherwise a digital asset platform.
- 1.121 A financial market or clearing and settlement facility is likewise not a financial product under the ASIC Act, but the operation of such a facility is still considered a financial service for the purposes of the unconscionable conduct and consumer protection provisions in that Act (see paragraphs 12BAA(8)(g) and 12BAB(1)(f) of the ASIC Act).

AFS Licences

- 1.122 A person who carries on a financial service business in Australia must hold an AFS licence authorising them to perform the financial service, unless they are exempt. A person provides a financial service when they deal in a financial product in the course of business (for an explanation of dealing, see *Dealing in a financial product that is a digital asset platform or tokenised custody platform*).
- 1.123 The amendments provide that digital asset platforms and tokenised custody platforms (unless they are MISs) are financial products under the Act, by adding the products to the list of things that are specifically included as financial products in section 764 of the Act. Operators that obtain a licence to

deal in digital asset platforms or tokenised custody platforms need to comply with the general obligations of an AFS licence, as well as specific requirements related to dealing in digital asset platforms and tokenised custody platforms.

- 1.124 ASIC cannot grant a licence allowing the provision of personal financial advice by an operator of a digital asset platform or tokenised custody platform where the prospective licensee is an individual.

[Schedule #, item 39, paragraph 921C(1)(d) of the Act]

General obligations

- 1.125 A person that carries on a financial services business of dealing in a digital asset platform or tokenised custody platform in Australia must hold an AFS licence unless an exemption applies.
- 1.126 A person intending to deal in digital asset platforms and tokenised custody platforms needs to apply for an AFS licence if they do not already have one and demonstrate to ASIC that they can meet and are meeting the conditions of the licence and comply with their ongoing compliance obligations. ASIC assesses whether an applicant for a licence is a fit and proper person and meets competency, honesty and organisational standards (see more broadly Part 7.6 of the Act).
- 1.127 Operators that currently hold a licence need to amend their licence to include an authorisation allowing them to issue a digital asset platform and/or tokenised custody platform.
- 1.128 Transitional arrangements for operators of digital asset platforms and tokenised custody platforms that currently hold a licence and operators of platforms that do not hold a licence are outlined under *Transitional rules*.
- 1.129 AFS licensees have a number of general obligations outlined in section 912A of the Act. It is intended that all these obligations apply to operators of digital asset platforms and tokenised custody platforms.

Specific obligations

- 1.130 In addition to their general obligations, a licensee that is authorised to issue a digital asset platform or a tokenised custody platform must:
- comply with the asset holding standards and the transactional and settlement standards, to the extent that the standards relate to the financial services authorised by the licence relating to the issuing of the platform; and
 - have platform rules that deal with certain matters.
- [Schedule #, item 36, sections 912BA, 912BB and 912BC of the Act]*
- 1.131 A licensee operating a digital asset platform or tokenised custody platform must also comply with any prohibition in force that relates to them (see *New powers of Minister* for an explanation of the Minister's power to prohibit

certain conduct through a specified digital asset platform or tokenised custody platform).

[Schedule #, item 36, section 912BD of the Act]

- 1.132 The failure of a licensee to comply with these standards, have the required platforms rules or comply with a relevant prohibition in force attracts a civil penalty and is a breach of the financial services law, allowing ASIC to exercise certain powers in relation to the licensee.

[Schedule #, item 38, the table in subsection 1317E(3) of the Act]

Asset-holding standards

- 1.133 ASIC may, by legislative instrument, make standards (called asset-holding standards) that deal with specific matters in relation to digital asset platforms or tokenised custody platforms.

[Schedule #, items 35 and 36, subsection 912BE(1) and section 9 of the Act]

- 1.134 These standards are intended to outline the minimum requirements for asset-holding functions of these platforms. This approach aligns with the existing regulatory model for other asset-holding services and products where obligations arise from principles-based minimum standards issued by ASIC (see, for example, standards for IDPSs, custodial or depository services providers or responsible entities of registered managed investment schemes). This ensures consumers receive a consistent level of protection regardless of whether their assets are held under digital asset platforms, tokenised custody platforms or other asset-holding arrangements.

- 1.135 In relation to digital asset platforms and tokenised custody platforms, the standards may deal with:

- the activities and conduct of the licensee and their authorised representatives in relation to:
 - possessing and safeguarding the underlying assets of the platform;
 - record keeping, reconciliation and reporting in relation to the underlying assets; or
 - how the underlying assets of the platform are used;
- the provision by licensees of supplementary services related to the underlying assets, including fund accounting, compliance monitoring, performance reporting or tax-related functions.

[Schedule #, item 36, subsection 912BE(1) of the Act]

- 1.136 Standards dealing with the above-mentioned matters ensure there is safeguarding of client assets that aligns with consumer safeguards for comparable products regulated under the financial services law, but tailored to unique features of digital token arrangements.

- 1.137 If ASIC decides to make a standard, ASIC must be reasonably satisfied of the following:
- the standard is adequate, effective and appropriate for a range of different types of digital asset platforms and tokenised custody platforms, including by being reasonably proportionate for differences in the size, scale or nature of such platforms;
 - the standard requires any money made by a client of the platform under the platform to be held on trust for the client, or dealt with in a way similar to another standard of a similar nature;
 - the standard does not prohibit a licensee that issues a platform from providing particular services (or arranging for those services) to clients of the platform;
 - the standard does not prohibit a licensee that issues a platform from possessing the digital tokens or holding assets under the platform in one address or location on public digital token infrastructure (or similar infrastructure), or in one wallet, if the licensee is able to identify the digital tokens or assets as the client's;
 - the standard includes any other requirement, limitation or outcome prescribed by regulations.

[Schedule #, item 36, subsection 912BE(2) of the Act]

This outcomes-based test is intended ensure the standards provide effective consumer safeguards across differing business models and technologies, but remain proportionate so as not to unfairly burden smaller platforms. This approach avoids barriers to innovation or use of the platform while ensuring that asset-holding practices do not expose consumers to unnecessary risks. This broadly aligns with the regulation of other comparable products (such as IDPSs, registered MISs and managed discretionary accounts).

Transactional and settlement standards

- 1.138 ASIC may, by legislative instrument, make standards (called transactional and settlement standards) dealing with the conduct of persons in relation to the underlying assets of a digital asset platform or tokenised custody platform issued by an AFS licensee.

[Schedule #, items 35 and 36, subsection 912BF(1) and section 9 of the Act]

- 1.139 The standards are intended to establish minimum requirements for how client transactions are executed and settled for these platforms. This approach aligns with existing regulatory models for transaction and settlement functions of other facilities where obligations arise from principles-based minimum standards issued by ASIC, therefore ensuring consistent protection for consumers. In particular, it provides for the transparency and integrity of these platforms in carrying out these functions.
- 1.140 The standards can deal with (but are not limited to dealing with) the following:

- facilitation of acquisitions, disposals, encumbrances or settlements of the underlying assets of a platform;
- matched principal trading and other execution models that involve the intermediary facilitation of such transactions;
- handling, prioritising and executing of the instructions of a client of a platform (including across different business models such as market operation, marking making, liquidity provision, brokerage or dealing);
- the conduct of persons engaged by the issuer licensee of such a platform in relation to the performance of any of the above (this includes the conduct of authorised representatives, agents and subcontractors).

[Schedule #, item 36, subsection 912BF(2) of the Act]

1.141 If ASIC decides to make a standard, ASIC must be reasonably satisfied of the following:

- the standard is adequate, effective and appropriate for a range of different types of digital asset platforms and tokenised custody platforms (including by being reasonably proportionate for differences in size, scale or nature of such platforms);
- the standard allows for a client of a platform to direct the exercise, either by the client or on the client's behalf, of rights that relate to the underlying assets of the platform and are provided under the platform;
- the standard requires the issuer of the platform to enter into enforceable written arrangements with each person providing liquidity to the platform, or are pursuing market-making strategies through the platform, and monitor and enforce such arrangements;
- the standard includes any requirement, limitation or outcome prescribed by regulations.

[Schedule #, item 36, subsection 912BF(3) of the Act]

1.142 This outcomes-based test is intended ensure the standards provide effective consumer safeguards across differing business models and technologies, but remain proportionate so not to unfairly burden smaller platforms. This approach avoids unnecessary barriers to innovation while ensuring that trading and settlement practices do not expose consumers to hidden counterparty or execution risks.

Platform rules

1.143 The platform rules of a digital asset platform or tokenised custody platform mean any rules, however they are described, made by the issuer of the platform to deal with activities or conduct of persons in relation to the platform. The

rules may form part of the issuer's constitution.

[Schedule #, item 35, section 9 of the Act]

- 1.144 The platform rules of a digital asset platform or tokenised custody platform required to be issued by the licensee must include:
- transparent and non-discriminatory eligibility criteria for identifying who can become a client of the platform;
 - any ongoing obligations of a client of the platform;
 - the settlement method for executing and settling transactions involving the acquisition or disposal of underlying assets in accordance with client instructions;
 - a requirement that the licensee disclose to a potential client:
 - the above-mentioned settlement method;
 - information about the use of external liquidity sources for such transactions, and if used, the extent to which the licensee remains responsible for the execution and settlement of such transactions;
 - who bears the counterparty or operational risk during execution and settlement of such transactions;
 - how any changes to the settlement method will be communicated to clients;
 - whether and how a client's acquisition of an underlying asset will be recorded in any legal or technical register; and
 - any other matters required to be disclosed that are prescribed in regulations;
 - information about the types of assets that are or will be available as underlying assets of the platform, and the method for how the licensee (or any custodian of the platform) will determine these assets;
 - the arrangements for depositing, redeeming and directing the delivery of underlying assets in their actual form (rather than their money's worth); and
 - any other rules that must be included as prescribed by regulations.

