EPAA SUBMISSION TO

REGULATING DIGITAL ASSET PLATFORMS PROPOSAL PAPER

Country of Origin:
Australia

Department:
Crypto Policy Unit, Financial System Division
The Treasury

Title:
Regulation Digital Asset Platforms Proposal Paper

Date:
October 2023

Submission Date:
1 December 2023

Original Link:
https://treasury.gov.au/consultation/c2023-427004

1 December 2023
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Submission by email to: crypto@treasury.gov.au

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Please find attached the submission of the Emerging Payments Association Asia (EPA Asia) to the Regulation Digital Asset Platforms Proposal Paper released by the Commonwealth Treasury in October 2023. EPA Asia has made submissions on previous related consultations, including the Crypto asset secondary service providers: Licensing and custody requirements Consultation Paper, released in March 2022, and the Token Mapping Consultation Paper, released in February 2023.

EPA Asia's goal is to unify the payments agenda in the region, drive business development and improve the regulatory landscape for all organisations within the payments value chain. We are a community of payments organisations whose goal is to strengthen and expand the payments industry for the benefit of all stakeholders. More information about EPA Asia can be found on our website www.emergingpaymentsasia.org.

Please note, that while we have consulted with our membership, any views expressed in this submission are solely the views of EPA Asia and do not necessarily represent the views of individual contributors / EPA Asia Ambassadors or individual EPA Asia Members.

The development of a regulatory framework for tokens and platforms in Australia has lagged developments in a number of other developed economies such as the UK as well as in regional trading partners such as Singapore, Malaysia, and Japan.1 While we appreciate the opportunity to be consulted, it is important that policymakers adopt a degree of urgency in respect to introducing a regulatory regime in Australia.

We also believe that there is an opportunity to align, where relevant, crypto-asset regulation and payments regulation reform, given that work on changes to the Payment Systems (Regulation) Act and the introduction of payments service provider licensing are proceeding in parallel with these reforms.

A key issue that we have raised in our previous submissions has been the importance of clarity as to what types of entities and what types of activities are to be regulated under the regime. Regulatory clarity remains essential and focussing on questions relating to what a system is offering, as opposed to the underlying technology, should provide a better basis for creating a regulatory regime. On this basis, we believe that a regulatory setting based on what a network is being used for, as opposed to the token itself or the underlying technology, is a better starting point for regulation. We appreciate the attempt to distinguish between financial and non-financial usages and while this will assist in crafting a regulatory response, care will need to be taken in creating definitions that prevent regulatory arbitrage or market distortions.

We further believe that the Government's role in regulation should be to protect consumers who could not otherwise protect themselves (including through a lack of understanding or knowledge of the crypto ecosystem) and to foster an environment that supports innovation and competition. This includes making Australia an attractive place to invest and to do business, as well as supporting regional and global trade.

Below are comments on selected questions from the Proposal Paper:

Questions (Set 1)

Prior consultation submissions have suggested the Corporations Act should be amended to include a specific 'safe harbour' from the regulatory remit of the financial services laws for networks and tokens that are used for a non-financial purpose by individuals and businesses.

What are the benefits and risks that would be associated with this? What would be the practical outcome of a safe harbour?

We encourage Treasury to consider adopting a taxonomy for and approaches to crypto asset regulation that is aligned to the asset's economic purpose and function to help define what assets and activities will be covered by financial services laws. This offers greater regulatory clarity for crypto asset service providers, whose business models are likely to revolve around more specific use cases rather than "financial and non-financial" applications. The approach in the Proposal Paper is heading in the right direction and aligns with approaches being taken in other developed markets such as the UK, but more details will be required to be able to fully assess the approach.

While clarity is a benefit, there will always be the risk that providers will look for arbitrage opportunities regardless of how the boundary is drawn between financial and non-financial purposes. Clear definitions will help but will need to be coupled with regulators monitoring market developments so that non-financial providers are not able to offer "financial-like" products and services outside of the regulatory perimeter and without consumer protections. This will be important if, for example, in-game tokens are traded on secondary markets or in-game wallets can be used outside of the game for payment purposes.

Questions (Set 2)

Does this proposed exemption appropriately balance the potential consumer harms, while allowing for innovation? Are the proposed thresholds appropriate?

How should the threshold be monitored and implemented in the context of digital assets with high volatility or where illiquid markets may make it difficult to price tokens?

While establishing a minimum threshold will create clarity, any such threshold could be closely monitored. Regulators and policymakers will need to be certain that the threshold is not distorting the market unnecessarily nor is it creating regulatory arbitrage opportunities. The speculative nature of many tokens and platforms will make this a significant challenge for regulators.

It is also unclear why the proposed thresholds of $1500 per customer and $5m in total are different than the current thresholds for non-cash payment facility which is $1000 per customer and $10m in total. Unless there is a good policy rationale for the difference, we would propose that these thresholds be aligned – for clarity and simplicity sake as well as reducing regulatory arbitrage opportunities.

Questions (Set 4)

Are the financial requirements suitable for the purpose of addressing the cost of orderly winding up? Should NTA be tailored based on the activities performed by the platform provider?

Does the distinction between total NTA needed for custodian and non-custodian make sense in the digital asset context?

Clarity on the NTA requirements is appreciated – particularly making it clear that NTA requirements are not intended to protect investors' capital but rather to ensure that those involved in the winding up are remunerated. There should be an expectation that those providers required to meet NTA requirements do not miscommunicate the purpose of the NTA requirements so that investors wrongly believe that the NTA requirements means their assets are protected in case of a failure of the provider.

Questions (Set 5)

Should a form of the financial advice framework be expanded to digital assets that are not financial products? Is this appropriate? If so, please outline a suggested framework.

It is important that the underlying assets and their economic purpose be the basis on which regulatory perimeter questions are determined. The application of a financial advice framework to non-financial products is problematic. Rather the definition of financial product should be inclusive enough so that a tokenised asset (for example, an in-game currency) be treated as a financial product if, for example the market cap becomes significant, the currency is widely traded outside of the game as well as captured by any payment service provider licensing if the currency is stored in wallets and used for non-gaming purchases.

Questions (Set 6)

Automated systems are common in token marketplaces. Does this approach to pre-agreed and disclosed rules make it possible for the rules to be encoded in software so automated systems can be compliant?

Should there be an ability for discretionary facilities dealing in digital assets to be licensed (using the managed investment scheme framework or similar)?

Automated systems and AI can support compliance and there should continue to be exploration of how the encoding of rules can assist with compliance. However, these are merely tools and should not relieve the promoters or providers of their regulatory responsibilities.

Questions (Set 16)

Is this transitory period appropriate? What should be considered in determining an appropriate transitionary period?

A twelve-month transition period from Royal Assent should provide industry and regulators with the necessary time to implement any new regulatory changes. However, as noted above, the parallel development of the tokens and platforms regime alongside the new payments licensing regime presents an opportunity to align these regimes where possible, including in terms of commencement dates.

We are more than happy to expand further on the items raised in this submission or to provide further information. If you do have any comments or questions, please feel free to contact me at camilla.bullock@emergingpaymentsasia.org or Dr Brad Pragnell at brad.pragnell@34south45north.com.

Kind regards,

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