



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

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

Email: crypto@treasury.gov.au

Dear Sir/Madame

Re: Crypto asset secondary service providers: Licensing and custody requirements

The Financial Planning Association¹ (FPA) welcomes the opportunity to provide feedback on Treasury's proposed Licensing and custody requirements for Crypto asset secondary service providers.

The financial planning profession has to date been left in limbo in relation to crypto assets. While on one hand, they are investible assets their clients are interested in, their unregulated state means they often have to decline advice, leaving clients unsupported and unadvised on a portion of their financial position. This has left financial planners vulnerable to watching clients risk their financial position, goals and objectives.

A recent global survey² of CFP Professionals by the Financial Planning Standards Board (FPSB) responded that the 'complex products' clients most frequently enquired about were:

1. Direct Equities (68%)
2. Exchange-Traded Funds (ETFs) (60%)
- 3. Crypto assets (55%)**
4. Other leveraged products (19%)

¹ The Financial Planning Association (FPA) is a professional body with more than 12,000 individual members and affiliates of whom around 10,500 are practising financial planners and 5,207 are CFP professionals. Since 1992, the FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first policy pillar is to always act in the public interest.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of the Future of Financial Advice reforms.
- The FPA was the first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC 'gifted' this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.

² FPSB CFP Professionals Survey 2022



5. Leveraged ETFs (16%)
6. Contracts for Difference (CFDs) (8%)

The same survey found that 84% of CFP professionals said that up to 50% of their clients had asked about crypto assets in the last 12 months, and 70% responded that they have clients who have purchased crypto assets on their own³. As noted however, the unregulated nature in Australia makes it impossible for financial planners to assist their clients despite this demand. Without access to professional advice, retail investors are relying on other forms of information to purchase crypto assets and are often influenced by parties who do not have appropriate qualifications, professional obligations or regulatory oversight to support their decision making and protect their investments. To this point, 62% of CFP professionals responded to the FPSB survey that they have clients who had suffered a financial loss from purchasing unadvised a complex product, such as Crypto assets, and 90% of those clients that suffered a financial loss did so without the benefit of having received professional financial advice. In other words, these clients acted as self-directed investors or based on the recommendations of social media influencers, friends or family and lost their investments.

There can be no argument that the regulation of crypto assets is very challenging. Firstly, their decentralised nature means there are few based in a specific jurisdiction. Secondly, the owner of the asset isn't necessarily identifiable as an individual given the anonymity basis through which many are held. Thirdly, there is the complexity that different crypto assets represent different types of financial products, have different purposes and are complicated by different sophistications of the technology layer of the underlying the blockchain. Specifically, some cryptos are the equivalent of a currency, some are more analogous to commodities, some operate as shares, some are rights over a property, and some are smart contracts or autonomous organisations. Some can be bought; some can be traded; and others can only be "earned" through mining. Where an asset is held, there is then the complexity of the "wallet" which holds the asset.

What is clear, is that there is an urgent need to better protect consumers, both from the risks of fraud and theft of assets, but also from an education and portfolio construction perspective. Given the nature of blockchains and the assets which sit on them, the only available mechanism for providing this protection within the Australian financial services industry is for the protections to sit on the secondary service provider layer. For this reason, the FPA supports the introduction of a regulatory framework.

The FPA however does not support regulating crypto asset secondary service providers ('CASSPrs') outside of the current financial services regulatory regime. One of the merits of the Australian financial services regulatory regime is that it is technology agnostic and with few exceptions protects all Australians equally to ensure their investments and assets are appropriately protected. Additionally, it ensures consumers are provided appropriate disclosure in relation to risks, costs, custodial arrangements and education in relation to the investments they are making. This ensures that any service provider or professional within the system is operating on an equal footing to ensure the overall system remains fair.