[Schedule #, item 36, subsection 912BG(1) of the Act]

- 1.145 Requiring platforms to have platform rules is intended to ensure that clients understand the terms on which they can access and use the service, and who bears key risks during execution and settlement. This improves transparency and comparability between platforms, prevents unfair or discriminatory access practices, and aligns digital asset platforms and tokenised custody platforms with the obligations already imposed on licensed markets and custodial services. It also ensures that clients can make informed decisions about using a

platform and that ASIC can hold operators to account for compliance with their own published rules.

- 1.146 The platform rules have effect as a contract under seal between the licensee and each client of the platform. If under the platform, clients can have dealings with each other, the rules also have effect as a contract under seal between each client of the platform. Accordingly, each of those persons agrees to observe the platform rules to the extent the rules are applicable to them, and to engage in conduct as is required by the rules. Failure to comply may therefore be a breach of an implied warranty of the contract— see section 12ED of the ASIC Act.

[Schedule #, item 36, subsection 912BG(2) of the Act]

- 1.147 However, the unfair contract term provisions of the ASIC Act do not apply to so much of a contract between:

- the issuer of a digital asset platform or tokenised custody platform and another person; or
- a contract that exists because of the platform rules;

that exists in order for the licensee to comply with its obligations with respect to the asset-holding and transactional and settlement minimum standards.

[Schedule #, item 76, subsection 12BLC(3) of the ASIC Act]

- 1.148 In the event that there is inconsistency between the platform rules and the transactional and settlement standards, or any other instrument prescribed by the regulations, the other standards or instrument prevail over the platform rules to the extent of any inconsistency.

[Schedule #, item 36, subsection 912BG(3) of the Act]

Compliance – reportable situations

- 1.149 Compliance with the asset-holding standards, transactional and settlement standards, obligations with respect to the licensee’s platform rules, and any prohibition declarations are core obligations or the purposes of determining if a reportable situation exists in relation to a licensee.

[Schedule #, item 37, subsection 912D(3) of the Act]

- 1.150 A reportable situation arises if a licensee breaches, or may breach, a core obligation and the nature of that breach is significant. If a licensee has reasonable grounds to believe a reportable situation has arisen in relation to a financial services licensee, the licensee must lodge a report in relation to the situation with ASIC (see generally section 912D of the Act).

Exemptions

Treatment of ‘wrapped’ tokens

- 1.151 The amendments provide greater certainty about the effect under the financial services law of creating what is commonly referred to as a ‘wrapped’ token – a digital token, the possession of which gives a right to redemption, delivery or possession of another asset (which may include another digital token). Uncertainty can arise due to how the redemption right is characterised for the purposes of determining whether the rights attached to a wrapped token under an associated facility meet the definition of a financial product.
- 1.152 The exemption addresses this uncertainty by allowing the redemption right to be disregarded in certain circumstances for the purposes of determining whether the rights granted to a person that possesses the wrapped token constitute a financial product.

Scope of exemption

- 1.153 The exemption applies if:
- a digital token – for convenience, a ‘wrapped’ token – is created in relation to an asset (which may be a digital token), defined as the related asset, under a tokenised custody platform, or a similar facility; and
 - possessing the digital token confers a right, defined as the redemption right, to redeem, or direct the delivery of, the related asset.

[Schedule #, item 3, paragraphs 765E(1)(a) and (b) of the Act]

- 1.154 The scope of the exemption is extended to facilities only where the related asset is another digital token, or it is rights or interests attached to another digital token, and the facility would be a tokenised custody platform if the creation of the wrapped token and the holding of the related asset were not required by subsection 761GE(1) of the definition of tokenised custody platform to be done by an operator of the facility.

[Schedule #, item 3, subparagraph 765E(1)(a)(ii) and subsection 765E(2) of the Act]

- 1.155 This is intended to accommodate the fact that smart contracts or similar computer programs can be used to “wrap” tokens for the purposes of interoperability. These smart contracts perform many of the functions of a tokenised custody platform, but may not be “operated” in the sense that no person possesses the related asset or is responsible for creating the wrapped token.

Example 1.6 Treatment of wrapped tokens – Wrapped native digital tokens

Any person can use the “wrapped Ether” (called wETH) smart contract on the Ethereum network to “wrap” network’s digital token, Ether (called ETH) into wETH. Possession of wETH grants an ability to redeem it (which is intended to be covered by references to the redemption right) for the same amount of ETH controlled by the smart contract. If the wETH arrangement involved an operator who possessed the ETH and created the wETH tokens, then the arrangement would be a tokenised custody platform. However, despite this, the exemption is extended to apply to wETH. Since ETH is not a financial product and there are no rights other than this ability to redeem that would cause wETH to be a financial product, the effect of this exemption is that wETH is not a financial product. The public digital token infrastructure exemption also complements the wrapped token exemption to exempt the entire arrangement from being a financial product and MIS, rather than just the wrapped token from being a financial product.

- 1.156 However, where the related asset is a financial product, the exemption only has effect if the person who possesses the wrapped token has the same rights as if they held the related asset directly. In this case, possessing the wrapped token is equivalent to holding the related asset financial product. As discussed above, a person that possesses a digital token as a related asset may be holding a financial product, depending on the nature of the arrangement and the rights accruing to a person in possession of that token under the arrangement.
- 1.157 An example where this requirement is met would be where the related asset is a debenture and under the terms of the facility, the rights under the debenture, including repayment of the principal, interest payments, any security rights, and priority in insolvency, are granted to the person who possesses the wrapped token as if they held the debenture directly.

Example 1.7 Treatment of wrapped tokens – Liquid staking tokens

A tokenised custody platform is issued under which the operator possesses the native digital token of a public digital token infrastructure and uses those native digital tokens to participate in staking activities. The native digital token is not a financial product, and has no rights attached to it. The wrapped token created by the operator grants the person possessing it a redemption right in relation to the native digital token, and a proportionate share of the rewards from the operator’s participation in the staking activity. These rewards are in the form of additional native digital tokens. While the effect of the exemption is that the redemption right

attached to the wrapped token does not cause it to be a financial product, the right to staking activity rewards together with the wrapped token may still meet the definition of a financial product.

1.158 A scenario for how this exemption is intended to operate is in the Appendix.

Effect of exemption

1.159 When the above-mentioned exemption has effect, the redemption right is disregarded when working out whether the rights or interests together with the wrapped token constitutes a financial product under the Act. This clarifies the effect of the redemption right and to that extent the effect of wrapping under the financial services law.

[Schedule #, item 3, subsection 765E(1) of the Act]

1.160 This does not mean that all of the rights or interests attached to the wrapped token are exempt from being a financial product. The intention of this exemption is to only negate the redemption right for the purposes of determining whether the rights together with the wrapped token constitute a financial product. This analysis would still take into account any other rights or obligations attached to the wrapped token. This means a person cannot circumvent financial services laws through technological means by notionally issuing a financial product through a wrapping arrangement.

Exemptions from fundraising provisions

1.161 The amendments exempt:

- certain information required by Parts 6D.2 or 6D.3 of the Act from inclusion in disclosure documents for offers of securities under a digital asset platform or tokenised custody platform; and

[Schedule #, item 58, subsection 741A(2) of the Act]

- promoters and operators of, as well as those involved in the operation of, digital asset platforms and tokenised custody platforms from Parts 6D.2 and 6D.3 of the Act in relation to offers to issue equitable rights or interests in securities arising because of offers to hold, or arrange for the holding of, the securities through the platform.

[Schedule #, item 58, section 741B of the Act]

1.162 The certain information to be exempted from inclusion in disclosure documents includes anything regarding the digital asset platform or tokenised custody platform for which an offer of securities is made under, as well as anything regarding the rights attached to said securities to the extent those rights differ from the rights a person would have if they acquired the securities directly.

[Schedule #, item 58, subsection 741A(2) of the Act]

- 1.163 This exemption is required because, when securities are offered through a digital asset platform or tokenised custody platform, investors do not hold those securities directly. The financial services laws may treat the creation of this separate equitable right or interest as the issuance of a new security. Without an exemption, prospectus obligations under Parts 6D.2 and 6D.3 of the Act are triggered, even though the issuer has already provided disclosure for the underlying securities. This would create duplicative and potentially confusing fundraising documents. The exemption removes that duplication, so that disclosure about the securities remains the responsibility of the issuer, while disclosure about the platform arrangements is delivered through the platform guide.
- 1.164 Additionally, the amendments require certain persons to notify the operator of a digital asset platform or tokenised custody platform under which an offer of securities is made, as well as each custodian for the platform, in the event of any of the following:
- a supplementary or replacement document is lodged with ASIC in relation to a disclosure document lodged with ASIC;
 - the person is prohibited under Division 1 of Part 6D.3 of the Act from making offers of securities under a disclosure document lodged with ASIC;
 - a disclosure document lodged with ASIC is withdrawn before the expiry date specified in the disclosure document.

[Schedule], item 58, subsection 741A(1) of the Act]

- 1.165 However, this notification requirement only applies to those persons that make an offer of securities:
- under a digital asset platform or tokenised custody platform;
 - that needs disclosure to investors under Part 6D.2 of the Act; and
 - that results in the person lodging a disclosure document with ASIC.

[Schedule #, item 58, subsection 741A(1) of the Act]

- 1.166 ‘Through the platform’ means that an investor acquires or holds a financial product using the custody or nominee arrangements of a digital asset platform or tokenised custody platform, rather than being recorded directly on the underlying product issuer’s register of holders or other centralised registry. In these cases: (i) the legal title to the underlying product is held by the platform as custodian or nominee; and (ii) the client’s beneficial interest in the underlying product is recorded by the platform operator and reflected in the platform’s reporting systems.

Exemption from holding an Australian financial service licence – minimal risk

- 1.167 The reforms do not intend to regulate those digital asset platform operators that pose only a minimal risk to clients. The purpose of this is to ensure that regulatory obligations are proportionate to the scale of operators. Accordingly, digital asset platform operators that pose minimal risk are to be exempt from the requirement to hold an AFS licence.
- 1.168 The amendments introduce an exemption for two categories of service providers – one for digital asset platform and tokenised custody platform operators and one for persons providing services that involve those platforms - which can be considered to pose a minimal risk, either due to them being low-value (i.e. not meeting a prescribed financial threshold) or due to the services they provide not being considered a significant part of their business.

