



# Consultation Questions

## Treasury Laws Amendment (Digital Asset and Tokenised Custody Platforms) Bill 2025

### Digital Tokens and Digital Assets

1. The component parts of the ‘digital token’ definition used in the draft Bill have been informed by international work including the UK Law Commission’s Final Report on Digital Assets, the UNIDROIT Principles on Digital Assets and Private Law, and the US Uniform Law Commission’s Uniform Code Amendments 2022.
  - 1.1. Is the concept of “control” in section 761GB sufficiently clear to allow stakeholders and courts to determine the circumstances in which: (i) a digital object is a digital token; and (ii) a person is issuing a digital asset platform (DAP) or tokenised custody platform (TCP)? If not, how can it be improved?
  - 1.2. Is the concept of “control” in section 761GB sufficiently flexible to enable the law to develop and apply to various technologies in future? If not, how can it be improved?
  - 1.3. Does the definition of digital token properly capture the types of digital objects that are intended to be captured (i.e. digital tokens that exist on decentralised networks such as bitcoin) and avoid capturing digital objects that are not intended to be covered (e.g. company shares recorded on digital registries)?
2. The draft Bill does not define the concept of “digital asset”. It assumes that 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.
  - 2.1. Is it appropriate for the draft Bill to assume an ‘asset’ includes any rights legally recognised as held by a person who possesses a digital token (including any proprietary rights associated with that token)? If not, how could this be codified in the draft Bill?
  - 2.2. Is it clear that draft Bill uses the term “digital token” in provisions where the nature or class of an asset (i.e. bundle of rights associated with the digital token) is not relevant? If not, how can this be clarified?
3. The draft Bill focuses on circumstances in which a person *in fact* possesses or transfers a digital token. It does not change the way that the existing law applies to determining whether a person – by possessing or transferring a digital token – is holding or transferring a financial product.
  - 3.1. Is it clear that a facility where ‘offers to acquire or dispose of *digital tokens* are regularly made’ may constitute a financial market, if those transactions effect (i.e. result in) the acquisition or disposal of financial products?
  - 3.2. Is it clear that a person (including a DAP or TCP operator) who arranges for another person to ‘acquire or dispose of a digital token’ may be providing a financial service of dealing in a financial product, if those transactions effect (i.e. result in) the acquisition or disposal of a financial product?



### Digital asset platforms and tokenised custody platforms

4. The draft Bill expressly defines DAPs and TCPs as non-transferable facilities. This differs from the definitions for other non-security financial products (e.g. margin lending facilities and non-cash payment facilities).
  - 4.1. Does the express reference non-transferability cause any issues or lead to any loopholes that may be exploited?
5. Technically, operators of DAPs and TCPs are issuing “interests” in underlying assets when those assets are held for clients. Where the underlying assets are financial products, the interests may be separate and individual financial products (e.g. see section 92 of the Act). Where the underlying assets are not financial products, the interests are not financial products.
  - 5.1. Is it clear that an interest in a non-financial product held under a DAP or TCP remains outside the definition of a financial product, including where that interest is linked to a TCP token? If not, how could this be clarified?
  - 5.2. Does the fundraising exemption in section 741B sufficiently prevent duplication of disclosure obligations (i.e. does it appropriately focus on disclosure in relation to the platform instead of disclosure in relation to individual “interest”)? If not, how can it be improved?
  - 5.3. Does the anti-hawking exemption in section 992AB ensure that the anti-hawking provisions do not restrict the general operation of DAPs and TCPs (e.g. unsolicited communications regarding onboarding, seeking instructions, etc)? If not, how can it be improved?
6. Under the draft Bill, a “client” of a TCP is a person who has entered into an agreement with the operator. Merely possessing a TCP token does not make a person a client – a TCP token holder must onboard with the operator and become a client before being able to exercise rights in relation to the underlying assets.
  - 6.1. Is the draft Bill sufficiently clear on this distinction between TCP client and TCP token holder? If not, how could this be clarified?
  - 6.2. Does the draft Bill need to make specific provision for operators to hold underlying assets on trust for TCP token holders, including those who may be unknown to the operator? If so, how could such a provision be implemented?
7. The draft Bill is intended to allow a digital asset platform or tokenised custody platform to be jointly operated by more than one licensee. This approach reflects existing business models where different entities provide custodial and transactional functions, and is designed to provide structuring flexibility while preventing avoidance of obligations. It also seeks to reduce duplication by allowing joint operators to prepare a single DAP/TCP Guide, with liability apportioned to each operator for their own services.
  - 7.1. Does the draft Bill properly enable the joint operation of DAPs and TCPs, including where custodial and transactional functions are split between different entities?
  - 7.2. Are the existing anti-avoidance mechanisms in the Corporations Act, such as section 761B(2), sufficient to prevent entities structuring around the regime (e.g. a nested exchange that provides transactional functions but relies entirely on a third-party marketplace for custodial functions)?