Regulating CASSPrs outside of the existing financial services regime creates two issues. Firstly, it would create an alternate, duplicate regulatory regime to regulate what at the core is the purchase and holding of a financial asset to either retail or wholesale investors. Secondly, it would require existing financial service licensees to apply for and hold a separate type of license adding to cost and regulatory duplication. While the ALRC Review of the Corporations Act has identified the difficulty of

³ FPSB CFP Professionals Survey 2022



regulating financial services and products due to its complexity, creating further regulatory duplication will only increase the cost to access financial services and products by consumers. To solve for this, ALRC's recommendation that specific financial services be regulated through the creation of a rules book makes sense and given the emerging nature and nimble approach needed to regulate this rapidly developing space, this concept makes sense.

Proposed obligations on regulation of crypto assets

As asked in question 4, the FPA supports the proposal that all crypto assets should be regulated in a consistent manner with their equivalent non-crypto versions. The regulation of a financial product or service should not depend on the technology which underlies the asset. To this point, investment in crypto assets is as much in relation to the asset itself (for example an ether [ETH] coin or a non-fungible token [NFT]) as a bet on the sustainability of the technology platform supporting the asset (for example the Ethereum blockchain). Ensuring consistency will reduce confusion for Australian investors and financial service providers.

The FPA also opposes CASSPrs' providing advice without being regulated under the personal financial product advice laws. These laws are designed to protect consumers from inappropriate recommendation or influence to purchase financial products where they are not appropriate to meet the clients goals, objectives and financial position. As noted, the complexity with crypto assets is that you are investing in both the asset and the technology on which the asset is held. This is far more complicated than custodial arrangements related to existing financial products which manage this risk through a separation of roles. Existing laws also have significant consumer protections built in, including complaints and disciplinary systems.

Additionally, greater engagement is required between regulators and market participants, including with new or non-traditional market participants such as social media influencers, to identify and distinguish genuine players who want to do the right thing from those who are using social media to manipulate, misinform or worse – to promote a scam or commit fraud. The FPA supports the work of Australian Securities and Investment Commission (ASIC) which issued information sheet 269 (INFO269) to identify what social media influencers practically and clearly can and cannot do (illustrated with examples). There is also a role for ASIC to engage technology platform providers (such as Google, Facebook, Twitter, etc.) to enter into cooperation agreements that would allow regulators and technology platforms to work together to prevent or shut down a scam or fraud being promoted on an online platform, and to help regulators by suspending or removing social media influencers who have broken the law by providing financial advice when not licensed.

Proposed obligations on crypto asset secondary service providers

Regulating CASSPrs' under Proposal 1 would uphold consumer protection by ensuring that secondary exchanges are engaging in reasonable business practise and not placing consumers at risk. Entities involved in providing crypto asset custodial services would need to comply with certain custodial obligations, which would protect consumers from being exposed to significant operational and financial risks.

While the FPA recognises the merit in pursuing Proposal 1, it advocates for greater consideration and the potential implementation of Alternative Option 1: regulating CASSPrs under the financial services regime. Under this model, crypto assets would be regulated through the existing financial services regime through recognition as a 'financial product'.



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This avoids the requirement for further regulatory licensing introduced by Proposal 1 and would ensure the streamlined regulation of crypto assets. Further, by defining crypto assets as 'financial products', they would attract the additional obligations imposed on the sale of 'financial products' and help address the growing concern of crypto finfluencing, and the benefits of the disciplinary and complaints systems already in place in the financial services industry.

It is also inappropriate to regulate financial products through just the creation of voluntary codes or a self-regulating model which have little in built consumer protections due to their voluntary nature. These sorts of codes have been seen to not work effectively in mature parts of the financial services industry to date and allowing an emerging sector to manage this on their own on a voluntary basis is inappropriate.

Proposed custody obligations to safeguard private keys

The FPA supports the consumers protection provided by implementing minimum, principles-based custody obligations for private-keys that are held or stored by CASSPrs on behalf of consumers.

The biggest risk in relation to holding crypto assets is the theft or loss of private keys which will ultimately result in the loss of the asset for the consumer. A mechanism to ensure both the safe holding of keys, the ability to restore keys in the event of passwords being lost, and to ensure that there are sufficient protections in place to ensure they are not stolen or misused are critical.

The FPA would welcome the opportunity to discuss with Treasury the concerns raised in our submission and request to be involved in any further consultations or roundtables undertaken.

Yours sincerely

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