Low-value exemption

- 1.169 An issuer of a digital asset platform does not need to hold an AFS licence if the total market value of transactions across all its platforms does not exceed \$10 million over a 12-month period. This amount can be increased by prescribing in regulations a higher amount, or a calculation method that results in a higher amount. Regulations may also specify any conditions that apply to this exemption.
[Schedule #, items 63, 64, 65, and 66, subparagraph 911A(2)(ja)(i), subsections 911A(4B) and (5) and paragraph 911A(5)(a) of the Act]
- 1.170 Total market value is to be calculated across a rolling 12-month period, as at the most recently completed financial year.
[Schedule #, item 63, subparagraph 911A(2)(ja)(ii) of the Act]
- 1.171 However, the exemption only applies to issuers if:
- no financial products are held under any relevant platform issued by a member of the issuer's closely-related group;
 - the total entry value of all underlying assets (i.e. market value of all digital tokens as at them entering a platform) across all relevant platforms for a particular client or their nominee is no more than \$5,000; and
 - the issuer has lodged with ASIC a notice that they are intending to rely on the exemption, and that notice is lodged in the prescribed form.
[Schedule #, item 63, paragraph 911A(2)(ja) of the Act]
- 1.172 'Relevant platform' includes any digital asset platform issued by a person or a member of their closely related group.
- 1.173 'Closely-related group' is intended to capture those entities that have a qualifying investment or significant influence over the operator, and the

interest is material to that operator. Accordingly, closely-related groups include the following members:

- The person (i.e. issuer/operator);
- Each associated entity of the person;
- Each entity for whom the person is an associated entity;
- Each entity who is connected with the person; and
- Each entity that the person is connected with.

[Schedule #, item 67, subsection 911A(6) of the Act]

1.174 The definition of closely-related group utilises the existing meaning of ‘associated entities’ in section 50AAA of the Act, which covers:

- related bodies corporate (as defined in section 50 of the Act); and
- entities that control the other entity (‘control’ is defined in section 50AA of the Act).

Insignificant part of business exemption

1.175 This exemption is intended to cover a person that arranges for another person (i.e. a client of the first-mentioned person) to use a digital asset platform or tokenised custody platform or give that person advice about its existence in the ordinary course of an otherwise primarily non-financial services business.

[Schedule #, item 63, paragraph 911A(2)(jb) of the Act]

1.176 Examples could include:

- A grocery business that provides a variety of payment methods for its customers to purchase goods and services, such as credit card, BPAY, direct debit or even the transfer of underlying assets to a digital asset platform or private wallet controlled by the retailer.
- A wine business that arranges for a tokenised custody platform issued by another person to hold its wine and create a digital token for customers to purchase to redeem the wine.

1.177 Since the arranging for customers to use digital asset platforms and/or tokenised custody platforms, or providing advice about the existence of them, is not a significant part of these businesses, they should not be subject to the financial services licensing requirements under the Act.

Exemption from the prohibition on hawking financial products

1.178 The amendments exempt promoters and operators of, and those involved in the operation of, digital asset platforms or tokenised custody platforms from the anti-hawking provisions under Division 8 of Part 7.8 of the Act.

- 1.179 However, this exemption only applies in relation to offers, requests, or invitations relating to financial products that are:
- digital asset platforms or tokenised custody platforms; or
 - equitable rights or interests in other financial products arising because of a holding, or an offer to hold or arrange for the holding of, said other financial products through a digital asset platform or tokenised custody platform.

[Schedule #, item 68, section 992AB of the Act]

- 1.180 Holding a financial product ‘through the platform’ means that an investor acquires or holds a financial product using the custody or nominee arrangements of a digital asset platform or tokenised custody platform, rather than being recorded directly on the issuer’s register of holders. In these cases: (i) the legal title to the underlying product is held by the platform’s custodian or nominee; and (ii) the client’s beneficial interest is recorded within the platform and reflected in the platform’s reporting systems.
- 1.181 This exemption is required because clients of a digital asset platform or tokenised custody platform do not directly hold the underlying assets. They hold equitable rights or interests in those assets, which are themselves treated as financial products under the financial services law. Without this exemption, ordinary engagement with clients — such as onboarding, explaining how assets will be held, or acting on instructions — could technically be treated as an ‘offer’ of a financial product during an unsolicited contact. This would inappropriately trigger the hawking prohibition and could prevent platforms from carrying on their ordinary functions. The exemption avoids this outcome, while disclosure obligations are preserved through issuer prospectuses for underlying securities and platform-specific guides for digital asset platforms and tokenised custody platforms. Interaction with existing exemptions and modifications by ASIC or regulations
- 1.182 The regulations may provide, or ASIC may declare, modifications to how the financial services law apply. To the extent that the modifications relate to digital asset platforms or tokenised custody platforms, the modifications only have effect in circumstances where:
- the provision subject of the modification relates to a platform in connection with a financial services; or
 - the platform is a financial product for a reason other than because it is a digital asset platform or tokenised custody platform, and is operated by a constitutionally-covered platform.

[Schedule #, items 40 and 41, subsections 926A(5A) and 926B(6) of the Act]

Exemption from market-making provision

- 1.183 The amendments exempt certain issuers of tokenised custody platforms from being considered to be ‘making a market’ (within the meaning of subsection 766D(1) of the Act) for a financial product. This exemption applies if the issuer is stating the prices at which they acquire or dispose of the products only for the purposes of holding, redeeming or directing the delivery of those products under the platform.

[Schedule #, item 6, subsection 766D(2) of the Act]

- 1.184 This exemption is intended to cover activities that are inherent to the operation of a tokenised custody platform. It aligns with existing exemptions for superannuation products, MISs and foreign passport funds under subsection 766D(2) of the Act, where the exempted conduct is not genuinely about creating two-way pricing and liquidity for financial products. It aims to prevent routine minting and redemption of those products from being unnecessarily treated as market-making.

Disclosure

- 1.185 Financial services licensees and their representatives have disclosure obligations when providing financial services to retail clients under Part 7.7 of the Act.
- 1.186 The aim of the disclosure regime with respect to financial services is to provide clients with enough information to ensure they understand the nature of the financial service, any conflicts of interest the provider of the service may have, and their rights in relation to the service. The bulk of the required information is provided in a financial services guide.
- 1.187 Where the issuer of a financial product offers the financial product to a retail client, the issuer has to provide that retail client with particular disclosures about the product under Part 7.9 of the Act.
- 1.188 The financial product disclosure regime aims to provide retail clients with enough information to make informed decisions about acquiring a financial product. This information is provided in a product disclosure statement.
- 1.189 The tailored disclosure obligations that apply to digital asset platforms and tokenised custody platforms (outlined below) address the same issues that the exemptions on which they are based address for IDPSs under the IDPS Instrument.

Tailored disclosure obligations for digital asset platforms and tokenised custody platforms

- 1.190 A new disclosure framework for digital asset platforms and tokenised custody platforms applies when they are issued, or will be issued, by the holder of an

Australian financial services licence to a retail client in the course of a financial services business.

[Schedule #, item 49, section 1020AM of the Act]

DAP/TCP Guide and associated obligations

- 1.191 A person that seeks to issue a digital asset platform or tokenised custody platform to a client as a retail client must give a DAP/TCP Guide before to the client before they issue the platform to that client. The DAP/TCP Guide must include all the required information (see paragraph X) and must be written in a clear, concise and effective manner.

[Schedule #, items 42 and 49, section 9 and subsection 1020AN(1) of the Act]

- 1.192 If a licensee fails to give a DAP/TCP Guide to a prospective client when making an offer to issue a digital asset platform or tokenised custody platform they are liable for a civil penalty.

[Schedule #, item 51, the table in subsection 1317E(3) of the Act]

- 1.193 As the DAP/TCP Guide is required to be given to the prospective client instead of a product disclosure statement, obligations connected to giving a product disclosure statement under Division 2 of Part 7.9 are not imposed with respect to a recommendation situation, an issue situation or a sale situation if the financial product is a digital asset platform or tokenised custody platform or an equitable right or interest in another financial product arising because of a holding, or an offer to hold or arrange for the holding of, the other financial product through the platform.

[Schedule #, items 47 and 48, subsection 1010B(3) and section 1010B of the Act]

- 1.194 A person is also exempt from most obligations under the following Divisions with respect to a financial product where they do not have to comply with Division 2 of Part 7.9 under subsection 1010B(3) for the financial product:

- any other disclosure obligations of the issuer (Division 3 of Part 7.9);
- requirements related to advertising and cooling-off periods (Divisions 4 and 5 of Part 7.9);
- rules around unsolicited offers and disclosure of certain financial products (Divisions 5A, 5B and 5C); and
- miscellaneous and enforcement provisions related to the above (Divisions 6 and 7 of Part 7.9).

[Schedule #, items 48, subsections 1010B(4) and (5) of the Act]

- 1.195 Obligations that still apply to the offer and issue of a digital asset platform and tokenised custody platform or an equitable right or interest in another financial product arising because of a holding, or an offer to hold or arrange for the holding of, the other financial product through the platform are:

- Obligations with respect to dealing with money received for a financial product before the product is issued and associated offence provision (sections 1017E and 1021O of the Act).
- The prohibition on contracting out of any disclosure obligations (section 1020D of the Act).
- Exemption and modifications made to the Part by ASIC or by regulations that effect disclosure in relation to digital asset platforms and tokenised custody platforms (sections 1020F and 1020G of the Act).