- 7.3. Do the proposed amendments to sections 952G, 952E(4) and 953B appropriately allow multiple operators of a DAP or TCP to rely on a single disclosure document while apportioning liability for defective disclosure to the responsible operator?
  - 7.4. Will the proposed approach reduce duplication and complexity for disclosure, while still ensuring that each joint operator remains accountable for its own services?
  - 7.5. Is the approach consistent with the existing model for investor-directed portfolio services, and are there any improvements that could be made to ensure clarity for clients and operators?
8. The draft Bill is intended to allow a DAP or TCP to be jointly operated by two or more issuers. The intention is to provide 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. For example, a custodian and a market operator could jointly operate a digital asset platform where the custodian undertakes only the asset holding functions, and the market operator undertakes the transactional and settlement functions.
- 8.1. Does the draft Bill properly enable the joint operation of DAPs and TCPs?
  - 8.2. Are the existing anti-avoidance mechanisms, such as section 761B(2), sufficient to address the risk of issuers circumventing financial services law by jointly issuing DAPs and TCPs?

#### Priority rules and safe harbour test

9. The draft Bill does not alter the priority between facilities that are financial products and facilities that are financial markets or clearing and settlement facilities.
- 9.1. Is it clear that a facility (or part of a facility) that meets both: (i) the definition of a DAP; and (ii) the definition of a financial market or clearing and settlement facility, will be a financial market or clearing and settlement facility (and not a DAP)? If not, how could this be clarified?
10. The draft Bill introduces: (i) a priority rule between DAPs/TCPs and managed investment schemes; and (ii) a safe harbour for DAPs/TCPs from the managed investment scheme regime).
- 10.1. Is it clear that an arrangement (or part of an arrangement) that meets both: (i) the definition of a DAP or TCP; and (ii) the definition of a managed investment scheme, will be a DAP or TCP only if it satisfies the safe harbour test (in paragraphs (mc) and (md) of the MIS definition in section 9)? If not, how could this be clarified?
  - 10.2. Do the elements of the safe harbour test appropriately capture the characteristics of DAPs and TCPs that justify relief from the MIS regime? If not, what alternative or amended test would you suggest?
  - 10.3. Would any elements of the TCP definition fit more appropriately within the safe harbour test? If so, which ones?

#### Disclosure

11. Disclosure requirement for assets available through a DAP or TCP would leverage the pass-through disclosure framework for custodial arrangements in section 1012IA of the Act, with the draft Bill introducing bespoke modifications based on ASIC's investor directed portfolio services (IDPS) framework.



- 11.1. Is this model efficient and proportionate in practice?
- 11.2. Are there disclosure issues unique to DAPs or TCPs that the IDPS framework does not address and that should be covered in these reforms? If so, what are they?
- 12. The draft Bill replaces the default product disclosure statement obligations for DAPs and TCPs with a requirement to prepare and provide a “DAP/TCP Guide” comprising: (i) the content necessary to satisfy financial services guide obligations; and (ii) specific information about the operation of the platform.
  - 12.1. Is the level of prescription appropriate, or would a general principle—such as “*all information a person would reasonably require to decide whether to become a client of the platform*”—be preferable?
  - 12.2. Should any specific content requirements be added or removed? If so, which ones?
- 13. Section 1020AR of the Bill would empower the Corporations Regulations to prescribe a disclosure regime for non-financial product digital tokens offered through a DAP or TCP.
  - 13.1. Would addressing disclosure for non-financial product digital tokens in this way cause any concerns, or would a different approach (e.g. standards prepared by ASIC) be preferable?
  - 13.2. If the approach in the draft Bill is appropriate, what disclosure obligations should apply to operators of DAPs and TCPs in respect of non-financial product digital tokens, and what information should be disclosed?
  - 13.3. Are there any obligations that should not be imposed on operators (i.e. obligations that would be impossible to comply with or disproportionate for non-financial product assets)?

