

**AUSTRALIAN TREASURY PROPOSAL PAPER:  
REGULATING DIGITAL ASSET PLATFORMS**

**OCTOBER 2023**

**CCI SUMMARY**

**EXECUTIVE SUMMARY**

- The focus of the [Proposal Paper](#) is centralized crypto exchanges (“digital asset platforms”).
- The Australian Treasury has made a slight variation on the [Financial Stability Board \(FSB\)](#)’s refrain of “same risk, same activity, same regulation” to “**similar risk, similar activity, same outcome.**”
- The Proposal Paper recommends regulating crypto exchanges under pre-existing financial services laws instead of crafting new crypto-specific rules.
- New rules will require any crypto exchange holding more than \$3.2 million (\$5 million AUD), or more than \$946 (\$1,500 AUD) per individual, to obtain a license from the Australian Securities and Investment Commission (ASIC).
- The purpose of this Proposal Paper is to seek feedback on the questions contained within. Public comments are due by December 1, 2023.
  - CCI staff recommend not to submit a comment letter as Australia is not a priority jurisdiction.

**CONTEXT**

On October 16, the Australian Treasury (the Treasury) put forth a new regulatory proposal—“[Regulating Digital Asset Platforms](#)”—aimed at bringing digital asset platforms under the purview of the Australian Financial Services Licence (AFSL) framework. Specifically, the proposed framework seeks to regulate crypto exchanges, or entities providing access to digital assets and holding them for Australians and Australian businesses. The release of the proposal follows a token mapping exercise undertaken by the Government earlier this year.

While the proposal introduces several new concepts, its primary aims are the following:

- Outlining the regulatory framework for digital assets under AFSL, with a focus on protecting Australian consumers and addressing concerns related to financial collapses, market misconduct, and scams in the digital asset market;

- Introducing the concept of a “digital asset facility” and specifies the licensing requirements for entities providing financial services in this context;
- Clarifying the obligations for licensed digital asset platforms obligations (i.e. crypto exchanges) in areas such as user contracts, asset safeguarding, and market misconduct prevention.

External comments on the proposal are due by **December 1, 2023**.

## **KEY INSIGHTS**

### **Token Mapping: Origins of Digital Asset Platforms Framework**

In February 2023, the Australian Treasury laid the groundwork for its most recent proposal when the governing body released its [token mapping consultation paper](#). For Australian legislators, the concept of “token mapping” refers to “the process of identifying the key activities and functions of products in the crypto ecosystem and mapping them against existing regulatory frameworks.”<sup>1</sup>

In addition to defining several key terms, the token mapping proposal set out to map the crypto token ecosystem against Australia’s existing financial regulation framework. Specifically, the proposal considered whether crypto token systems aligned with Australia’s current definition of “financial products” under the Australian Financial Services License (AFSL) regime. With the AFSL framework, “financial products” are defined facilities through which a person does any of the general financial functions. According to the Treasury’s token mapping proposal, any crypto tokens that meet the existing definition of “financial products” should also be subject to the AFSL regime.

### **Australian Financial Services License (AFSL) for Crypto Token Systems**

The Treasury’s most recent proposal specifies what an AFSL regime would actually look like in the context of digital assets. According to the proposal, the focus of this regulatory effort is consumer protection, particularly in light of concerns about financial collapses, market misconduct, and scams related to digital assets.

Given these concerns, the Treasury has opted to focus its regulation on intermediaries that hold digital assets, as customer asset holding is perceived to pose the highest risk to Australian consumers.<sup>2</sup> Under the AFSL framework, entities that hold customer digital assets, such as

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<sup>1</sup> [Australian Treasury Press Release on Crypto Asset Reforms](#)

<sup>2</sup> The proposal states that digital asset holding arrangements constitute “pivotal points of vulnerability from a technical, counterparty and fraud risk perspective.” See [Proposal Paper](#) at p. 10.

pure custodians and trading platforms, would be required to meet existing requirements associated with AFSL. Such requirements include managing conflicts of interest, maintaining a risk management system, and meeting minimum solvency and liquidity obligations. Minimum standards would also be set for asset holding. Importantly, the assets would need to be held on trust or bailment.