[Schedule #, item 48, subsection 1010B(3) of the Act]

- 1.196 The DAP/TCP Guide must include all information that a person reasonably requires to make a decision, as a retail client, whether to become a client of the platform. This general requirement mirrors general requirement of the IDPS Guide in section 8 of the IDPS Instrument, and part of the main requirement of a product disclosure statement in section 1013D of the Act.
- 1.197 Specifically, the DAP/TCP Guide must identify the licensee as the issuer of the product and any custodians of the platform and state the nature of their responsibilities and any relationships between them. The DAP/TCP Guide must include information a person would reasonably require to:
- Understand the nature of the platform and any risks associated with the platform;
 - Understand the method and extent of all charges associated with the platform, including the right of the issuer or anyone else to recoup expenses from a client's assets;
 - Understand the differences between the rights of the client and rights of others under the platform including:
 - cooling-off rights;
 - voting rights (see below); and
 - withdrawal rights;
 - Understand how and to whom a client may make a complaint in relation to:
 - The operation of the platform;
 - The underlying assets of the platform (where this is possible). This reflects that some digital tokens, such as cryptocurrencies like bitcoin, may not have issuers and there may not be a person to whom a client is able to make a complaint; and
 - Financial product advice provided to the client in relation to the platform that is not provided on behalf of the licensee.

- Understand how the licensee, or any custodians of the platform, determine the underlying assets of the platform; and
- Understand any other matters prescribed by the regulations.

[Schedule #, item 49, subsection 1020AO(1) of the Act]

1.198 The required contents of the DAP/TCP Guide are based on the required contents of the IDPS Guide (see section 8 of the IDPS Instrument).

1.199 The DAP/TCP Guide must also include the following statements:

- Copies of the platform's voting policy are available free on request;
- The total fees and expenses payable by the client include the costs of the platform – and that all fees for conduct that the client chooses to engage in under the platform will be in addition to fees charged for the platform;
- The DAP/TCP Guide must include examples of estimated fees and expenses satisfying any requirements prescribed in regulations.

1.200 Regulations can prescribe other matters that the DAP/TCP Guide must also include.

[Schedule #, item 49, subsection 1020AO(2) of the Act]

1.201 Any information that is publicly available does not need to be included in the DAP/TCP Guide. However, in the event publicly available information is relevant to the matters that a person reasonably requires to make a decision, as a retail client, whether to become a client of the platform, the DAP/TCP Guide must:

- Refer to that information;
- Include sufficient details about the information to enable a person to easily identify and locate it;
- State that the information can be obtained free from the licensee on request; and
- Include a summary of information about any significant benefits to which a person will or may become entitled to under the platform, and any significant risks associated with the platform.

[Schedule #, item 49, subsection 1020AO(3) of the Act]

1.202 A licensee must not give a DAP/TCP Guide to a person if they become aware that the information has materially changed or has or is likely to become misleading and deceptive. If a licensee gives a DAP/TCP Guide to a person in this circumstance they are liable for a civil penalty.

[Schedule #, items 49 and 51, subsection 1020AN(2) and the table in subsection 1317E(3) of the Act]

1.203 In the event that, subsequent to issuing a DAP/TCP Guide with the required information, circumstances arise which mean that the DAP/TCP Guide no longer includes the required information – the licensee must provide:

- Information to enable clients to have the full scope of information required to be in the DAP/TCP Guide about the platform; and
- Objective advice stating if the updated information, when compared to the existing DAP/TCP Guide, is materially adverse to a retail client of the platform.

If the licensee fails to provide the updated information or the required objective advice they are liable for a civil penalty.

[Schedule #, items 49 and 51, subsection 1020AN(3) and the table in subsection 1317E(3) of the Act]

1.204 Similar to the obligations imposed on IDPSs under the IDPS Instrument on which these obligations are based, the updated information with respect to a DAP/TCP Guide should be provided in the form of a Supplementary DAP/TCP Guide for clients of the platform.

Disclosure obligations of assets held or acquired through the platform

1.205 On request (standing or otherwise) by a client of a digital asset platform or tokenised custody platform, copies of any particular communications about related assets or classes of such communications is required to be given to the client by the licensee who issues the platform as soon as practicable after the communications are received by the licensee or by a custodian of the platform if:

- a financial product, or a prescribed digital token (referred to as the ‘asset’):
 - is an underlying asset of a digital asset platform or tokenised custody platform; or
 - is otherwise held or possessed through such a platform; for a client of the platform (whether directly or through a nominee); and
- communications are required by law to be given to the person who holds or possesses the asset (including communications required to be given on request).

[Schedule #, item 49, subsections 1020AR(1) and (2) of the Act]

1.206 The above disclosure requirement is a civil penalty provision. The requirement applies only to those platforms that need to be one that is issued, or will be issued, by a financial services licensee in the course of a financial services business.

[Schedule #, item 49, notes 1 and 2 to subsection 1020AR(1) of the Act]

1.207 ‘Prescribed digital token’ in the above disclosure requirement means a digital token that:

- is not a financial product; and
- is of a class prescribed by regulations made for the purposes of this paragraph.

[Schedule #, item 49, subsection 1020AR(6) of the Act]

1.208 Regulations may be made for the purposes of disclosure requirements relating to acquisitions of prescribed digital tokens. These regulations may prescribe disclosure obligations before an acquisition of a prescribed digital token, by way of issue or sale, happens because of an instruction given:

- under a digital asset platform or tokenised custody platform; and
- by a client of the platform (whether directly or through a nominee).

[Schedule #, item 49, subsection 1020AR(3) of the Act]

1.209 The power to impose disclosure requirements relating to the acquisition of prescribed digital tokens is intended to provide the ability to develop and implement tailored disclosure requirements as the digital asset market evolves.

1.210 Disclosure obligations created by these regulations could be imposed on one or more of the following:

- the licensee who issues the platform (if issued or to be issued in the course of a financial services business);
- a custodian of the platform (if said platform is issued or to be issued by a financial services licensee in the course of a financial services business);
- a person who is to issue or sell the prescribed digital token.

[Schedule #, item 49, subsection 1020AR(4) of the Act]

1.211 A person must comply with those obligations imposed on them by the regulations, or risk breach of a civil penalty provision.

[Schedule #, item 49, subsection 1020AR(5) of the Act]

Disclosure requirements connected to custodial arrangements

1.212 Section 1012IA of the Act modifies the obligation to provide a product disclosure statement where the provider of a custodial arrangement is instructed to acquire a financial product under the custodial arrangement on behalf of a client. Section 1012IA applies only where a product disclosure statement would be required to be given if there was an equivalent direct acquisition of the financial product. It is intended that where the client of a digital asset platform or tokenised custody platform instructs the operator to acquire a financial product through the platform, on the client’s behalf, the modifications under section 1012IA apply as they do to any other custodial arrangement.

- 1.213 The aim of the custodial arrangement framework is to ensure that disclosure documents are provided to clients of ‘custodial arrangements’ in a similar way to how they would be provided if the client had acquired those products directly. This approach also eases the regulatory, compliance and operational burden on the platforms themselves as the onus to make and provide the product disclosure statements is put on the issuers of the financial products.

Contracting out of disclosure obligations

- 1.214 Any conditions of a contract to acquire a digital asset platform or tokenised custody arrangement are void if they are not specifically referred to in the Guide or any updated information with respect to the Guide that is required to be provided.

[Schedule #, item 50, paragraph 1020D(c) of the Act]

Platform voting policy

- 1.215 A licensee that is the operator of a digital asset platform or a tokenised custody platform must ensure the platform maintains a policy that deals with the exercise of any voting rights or governance rights arising for the platform’s underlying assets and any other assets held or possessed through the platform.

- 1.216 The policy must contain the required information and be written and presented in a clear, concise and effective manner.

[Schedule #, items 42 and 49, section 9 and subsection 1020AP(1) of the Act]

- 1.217 The policy reason is to protect clients where intermediaries or custodians may hold assets that carry voting or governance rights. Without a clear policy, platforms could exercise these rights in their own interests or inconsistently across clients. Requiring a published policy ensures transparency, allows clients to understand whether and how their rights can be exercised, and reduces conflicts of interest. This mirrors long-standing obligations in IDPS regulation, where platform operators must maintain and disclose a voting policy.

- 1.218 The policy must contain the following information:

- Voting of governance rights of a client relating to the underlying assets and other assets possessed or held through the platform – directly by the client or through a nominee;
- Whether the client of a platform may instruct the licensee, or any custodian of the platform, about the exercise of those rights;
- Whether the client can give any of the following instructions:
 - if a vote is exercised by someone other than the client, requiring the vote to be exercised as instructed by the client;

- Requiring the client to be given copies of any relevant information received by the licensee or any custodian in relation to assets the subject of voting or governance rights;
 - Requiring information to be provided to the client in a certain way;
 - Identifying the steps to be taken after voting instructions have been communicated;
 - Identifying whether costs are to be charged to the client for exercising voting or governance rights; and
- If the client is not able to give any of the instructions listed above, the policy must require authority to be provided to not exercise any such voting or governance rights.

[Schedule #, item 49, section 1020AQ of the Act]

1.219 This provision aims to ensure that:

- Clients know whether they can direct how votes are cast on assets held via the platform;
- Operators and custodians disclose whether they will pass through notices, reports, and voting materials to clients; and
- Clients are not disenfranchised simply because their assets are pooled in a digital asset or custody platform.

Joint operation and the exception to liability for defective financial services guide

- 1.220 As mentioned, the amendments contemplate circumstances where a digital asset platform or tokenised custody platform is jointly issued by two or more issuers. This is similar to how IDPSs are able to have multiple operators that each have distinct functions under the platform. The intention of this is two-fold. Firstly, this provides issuers greater flexibility in relation to the products and services they are able to provide and the legal structures through which they could be provided. Secondly, this is intended to capture jointly issued platforms where two or more persons separately provide custody and transactional and settlement functions. For example, a custodian and a market operator could jointly issue a digital asset platform where the custodian undertakes only the asset holding functions, and the market operator undertakes the transactional and settlement functions.
- 1.221 This is reflected by new exceptions to the criminal and civil liability offences in sections 952E, and 952G of the Act which relate to defective disclosure documents or statements where the defect was not known.