#### Regulatory clarity and flexibility

- 14. The draft Bill attempts to provide regulatory clarity with targeted exemptions and flexible powers that can be exercised by the Minister or ASIC.
  - 14.1. Do the exemptions for wrapped tokens, public digital token infrastructure, and intermediary staking arrangements adequately address the regulatory uncertainties that arise in each context? If not, how could they be improved?
  - 14.2. Is the power for the Minister to declare that specific digital tokens are not treated as financial products for the purposes of the financial markets or clearing and settlement regime an appropriate way to provide flexibility to “right-size” regulation in future?
- 15. The appendix to the Explanatory Memorandum includes a series of worked examples covering the application of the definitions and exemptions in the Bill. These examples are intended to show at a high level how the statutory tests are intended to apply in practice.
  - 15.1. Do the examples illustrate the intended application of the Bill clearly and accurately? If not, how could they be improved?
  - 15.2. Are there additional examples or clarifications that would assist stakeholders in understanding how the regime applies in practice?



### Transitional arrangements

16. The draft Bill provides transitional timeframes for: (i) staged commencement of amendments and obligations; (ii) ASIC to begin accepting licensing applications; and (iii) temporary relief from obligations during a transitional period.
  - 16.1. Is the transitional period sufficient for businesses to obtain legal advice, prepare and lodge an AFS licence (or variation) application, and adjust compliance systems?
  - 16.2. Is the initial twelve-month period after Royal Assent sufficient to prepare for commencement and to consult with ASIC on regulatory guidance, minimum standards, and other instruments or materials?
  - 16.3. Is the option to extend the transitional periods under the Corporations Regulations appropriate, or should certainty be provided by setting out the intended transitional periods in the Bill?

### Necessary Regulations

17. Under existing financial services laws, operators of facilities akin to DAPs or TCPs would be providing a custodial or depository service if they held financial products. Under the draft Bill, this would no longer be the case.
  - 17.1. Should the following exemptions, currently granted to custodial and depository service providers, be extended to issuers of DAPs that do not provide transactional and settlement functions (i.e. those that only provide custody):
    - sub-custodian exemption – Regulation 7.6.01(1)(k);
    - overseas issuer and client exemption – Regulation 7.6.01(1)(fa);
    - overseas related body corporate exemption – Regulation 7.6.01(1)(na);
    - nominee exemption – Regulation 7.6.01(1)(v);
    - advising about the existence of a non-transactional DAPs – Regulation 7.1.33E;
    - status of wholesale clients – Regulation 7.1.27; or
    - financial product advice modifications – Regulation 7.1.08?
  - 17.2. Alternatively, should the exemptions listed above apply to issuers of DAPs and TCPs generally?
  - 17.3. If applied to DAPs or TCPs generally, would these exemptions create any problems?
18. Many of the existing Corporations Regulations will automatically apply to activities involving DAPs and TCPs. Others—such as the exemptions for custodial and depository services referred to above—would need to be expressly applied.
  - 18.1. Are there specific regulations that should be expressly applied to DAPs and TCPs to ensure the framework operates as intended?
19. Issuers of margin lending facilities and similar products cannot rely on the intermediary authorisation exemption due to regulation 7.6.01AAA of the Corporations Regulations.
  - 19.1. Should this intermediary authorisation exemption also be disapplied to DAPs and TCPs under regulation 7.6.01AAA?



### Policy intent

20. An explanatory memorandum is intended to assist members of Parliament, officials, and the public to understand the objectives and detailed operation of a bill. It may also be used by a court to interpret a legislative provision where the provision is ambiguous or obscure.
- 20.1. Do the policy objectives expressed in the explanatory memorandum align with the operation of the draft Bill? If not, how would you recommend remediating the difference?
- 20.2. Are there clauses of the Bill that are ambiguous or obscure? If so, would you recommend remediating this by amending the draft Bill or by supporting those provisions with targeted expressions of policy objectives in the explanatory memorandum?

### Compliance costs

21. Compliance with the draft framework is expected to involve additional costs and resources (beyond those already incurred by businesses).
- 21.1. What additional costs (expressed in dollar terms, if possible) would you expect to incur in order to comply with the framework contained in the draft Bill? What would be the breakdown of these costs, distinguishing between upfront and ongoing impacts, in relation to:
- uplift in administrative processes (including staff capacity building)
  - change management and education support
  - governance costs
  - technology uplift
  - any other compliance impacts.

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