The proposal brings holders of digital assets under the umbrella of the AFSL regime by calling them a new type of financial product known as a “digital asset facility.” Any entity in Australia that provides financial services related to a digital asset facility—including dealing, market making, custody, and advisory services—becomes a regulated “digital asset platform.” A digital asset platform that offers the aforementioned financial services above a specified threshold, would be required to obtain a license. The proposed threshold is either AUD 5 million in aggregate or AUD 1,500 for any individual customer.

To determine which businesses require a license, regulators will consider whether the business exerts “control” over customer assets. This means that businesses with the ability to exercise, coordinate, or direct “factual control” over customer assets in a real and immediate sense will be subject to licensing requirements. The US Uniform Law Commission, the [UK Law Commission](#) and the [Financial Action Task Force \(FATF\)](#) have employed similar concepts.

## Obligations

Under the proposed regime, licensed digital asset platforms would be subject to the same standard obligations as traditional financial service providers. These obligations encompass areas such as disclosure, reporting, solvency, and governance.

In addition to the general obligations, the proposal also sets out obligations that are unique to digital asset platforms. Under the prospective framework, digital asset platforms would be subject to specific obligations tailored to their operations, including the following:

- **Standard User Contracts:** Digital asset platforms must offer standard user contracts that meet predefined minimum standards. These standards cover areas related to asset holding, customer rights (platform entitlements), and transactional functions (e.g., asset disposal, transfer, and exchange). For instance, customer assets classified as financial products must be held in trust.
- **Token Safeguarding:** Tokens on the platform need to be safeguarded at the “highest level” while balancing the need for timely and secure withdrawals. Custody software, service providers, or third-party custodians must meet specific minimum standards to ensure the safety of tokens.

- **Listing Criteria:** Digital asset platforms must establish listing criteria for tokens that they make available on their platform. These criteria likely pertain to the eligibility and quality of tokens.
- **Enforcement Mechanism for Market Misconduct:** Licensed digital asset platform providers are expected to serve as the primary enforcement mechanism for addressing market misconduct. They must make “reasonable efforts” to identify, prevent, and disrupt such activities. This suggests that they have a responsibility to maintain market integrity and protect users from fraudulent or harmful activities.

Notably, the proposed obligations generally align with recent policy recommendations from international organizations like the [Financial Stability Board](#) (FSB) and the [International Organization of Securities Commissions](#) (IOSCO). This alignment reflects Australia’s goal of achieving consistency with international standards and practices in the digital asset industry.

### Financialized Functions

The proposal assigns additional obligation to what it calls “financialised functions” of digital assets, recognizing that tokenization can easily transform non-financial products into financial products in the digital assets ecosystem. Accordingly, even entities that engage with digital assets that are categorized as “non-financial” would be subject to obligations if such entities provide services related to trading, staking, asset tokenization, and fundraising.<sup>3</sup>

For example, platforms that offer token trading would be required to implement processes that guarantee operational efficiency and transparency. In the case of asset tokenization platforms, they must adhere to token standards that allow the identification and freezing of tokens associated with sanctioned addresses.

### Next Steps

Looking forward, it is reasonable to anticipate more stringent regulations for crypto exchanges in Australia. In a recent [speech](#), Australia Securities & Investments Commission (“ASIC”) Chair Joseph Longo stressed the importance of holding the crypto industry to the same high standards as other sectors and emphasized the need for robust enforcement, which is consistent with ASIC’s previous actions against crypto service providers.

Chair Longo further encouraged the industry to establish a culture of compliance, highlighting that compliance isn’t merely about checking boxes, but also about prioritizing consumer protection in every aspect of operations.

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<sup>3</sup> If a digital asset is categorized as a financial product, it will be subject to the existing regulations that apply to such products.

Simultaneously, the Australian government remains committed to fostering innovation in the digital asset space, recognizing that clear and proportionate regulation is crucial. Assistant Treasurer and Minister for Financial Services Jones [acknowledged](#) that to build a world-class digital assets market, regulations must be agile enough to keep up with the rapidly evolving ecosystem.

The consultation period is open for public comments until December 1, and draft legislation is expected to be unveiled in 2024. Once the legislation becomes law, industry participants will have a 12-month transition period to ensure compliance and obtain licenses as necessary.