- 1.222 A financial services licensee (or authorised representative) is not in contravention of those provisions for a defective disclosure document or statement to the extent that it is defective in a part which both another licensee states it is responsible and which relates to the financial services that are to be performed by that other licensee. This exception applies in relation to Financial Services Guides, Supplementary Financial Services Guides or website disclosure information that relate to digital asset platforms or tokenised custody platforms.
[Schedule #, items 43 and 44, subsections 952E(4A) and 952G(11) of the Act]
- 1.223 To that extent, the licensee or authorised representative is also not liable in a suit for civil action for loss or damage under section 953 of the Act for the defective disclosure documents or statements.
[Schedule #, item 45, subsection 953B(6A) of the Act]
- 1.224 However, in criminal proceedings, the licensee (or authorised representative as the case may be) defendant bears an evidential burden in relation to these matters (see subsection 13.3(3) of the *Criminal Code*). This is appropriate as they are matters that would be peculiarly within the knowledge of the defendant. This is also consistent with other exceptions to these offences.
- 1.225 These exceptions reflect that disclosure documents or statements may cover the financial services of multiple licensees. They allow a financial service licensee or authorised representative to limit their liability for the contents of disclosure documents or statements (or disclosure material as the case may be) so that they are not responsible for any part for which another licensee assumes responsibility. The effect of this is that multiple operators or promoters can operate a platform together and distribute liability for certain services between them. This aligns with exceptions in the disclosure regime for IDPSs to ensure consistent treatment with comparable services.

Licensee must make a target market determination

- 1.226 The design and distribution requirements relating to financial products for retail clients in Part 7.8A of the Act apply in relation to financial products that are digital asset platforms and tokenised custody platforms.
- 1.227 Amendments are made to ensure that a person is required to make a target market determination in relation to a financial product if the person is required to prepare a DAP/TCP Guide for the product, since a Product Disclosure Statement is not required for digital asset platforms or tokenised custody platforms.
[Schedule #, item 46, paragraph 994B(1)(b) of the Act]

New powers of Minister

Minister has certain powers relating to financial markets and clearing and settlement facilities

1.228 The amendments insert in the Act new powers of the Minister to:

- deem certain facilities that are digital asset platforms to constitute a financial market or clearing and settlement facility; and
- exempt certain facilities that are digital asset platforms from constituting a financial market or clearing and settlement facility.

1.229 As explained under the section *When a digital asset platform is financial market or clearing and settlement facility*, in certain circumstances a facility may constitute both a digital asset platform and a financial market or clearing and settlement facility under the Act. In these cases, the facility is not a financial product (see subparagraphs 765A(1)(l)(i) and (ii) of the Act) and accordingly the law relating to financial products does not apply to the facility (including the requirement for the issuer to hold an AFS licence in Part 7.6 of the Act). Instead, the licensing regimes relating to financial markets or clearing and settlement facilities in Part 7.2 or 7.3 of the Act apply.

1.230 These powers are intended to ensure that each facility is regulated under the most appropriate licensing regime that effectively addresses the specific risks relating to the facility. For example, a digital asset platform may become systemically important enough to be regulated as a financial market or clearing and settlement facility, even when the underlying assets of the platform are not financial products. Conversely, the obligations related to providing financial services may be better suited for a small digital asset platform, despite the facility ordinarily constituting a financial market or clearing and settlement facility.

Minister can deem a certain digital asset platform to be a financial market or clearing and settlement facility

1.231 The Minister may, by legislative instrument, declare that a digital asset platform is a financial market or clearing and settlement facility under the Act if:

- the facility would be a financial market or clearing and settlement facility in relation to one or more classes of digital tokens, if those tokens were financial products; and
- the facility is operated by, or on behalf of, a constitutionally-covered corporation.

[Schedule #, items 13 and 18, subsections 767B(1) and 768B(1) of the Act]

1.232 A facility that otherwise constitutes a digital asset platform can therefore be a financial market or clearing and settlement facility under the Act in either or both of the following ways:

- the definition of financial market or clearing and settlement facility applies to the facility;
- the facility is declared to be a financial market or clearing and settlement facility by the Minister.

[Schedule #, items 10 and 15, note 1 to subsections 767A(1) and 768A(1) of the Act]

1.233 While the declaration is in force, the facility is a financial market or clearing and settlement facility (as applicable) to the extent that it relates to the digital tokens specified in the declaration, and those digital tokens are deemed to be financial products to the extent that the digital tokens relate to the facility. As discussed above, any rights that accrue to the person who possesses the token (including under an external arrangement) form part of that deemed financial product. This deeming ensures the law relating to financial markets or clearing and settlement facilities in Chapter 7 of the Act apply as ordinary in relation to the declared facility.

[Schedule #, items 12 and 17, subsections 767A(6) and 768A(5) of the Act]

1.234 Accordingly, the facility, to the extent it is a financial market or clearing and settlement facility, is not a financial product under the Act while the declaration is in force (see subparagraphs 765A(1)(i) and (ii) of the Act).

[Schedule #, items 10 and 15, note 2 to subsections 767A(1) and 768A(1) of the Act]

1.235 However, the facility remains a financial product to the extent that the operator possesses digital tokens not covered by the declaration. In practice, this means a person would be required to operate a separate facility for those digital tokens, to which Part 7.6 of the Act (concerning licensing of providers of financial services) would apply.

1.236 In considering whether to make, vary or revoke a declaration, the Minister must have regard to the following matters:

- the likely effect on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system;
- any impact on competition in the operation of financial markets or clearing and settlement facilities (as applicable) or on the provision of digital asset platforms;
- the likely regulatory impact;
- whether each facility that could be covered by the declaration has a material connection with Australia; and

- any relevant advice the Minister has received from ASIC, APRA or the Reserve Bank on whether the declaration should be made, amended or revoked (as applicable);
 - ASIC, APRA or the Reserve Bank may provide this advice on their own initiative but must provide it at the request of the Minister.

- 1.237 The Minister may also have regard to any other matters that the Minister considers relevant.
[Schedule #, items 13 and 18, paragraphs 767B(4)(c) and 768B(4)(c) and subsections 767B(5) and (6) and 768B(5) and (6) of the Act]
- 1.238 A facility is taken to be operated in this jurisdiction if it is covered by a declaration in force, even if the facility is based overseas. This means the operator of a facility covered by the declaration is subject to the licensing regime under Part 7.2 or 7.3 (as applicable) of the Act. For this reason, the Minister must have regard to whether the facilities covered by the declaration have a material connection to this jurisdiction before making the declaration.
[Schedule #, items 13, 18, 31 and 32, paragraphs 767B(5)(d), 768B(5)(d), 791D(1)(c) and 820D(1)(c) of the Act]
- 1.239 The declaration may apply unconditionally or subject to conditions and apply indefinitely or for a specified period. The Minister may at any time, by legislative instrument, revoke the declaration, impose or amend conditions or amend the duration of the declaration.
[Schedule #, items 13 and 18, subsections 767B(2) and (3) and 768B(2) and (3) of the Act]
- 1.240 However, the Minister may only vary or revoke the declaration after giving notice and providing an opportunity to make submissions on the proposed action to those operators affected by the declaration. This includes causing a notice to be published on ASIC's website for a reasonable period before taking the action. In considering whether to take action, the Minister must also have regard to the same matters as required for the original declaration.
[Schedule #, items 13 and 18, subsections 767B(4) and 768B(4) of the Act]
- 1.241 The declaration instrument is subject to sunseting and Parliamentary scrutiny through the disallowance process.
- 1.242 Consequential amendments are made to definitions of 'financial market' and 'clearing and settlement facility' in section 9 of the Act to update the legislative references, as well as to Divisions 5 and 6 of Part 7.1 of the Act to insert new Subdivision headings.
[Schedule #, items 9, 14, 19 and 24, section 9 (definitions of 'financial market' and 'clearing and settlement facility') and Subdivision A of Divisions 5 and 6 of Part 7.1 of the Act]

Minister can exempt certain digital asset platform from constituting a financial market or clearing and settlement facility

1.243 The Minister may, by legislative instrument, declare that a facility that otherwise constitutes a digital asset platform is not a financial market or clearing and settlement facility under the Act in relation to one or more specified financial products. The declaration may specify one or more classes of digital asset platform, or specify one or more classes of financial products (see subsection 13(3) of the *Legislation Act 2003*).

[Schedule #, items 13 and 18, subsections 767C(1) and 768C(1) of the Act]

1.244 An exemption results in a facility covered by the declaration becoming a financial product under the Act and subject to the AFS licensing regime as it applies to the provision of financial services. This is because the priority rules in subparagraphs 765A(1)(i) and (ii) of the Act are no longer applicable.

1.245 In considering whether to make, vary or revoke a declaration, the Minister must have regard to the following matters:

- the likely effect on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system;
- any impact on competition in the operation of financial markets or clearing and settlement facilities (as applicable) or on the provision of digital asset platforms;
- the likely regulatory impact; and
- any relevant advice the Minister has received from ASIC, APRA or the Reserve Bank on whether the declaration should be made, amended or revoked (as applicable);

- ASIC, APRA or the Reserve Bank may provide this advice on their own initiative but must provide it at the request of the Minister.

The Minister may also have regard to any other matters the Minister considers relevant.

[Schedule #, items 13 and 18, paragraphs 767C(4)(c) and 768C(4)(c) and subsections 767C(5) and (6) and 768C(5) and (6) of the Act]

1.246 The declaration may apply unconditionally or be subject to conditions and may apply indefinitely or for a specified period. The Minister may, at any time by legislative instrument, revoke the declaration or vary the declaration to impose or amend any conditions or amend the duration of the exemption.

[Schedule #, items 13 and 18, subsections 767C(2) and (3) and 768C(2) and (3) of the Act]

1.247 However, the Minister may only take the above-mentioned actions after giving notice and an opportunity to make submissions on the proposed action to those operators affected by the declaration. This includes causing a notice to be

published on ASIC’s website for a reasonable period before taking the action. In considering whether to take action, the Minister must have regard to the same matters as required for the original declaration.

[Schedule #, items 13 and 18, subsections 767C(4) and 768C(4) of the Act]

1.248 The declaration instrument is subject to sunseting and Parliamentary scrutiny through the disallowance process.

1.249 Subsections 767A(2) and 768A(2) of the Act set out other exemptions to the general meaning of financial market and clearing and settlement facility. A note is added to each subsection to refer the reader to this new exemption power.

[Schedule #, items 11 and 16, subsections 767A(2) and 768A(2) of the Act]

Minister can make a prohibition declaration

1.250 If financial services authorised by an AFS licence relate to the issuing of a digital asset platform or tokenised custody platform, the Minister may declare that conduct that involved a specified financial product is prohibited through the platform. The declaration must be a legislative instrument.

[Schedule #, item 36, subsection 912BH(1) of the Act]

1.251 Failure to comply with this prohibition declaration carries a civil penalty for the licensee and is a breach of the financial services law, allowing ASIC to exercise their powers with respect to the licensee. Breach of a prohibition is also a breach of a core obligation for the purposes of determining whether a reportable situation has occurred (see generally section 912D of the Act).

[Schedule #, items 36 to 38, paragraph 912D(3)(a), section 912BD and the table in 1317E(3) of the Act]

1.252 Providing the Minister with such a power intends to provide the financial services law with the flexibility to respond to emerging financial stability risks and investor protection concerns. For example, if it becomes apparent that digital asset platforms or tokenised custody platforms are being used to facilitate the widespread distribution of highly volatile or opaque financial products—such as complex derivatives or algorithmic stablecoins—the Minister would have the ability to intervene and restrict the availability of that class of financial product through these platforms. This allows for timely regulatory action without requiring full legislative amendment and supports the broader objective of maintaining trust and integrity in digital asset markets.

1.253 The prohibition can be conditional or subject to conditions and can be applied indefinitely or for a specified period. The Minister can, by legislative instrument, vary the prohibition to impose or vary conditions, amend the duration of the prohibition or revoke the prohibition.

[Schedule #, item 36, subsections 912BH(2) and (3) of the Act]

1.254 The Minister can only take the above-mentioned actions in relation to the prohibition after providing notice to licensees covered by the prohibition.

Licensees must also be provided with an opportunity to make submissions through a notice published on ASIC's website that allows a reasonable period for licensees to make such submissions.

[Schedule #, item 36, subsection 912BH(4) of the Act]

- 1.255 When considering making a declaration to prohibit conduct, or to amend such a declaration, the Ministers must have regard to:
- the likely effect on the Australian economy and on the efficiency, integrity and stability of the Australian financial system;
 - any impact on competition in the operation of financial markets or the provision of digital asset platforms or tokenised custodial services;
 - regulatory impacts;
 - the possibility of any consumer detriment; and
 - any advice that the Minister has received from ASIC, APRA or the Reserve Bank on whether a declaration should be made or amended.
 - ASIC, APRA or the Reserve Bank may provide this advice on their own initiative but must provide it at the request of the Minister.

The Minister may also consider any other matters the Minister considers relevant.

[Schedule #, item 36, section 912BI of the Act]

Exemptions for public digital token infrastructure and intermediated staking arrangements

Public digital token infrastructure

- 1.256 Certain infrastructure, defined as 'public digital token infrastructure', is exempt from regulation as a MIS and a financial product. Further, certain conduct in relation to the operation of this infrastructure is exempt from being conduct that constitutes operating a clearing and settlement facility.
[Schedule #, items 56, 57, 60 and 61, paragraphs 765A(1)(xa) and 768A(2)(ha) and section 9 (paragraph (mf) of the definition of 'managed investment scheme') of the Act]
- 1.257 The financial product and MIS exemptions align with the existing policy of exempting physical equipment and infrastructure—such as ATMs or telecommunications services—from regulation as financial products.
- 1.258 The clearing and settlement facility exemption aligns with the existing policy of not regulating persons as operators of clearing and settlement facilities where they merely provide an electronic means of communication or act as an

internet service provider (see paragraph 8.23 of the Revised Explanatory Memorandum for the Financial Services Reform Bill 2001).

- 1.259 These exemptions are in line with comparable exemptions in other jurisdictions, where public digital token infrastructure is considered a “public good”, and where creators or operators the infrastructure are not regulated as financial intermediaries merely because of their technical role in developing or operating publicly available software or hardware that they do not control.
- 1.260 The definition is intended to cover public, permissionless networks such as Bitcoin and Ethereum. These networks are defined by open protocols that govern how transactions are validated and recorded. Users submit transaction instructions that may direct the execution of code that is recorded on the shared ledger (such as Ethereum smart contracts or Bitcoin scripts).
- The conduct of operators is exempt because they merely apply the protocol rules deterministically to the data they receive. The role of an operator is non-discretionary: a node that departs from the rules produces a divergent state and its outputs are rejected by peers (that is, an operator that does not follow the protocol rules is no longer an operator of the network).
 - The software used to apply the protocol rules, and the code executed by that software, is exempt because it forms part of the underlying infrastructure of the network. Smart contract protocols—such as automated market makers and interoperability (i.e. wrapping) protocols—are therefore treated as public digital token infrastructure rather than as financial products or services in their own right (called decentralised applications).

Definition of public digital token infrastructure

- 1.261 A definition of ‘public digital token infrastructure’ is added to section 9 of the Act. It includes any software or hardware (or combination of both).
[Schedule #, item 57, section 9 (definition of ‘public digital token infrastructure’) of the Act]
- 1.262 ‘Software’ and ‘hardware’ have their ordinary meanings, and include both commonly used and purpose-built software and hardware.
- 1.263 The infrastructure must have each of the following five features to be public digital token infrastructure.
- 1.264 First, the infrastructure must be used for transmitting, processing, or recording data relating to digital tokens.
[Schedule #, item 57, section 9 (paragraph (a) of the definition of ‘public digital token infrastructure’) of the Act]
- 1.265 This requirement captures networks and decentralised applications through which data relating to digital tokens is transmitted, processed or recorded.
- 1.266 Second, any person must be able to contribute to the integrity, functionality and reliability of the infrastructure by transmitting, processing and recording

such data transmitted by others without requiring permission from any other person or persons.

[Schedule #, item 57, section 9 (paragraph (b) of the definition of ‘public digital token infrastructure’) of the Act]

- 1.267 The actions or activities contemplated by this requirement, and the arrangements that form part of the infrastructure under which they are conducted (called ‘consensus arrangements’), cover, in a technology-neutral way, those necessary for consensus to form as to the state of the infrastructure’s record of digital token-related data. This is regardless of means, whether through ‘staking’ a native digital token and operating a ‘node’ in a ‘proof of stake’ system, contributing computational resources in a ‘proof of work’ system, or any other similar mechanism by which consensus is reached.
- 1.268 A person that simply arranges for another to participate in a consensus arrangement within scope of this exemption is not considered to be providing a financial service. However, an arrangement that allows a person to participate in a consensus arrangement which provides rights or imposes obligations greater than if the person participated directly (called ‘intermediated consensus arrangement’) is not within scope of this exemption. The additional rights and obligations of these intermediated consensus arrangements may cause them to be financial products and may introduce additional risks which warrant this treatment.
- 1.269 Nevertheless, a further exemption mentioned below recognises that intermediated staking arrangements are a category of intermediated consensus arrangements that are also not to be considered to be financial products or MISs. This is because the risks are mitigated where it is provided through digital asset platform issued by an AFS licensee authorised to issue the platform.
- [Schedule #, items 56 and 59, paragraph 765A(1)(pa) and section 9 (paragraph (me) of the definition of ‘managed investment scheme’) of the Act]***
- 1.270 This requirement also confines the scope of the exemption to public and permissionless infrastructure:
- public because any person may view the data recorded on the infrastructure (whether or not it is encrypted), and transmit data through, or otherwise use, the infrastructure; and
 - permissionless because those persons do not require permission from any person or persons to participate in the mechanism by which data related to digital tokens is processed, validated and recorded. For example, infrastructure would not be permissionless where it requires a person be authorised by a person or group of persons (such as by entering into a legal agreement or satisfying certain legal or regulatory requirements, such as know your customer requirements). Meeting minimum hardware requirements or staking

- a minimum amount of digital tokens as a prerequisite to participating in a consensus arrangement does not preclude the infrastructure from being public digital token infrastructure.
- 1.271 This requirement is satisfied in relation to decentralised applications that are recorded on and operate through a network that meets the definition of public digital token infrastructure. This is because the data transmitted, processed and recorded by persons undertaking the activities referred to in paragraph (b) of the definition of public digital token infrastructure in relation to the underlying network would include data of the decentralised application.
- 1.272 The remaining necessary features of the infrastructure further preclude other forms of control persons, groups of persons, or others forms of centralised authority that are inconsistent with the rationale for this exemption. While in some cases, all persons who in fact use or perform roles within public digital token infrastructure at a particular time could act together to do these things, this is anticipated to be either technically or practically impossible.
- 1.273 Third, neither the use nor functionality of the infrastructure can substantially depend on the actions or influence of any person or persons.
[Schedule #, item 57, section 9 (paragraph (c) of the definition of ‘public digital token infrastructure’) of the Act]
- 1.274 This reflects that the non-discretionary role of operators of public digital token infrastructure means that use of it or its functionality does not substantially depend on any person or persons to do a particular action, or influence something to occur. That is, the infrastructure will function in spite of the actions or influence of individual operators, who will no longer be an operator if those actions or influence diverge from the majority.
- 1.275 This requirement is satisfied and there will not be substantial dependence, for example, where a person is able to use infrastructure to transfer a digital token, without needing a person or persons to actively do something to effect the transfer. In addition, where a person or group of persons may direct, influence or coordinate the development of the infrastructure, or engage in commercial activities related to the infrastructure, such as grant funding, raising capital or marketing, this is not sufficient to establish substantial dependence.
- 1.276 Fourth, the infrastructure is not set up so as to enable a person or group of persons to unilaterally control all the digital tokens maintained by the infrastructure.
[Schedule #, item 57, section 9 (paragraph (d) of the definition of ‘public digital token infrastructure’) of the Act]
- 1.277 Fifth, the infrastructure is not subject to rules governing its operation or use that can be unilaterally altered by a person or group of persons.
[Schedule #, item 57, section 9 (paragraph (e) of the definition of ‘public digital token infrastructure’) of the Act]

- 1.278 The fourth and fifth elements of the definition effectively go towards whether the infrastructure is sufficiently decentralised. ‘Sufficiently decentralised’ is not used or defined in the amendments – whether infrastructure is sufficiently decentralised is a question of fact, and depends on the level of control a person or group of persons have over the infrastructure.
- 1.279 Infrastructure is sufficiently decentralised where it is set up such that no person or group of persons can actually exercise unilateral control over all of the digital tokens recorded on the infrastructure, and where it is not subject to rules governing its operation or use that can be unilaterally altered by a person or group of persons.
- 1.280 The control that a person or group of persons has is a question of degree. For example, in the context of a network, this threshold is not met where control of it is concentrated in several related entities that are responsible for processing and validating its transactions and those entities can actually exercise unilateral control over all digital tokens recorded on the infrastructure, or unilaterally alter the rules governing the operation or use of the system. Infrastructure whose operators are not independent from one another, because they have an actual ability to gain this level of control through coordination, is also not intended to fall within this definition. However, this limb would still be satisfied where there is merely the possibility of a group of operators that independently transmit, process and record data related to digital tokens coordinating to exercise such control.
- 1.281 In the context of decentralised applications, the fourth requirement is not satisfied where a person or group of persons is able to unilaterally control any digital tokens maintained by it. For example, a decentralised finance lending protocol does not meet this requirement if a person or group of persons has administrative controls such that they could control the digital tokens possessed through the protocol. The fifth requirement is not satisfied where a person or group of persons are able to unilaterally change the rules governing the use of the lending protocol, such as lending and borrowing rates, or the collateral and liquidation thresholds. Such changes made after undertaking a governance process that is sufficiently decentralised would allow this requirement to be satisfied.
- 1.282 To avoid doubt, while digital tokens may be enabled by, and balances of which are recorded by, smart contracts or similar software, this exemption is not intended to extend to any rights that are attached to those digital tokens. These rights may constitute financial products depending on their legal nature.

Exemptions

- 1.283 The definition of MIS in section 9 of the Act is amended to exclude public digital token infrastructure.
[Schedule #, item 56, section 9 (paragraph (mf) of the definition of ‘managed investment scheme’) of the Act]

- 1.284 Subsection 765A(1) of the Act is amended to add public digital token infrastructure as a specific thing that is not a financial product.
[Schedule #, item 60, paragraph 765A(1)(xa) of the Act]
- 1.285 Conducting activities described in paragraph (b) of the definition of public digital token infrastructure is also added as conduct that does not constitute operating a clearing and settlement facility. This means that a person does not operate a clearing and settlement facility to the extent that that contribute to the integrity, functionality and reliability of the infrastructure by transmitting, processing and recording such data transmitted by others and this does not require permission from any person or persons.
[Schedule #, item 61, paragraph 768A(2)(ha) of the Act]
- 1.286 To avoid doubt, this exemption does not exempt a person from operating a clearing and settlement facility where they are operating a separate clearing and settlement facility through, or using, the public digital token infrastructure.

Intermediated staking arrangements

- 1.287 To provide regulator clarity, intermediated staking arrangements are exempted from being considered a MIS or financial product under the Act. This exemption applies only where the arrangement is offered through a digital asset platform issued by an AFS licensee authorised to issued the platform.
[Schedule #, items 56 and 59, paragraph 765A(1)(pa) and section 9 (paragraph (me) of the definition of ‘managed investment scheme’) of the Act]
- 1.288 There can be various barriers to participation in staking or consensus arrangements, such as requirements to have particular technical knowledge to operate certain hardware or software, requirements to stake a minimum amount of tokens, minimum withdrawal or cool-down periods, and exposure to penalties.
- 1.289 There are a range of products and services that have arisen which facilitate clients with access to consensus arrangements. These arrangements often include features which overcome these barriers. However, how operators provide these features, such as by pooling digital tokens, gives rise to risk the arrangement could be a financial product or MIS.

Definition of intermediated staking arrangements

- 1.290 A new definition of intermediated staking arrangement is inserted into section 9 of the Act. An intermediated staking arrangement, for a digital asset platform, is an arrangement that is entered into by the operator of the platform and by a client of the platform (whether directly or through a nominee), and is entered into through the facility that constitutes the platform.
[Schedule #, item 55, section 9 (paragraphs (a) and (b) of the definition of ‘intermediated staking arrangement’) of the Act]

- 1.291 To be an intermediated staking arrangement, the arrangement must have certain features. The arrangement must permit the operator to allow one or more of the underlying assets possessed under the platform for the client, whether directly or through a nominee, to be used for activities, defined as ‘staking activities’, described in paragraph (b) of the definition of public digital token infrastructure. The client or the nominee must also expressly authorise the operator to do so.
[Schedule #, item 55, section 9 (paragraph (c) in the definition of ‘intermediated staking arrangement’) of the Act]
- 1.292 As mentioned above, paragraph (b) of the definition of public digital token infrastructure says that any person must be able to contribute to the integrity, functionality and reliability of the infrastructure by transmitting, processing and recording data relating to digital tokens transmitted by others without requiring permission from any person or persons. As mentioned above, these activities are the means by which the infrastructure achieves consensus as to the state of the infrastructure’s record of digital token-related data. This means that staking activities undertaken by the operator by or on behalf of the client will involve the operator transmitting, processing and recording such data transmitted by others.
- 1.293 The arrangement must also ensure that rewards from the staking activities, after deducting any fees and charges, are passed on to the client (whether directly or through a nominee).
[Schedule #, item 55, section 9 (paragraph (d) of the definition of ‘intermediated staking arrangement’) of the Act]
- 1.294 This required featured of the arrangement reflects that many kinds of public digital token infrastructure require the person undertaking the staking activities to ‘stake’, or lock an amount of digital tokens as a prerequisite to doing so. The person receives rewards in the form of additional digital tokens where they conduct staking activities in accordance with the rules governing the public digital token infrastructure. Conduct in contravention of those rules may result in some or all of their digital tokens being forfeited, commonly known as ‘slashing’.
- 1.295 Further, the arrangement must benefit the client in one or more of the following ways:
- by allowing the underlying assets to be returned earlier than if the client had participated in staking activities directly;
 - by allowing the underlying assets to be used in staking activities if the client would otherwise have insufficient assets to be able to participate in staking activities directly; and
 - by protecting the client from, or by compensating the client for, any losses arising from the operation of public digital token infrastructure in relation to the underlying assets.

[Schedule #, item 55, section 9 (paragraph (e) in the definition of ‘intermediated staking arrangement’) of the Act]

- 1.296 The first possible benefit reflects that, frequently, the infrastructure may impose minimum periods before staked digital tokens are able to be unstaked or unlocked. A digital asset platform operator can enable a client to bypass these, for example by reallocating to the client digital tokens from a reserve.
- 1.297 The second possible benefit reflects that the infrastructure may impose minimum requirements on the amount of digital tokens necessary to participate in staking activities. Operators of digital asset platforms can enable clients to bypass these, most obviously by pooling digital tokens across clients.
- 1.298 The third possible benefit reflects the fact, as mentioned above, that conducting staking activities in contravention of the rules that govern the infrastructure may result in some or all tokens being forfeited. These activities therefore involve risk, particularly for unsophisticated clients. This risk can be shifted to the digital asset platform, who in turn may have or engage a third party with greater technical capacity.

Exemption

- 1.299 The meaning of a MIS in section 9 of the Act is amended so that to the extent that a digital asset platform relates to one or more intermediated staking arrangements, it is not within the meaning of a MIS, provided the issuer of the platform holds an AFS licence authorising the provision of financial services relating to the issuing of the platform.
- [Schedule #, item 56, section 9 (paragraph (me) in the definition of ‘managed investment scheme’) of the Act]***
- 1.300 Similarly, subsection 765A(1) of the Act is amended so that to the extent that a digital asset platform relates to one or more intermediated staking arrangements, it does not constitute a financial product, provided the issuer of the platform holds an AFS licence authorising the provision of financial services relating to the issuing of the platform.
- [Schedule #, item 59, paragraph 765A(1)(pa) of the Act]***
- 1.301 The effect of the exemptions is that the entry into and execution of one or more intermediated staking arrangements with clients does not amount to the issue of a separate financial product or operating a MIS.
- 1.302 The exemption will not apply where an intermediated staking arrangement is provided by an unlicensed operator. The requirement that the issuer of the platform holds an AFS licence ensures this.

Consequential amendments

- 1.303 The amendments fix a typographical error in the heading above subsection 791C(7) of the Act. The heading incorrectly refers to clearing and settlement facilities when it should refer to financial markets.
[Schedule #, item 62, the heading above subsection 791C(7) of the Act]
- 1.304 The amendments also make a minor change to paragraph 963B(2)(a) of the Act to update the words ‘custodian in relation to’ to ‘custodian of’ to improve readability.
[Schedule #, item 33, paragraph 93B(2)(a) of the Act]

Commencement, application, and transitional provisions

- 1.305 Schedule # to the Bill commences the day ending 12 months after the day the Act receives Royal Assent.
[Schedule #, item 80, section 1730 of the Act]

Transitional Rules

Amendments not connected with financial services

- 1.306 The amendments in Schedule # that are not connected with financial services apply to a digital asset platform or tokenised custody platform issued, or to be issued, on or after commencement.
[Schedule #, item 80, section 1733 of the Act]
- 1.307 Amendments not connected with financial services are those that:
- relate to a digital asset platform or tokenised custody platform; but
 - do not relate to the platform in connection with a financial service.
- [Schedule #, item 80, section 1733 of the Act]*

Amendments connected with financial services

- 1.308 The amendments in Schedule # that are connected with financial services apply to a provider of services in relation to a digital asset platform or tokenised custody platform from commencement, but not during the first 6 months thereafter (i.e. the ‘first transition period’) if the ‘responsible person’ (the provider or a person providing on their behalf) does not hold an AFSL authorising the provision of the service(s).
[Schedule #, item 80, sections 1731 and 1732 of the Act]

- 1.309 However, if during the first transition period the responsible person applies to ASIC for an AFS licence or a licence variation to authorise the provision of services in relation to a digital asset platform or tokenised custody platform, then the amendments apply to them from the earlier of the following:
- the day of ASIC's determination (if any) in response to the application;
 - the day after 12 months after commencement (i.e. the day after the end of the 'second transition period').

[Schedule #, item 80, subsections 1732(2) and (3) of the Act]

- 1.310 If the responsible person does not apply to ASIC for an AFS licence or a licence variation to authorise the provision of services in relation to a digital asset platform or tokenised custody platform during the first transition period, then the amendments apply from the end of the first transition period (i.e. from the end of 6 months after commencement).

[Schedule #, item 80, subsection 1732(3) of the Act]

Acquisition of property and regulations

- 1.311 The above commencement, application and transitional provisions of the amendments (Schedule #, item 78, sections 1731 to 1733 of the Act) do not, and are not taken ever to have applied, to the extent their operation results in an acquisition of property from a person, unless that occurred on just terms.

[Schedule #, item 80, subsection 1734(1) of the Act]

- 1.312 The amendments utilise the same meanings of 'acquisition of property' and 'just terms' as used in paragraph 51(xxxi) of the Constitution.

[Schedule #, item 80, subsection 1734(2) of the Act]

- 1.313 Regulations may be made to include provisions of a transitional, application or saving nature relating to:

- what is intended to become Part 10.83 of Chapter 10 of the Act; and
- amendments and repeals made by amending Schedule # of the Bill.

[Schedule #, item 80, subsection 1735(1) of the Act]

- 1.314 It is intended that regulations made for this purpose be able to modify any provisions introduced by the amendments.

[Schedule #, item 80, subsection 1735(2) of the Act]

Appendix: Test scenarios

Feedback and views are sought on the following test scenarios to ensure that the amendments made in Schedule # meet the stated policy intent.

1. Where a digital object is not a digital token

Scenario 1.1 Non-rivalrous but cryptographically protected

Chris downloads an e-book that is encrypted and can only be opened with a valid licence key. The file is a digital object. However, paragraph 761GB(2)(a) is not satisfied because Chris cannot exclude others from accessing the same e-book once they obtain their own licence key; many people can simultaneously unlock and use identical copies. Paragraph 761GB(2)(b) is not satisfied because transferring the file or licence does not divest Chris of it — it simply creates another usable copy. The e-book is not a digital token.

Scenario 1.2 “Burned” objects

After redemption of funds by clients, a stablecoin issuer sends stablecoins to a designated “burn” address (i.e. address that provably has no private key). The stablecoin is a digital token before being sent to the burn address. However, after being sent to the burn address paragraphs 761GB(2)(a) and (b) are not satisfied because no person can exclude others and the object cannot be used or transferred. The stablecoins are not digital tokens after burning.

Scenario 1.3 Objects on conventional databases

A private company issues shares to its founders and early investors. These shares are recorded in database entries maintained by the company secretary. The entries in the database are digital objects. However, paragraph 761GB(2)(a) is not satisfied because internal database entries are not rivalrous, they are mere information. The database entries are not digital tokens.

Scenario 1.4 Objects on private blockchains

A fintech company issues what it describes as “Koin” tokens on a private blockchain that it operates alone. “Koin” is a digital object. However, paragraph 761GB(2)(a) is not satisfied because digital objects on a private blockchain with a single operator are not rivalrous for the same reason as conventional database entities are not rivalrous. Koin is not a digital token.

Scenario 1.5 Objects under technical encumbrance

Jie uses a smart-contract “time-lock” for her stablecoins as a forced savings measure. The stablecoins are digital objects. Paragraph 761GB(2)(a) is satisfied because only Jie’s private key can authorise interactions with the contract once the time is up, excluding others. Paragraph 761GB(2)(b) is satisfied because the contract enforces Jie’s chosen condition of time-locking, which is a use of the tokens. Paragraph 761GB(2)(c) is satisfied because Jie can sign a message proving that she has these abilities, even though the use is constrained. The stablecoins remain digital tokens while technically encumbered.

2. Possession of a digital token

Scenario 2.1 Self-custody

Vasant receives bitcoin to his private wallet. He knows the private key necessary to control the digital token. Vasant controls and possesses the bitcoin.

Scenario 2.2 Co-custody service provider

A centralised exchange offers a feature where client tokens are held in segregated addresses for each client. A smart-contract mechanism requires agreement between the client and the exchange before any transfers of tokens from those addresses can take place. Because neither party can transfer tokens unilaterally, both parties jointly control and therefore possess the digital tokens.

Scenario 2.3 Network service provider

A fintech company creates a blockchain that is operated by ten nodes, subcontracted to a cloud service provider running infrastructure in ten separate jurisdictions. The blockchain is designed for third-party businesses to issue stablecoins and tokenised securities. Users control tokens on the platform using standard wallet software. However, the users do not possess the digital tokens. Instead, the cloud service provider possesses them because users require the provider’s implicit cooperation to transact, and the provider can control tokens unilaterally.

Scenario 2.4 No possession

An address is known to the shared ledger of a popular blockchain but the private key has been lost. Unlike the “burned” object example, the possibility of the lost private key being found means the digital

tokens in the wallet are theoretically *capable* of being controlled in the future (so they do not cease to be digital tokens). However, no person is currently capable of control, so no person possesses the digital token.

Scenario 2.5 Technical encumbrance

Jie uses a smart-contract “time-lock” for her stablecoins as a forced savings measure. Jie can cryptographically sign a message once the withdrawal window opens. Jie possesses the stablecoins throughout because she maintains control, even though it is temporarily constrained by the time-lock.

3. Joint Control

Scenario 3.1 A 2-of-3 multi signature wallet (2 key holders)

Lisa holds two of the three keys required to transfer a token. She can transfer it without anyone else’s cooperation. Lisa alone controls and possesses the token.

Scenario 3.2 A 2-of-3 multi signature wallet (3 key holders)

Theo, Megan, and Tony each hold one key required to transfer a token. Any two must cooperate to move the token. No one person possesses the digital tokens individually. However, each person jointly possesses the token because each person is capable of controlling (and therefore possesses) the token contingent on cooperation with one other person.

Scenario 3.3 1-of-2 multi-signature wallet

James and Eva each hold one of two keys, and only one key is needed to transfer the token. Both can act alone. Each of James and Eva controls and possesses the token individually.

Scenario 3.4 A 3-of-5 multi-signature wallet

Josh, David, and Christian each hold one of the five keys needed to transfer a token. Because three are required, no individual among them can act alone and so no one person possesses the token individually. However, each person possesses the digital token because each person is capable of controlling (and therefore possesses) the token contingent on cooperation with 2 other persons.

Scenario 3.5 A 51-of-100 multi-signature wallet (DAO-style)

One hundred people each hold a private key to a smart-contract wallet containing digital tokens worth \$10,000, with each person having contributed \$100 worth of digital tokens. The wallet requires 51 signatures to authorise any transfer. No single participant can act alone, and no subset smaller than the majority can move the tokens. Therefore no one person possesses the tokens individually. However, each of the 100 key holders is capable of controlling (and therefore possesses) the tokens contingent on cooperation with 50 other persons. As with the other examples above, this is because effective control depends on collective cooperation and no individual has unilateral control.

4. Applying the MIS priority rules to a tokenised custody platform

Scenario 4.1 Tokenised Custody Platforms - Physical delivery of divisible tangible assets

A person holds 1kg of gold under a facility and creates 1000 fungible tokens, each representing 1 gram of gold. The digital tokens are able to be divided into parts, so a person is able to redeem 1 gram of gold by possessing 1 digital token or redeem 0.5 grams of gold by possessing 0.5 of a digital token. The facility is a tokenised custody platform because the gold is reasonably capable of being divided into smaller parts and each part is capable of being physically delivered upon redemption by a person that possesses digital tokens.

Scenario 4.2 Tokenised Custody Platforms - Physical delivery of non-divisible tangible asset

A person holds an artwork under a facility and creates 1 non-fungible token, possession of which allows a person to redeem or direct delivery of the artwork. The digital token cannot be divided into parts. This facility is a tokenised custody platform because that artwork is capable of being physically delivered on redemption by the person that possesses the digital token. Since the artwork cannot reasonably be divided into parts and physically delivered to that person (because it would not be reasonable to cut up the artwork to do so), if the digital token was able to be divided into parts, the facility would be a MIS, as each part of the digital token would instead represent a fractional interest in the artwork.

5. Treatment of wrapped tokens

Scenario 5.1 Treatment of wrapped tokens – Requirement for rights of financial product to flow through

A bond is held in a tokenised custody platform and a token is created. The tokenised custody platform was issued in a jurisdiction where issuer obligations do not mandate that underlying assets must be held

on trust for token holders. As a result, the possession of the token created by this tokenised custody platform does not convey beneficial ownership of the underlying asset. Rather, possession of this token only grants a right to redeem or direct delivery of the bond. None of the rights that a direct holder of the bond (or a beneficial owner of a bond) would receive accrue to the possessor of the token. The wrapped token exemption does not apply to this arrangement, and whether the rights together with the wrapped token constitute a financial product depend on the whether they meet the definition of a financial product (such as a derivative). This example demonstrates the circumstances the condition in paragraph 765E(1)(c) intends to mitigate. That is, if the exemption did apply, then the rights together with the wrapped token would not constitute a financial product and a person could notionally deal in the underlying bond using the wrapped token without the financial services law applying to those dealings.