

28 February 2025

Digital Assets Team
Australian Securities and Investments Commission
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Subject: Response to ASIC Consultation Paper 381 - Updates to INFO 225

Dear Digital Assets Team,

Australian Custodial Services Association Submission for Consultation Paper 381 - Updates to INFO 225: Digital assets: Financial products and services

The Australian Custodial Services Association (ACSA) Digital Asset Working Group welcomes the opportunity to provide feedback on ASIC's proposed updates to Information Sheet 225 (INFO 225). As key stakeholders in the financial services ecosystem, custodians play a vital role in ensuring the safekeeping and administration of digital assets. We support ASIC's initiative to provide greater regulatory clarity on digital assets and offer the following observations and recommendations. Our submission highlights key considerations from a custodial perspective, focusing on areas where further clarification or adjustments would strengthen the regulatory framework.

1. Clarification on Best Practices for Custodians and Depositories

We respectfully request ASIC to clarify the application of best practices to custodians and depositories, particularly regarding the division of responsibilities between custodians and their regulatory clients. Custodians and their regulatory clients (e.g. the manager of an investment vehicle) may have already, contractually, agreed how to allocate certain duties. The implementation of these best practices should align with the specific duties custodians have agreed to carry out, ensuring no misalignment of expectations. Additionally, we seek guidance on whether custodians are expected to offer voluntary compensation arrangements for lost digital assets that go beyond what is required by applicable law. For example, custodian liability provisions are already subject to regulation under RG 133.88-89. Such clarification would help custodians align their operational models with ASIC's expectations without introducing unnecessary risk or ambiguity.

2. Trust Structures for Digital Assets

We note that updated INFO 225 refers specifically to the requirement that scheme assets be held on trust. Given the complexities surrounding digital asset ownership, we request ASIC to consider providing further guidance on the application of trust structures to digital assets. It may be unclear in certain scenarios whether an Australian law trust can be declared over a digital asset. Our understanding is that there are as yet no Australian cases specifically confirming that trusts can be declared over digital assets (although there is case law confirming recognising the validity of trusts over digital assets from other common law jurisdictions). Under RG 133.51 there are some exceptions to the requirement that relevant assets are held on trust. Further clarity on the ASIC's expectations where it may be unclear whether a digital asset is held in Australia (or not) or if (e.g. due to technological features) it is not clear if an Australian law trust could be declared over a digital asset in this area would benefit both custodians and their clients.

3. International Equivalence and Regulatory Alignment

ACSA welcomes ASIC's efforts to align INFO 225 with international regulatory standards. However, we encourage ASIC to confirm whether it would consider exceptions to best practice requirements when firms adhere to equivalent non-Australian regulatory frameworks that do not introduce additional risks. Such flexibility would support global custodians operating under robust international regimes and promote cross-border consistency.

4. Custodial Considerations for Stablecoins and Wrapped Tokens

We support ASIC's proposal to include examples of stablecoins and wrapped tokens in INFO 225 but highlight the need for a nuanced approach. Stablecoins and wrapped tokens often serve as cash alternatives, and custody services typically do not apply to cash assets. Treating these as financial products would necessitate custodial services, which may pose practical and operational challenges.

From a custodial perspective, we ask ASIC to consider the implications of capital and liquidity requirements for stablecoins and wrapped tokens and how these might impact custodial services. Additionally, we suggest ASIC evaluate the feasibility of supporting native wrapped tokens or stablecoins given the technical challenges in establishing direct connections to multiple distributed ledger technologies (DLTs).

5. Licensing and Organisational Competence for Custodians

ACSA supports ASIC's default position that existing Australian Financial Services Licenses (AFSL) should apply to digital assets, as this aligns with the principle of regulatory consistency and IOSCO recommendations. However, we request further clarification on the application of existing custodial standards to digital assets, particularly regarding guidance provided in RG 133. We also seek additional insight into how omnibus accounts would function in the digital asset space. The expectation that custodians segregate private keys for each client may conflict with traditional omnibus structures, requiring further guidance on how to balance these competing considerations.

Given the nascent stage of the digital asset industry, we recognize the potential challenges in applying certain competency requirements outlined in RG 105. Custodial staff may lack extensive formal training on digital assets, and ASIC's guidance should reflect this by allowing practical experience to meet competency standards.

6. Treatment of Derivative Digital Assets

ACSA agrees with ASIC's approach to exclude custodians from holding derivative digital assets, as current custodial services are not structured to support such assets. We support the proposal to segregate licensing requirements for derivative digital assets based on their specific risk profiles, enabling custodians to avoid unnecessary operational burdens related to risk assessment and compliance.

We further recommend that ASIC consider creating a distinct authorisation for digital asset products that function as cash alternatives, such as stablecoins, to ensure appropriate regulatory treatment.

7. Clarification on Incidental Custody in Digital Asset Services

ACSA looks forward to further guidance from ASIC regarding what constitutes incidental custody in the context of digital asset-related services. The current consultation paper does not elaborate on specific circumstances under which holders of digital assets may be deemed to be providing incidental custody.

For example, issuers of traditional non-cash payment facilities typically hold client funds through authorised deposit-taking institutions in accordance with Part 7.8 of the Corporations Act 2001. When a non-cash payment facility (NCP) issuer

provides custody over underlying digital assets, it is unclear under what conditions this custody would be considered incidental. Moreover, in scenarios where the NCP issuer is not directly authorised to offer custodial services, clarity is needed on whether the issuer must appoint a fully licensed custodian to meet regulatory requirements.

While ACSA acknowledges recent changes to RG 133, further guidance on what types of digital asset services may constitute incidental custody would be beneficial. This would assist custodians and service providers in structuring their offerings to ensure compliance while avoiding unnecessary licensing burdens.

8. Transitional Provisions and Implementation

ACSA appreciates ASIC's proposed transitional arrangements but encourages further clarity on how custodians should adapt to potential new licensing requirements. Specifically, we seek guidance on whether custodians will have sufficient time and support to adjust operational models if certain digital assets, such as stablecoins or wrapped tokens, are newly classified as financial products.

Conclusion

ACSA welcomes ASIC's efforts to enhance regulatory clarity in the digital asset space. Custodians are uniquely positioned to provide secure and reliable infrastructure for financial products involving digital assets. We encourage continued dialogue to ensure that the evolving regulatory framework supports innovation while maintaining investor protection and financial market stability. We appreciate the opportunity to provide this feedback and look forward to continued collaboration with ASIC on these important regulatory developments.

Yours sincerely

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About ACSA

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Custodians provide a range of institutional services, with clients typically favouring a bundled approach to custody and investment administration. Solutions may include traditional custody and safekeeping, investment administration, foreign exchange, securities lending, tax and financial reporting, investment analytics (risk, compliance and performance reporting), investment operations middle office outsourcing and ancillary banking services.

These services represent key investment back office functions – often representing the client’s asset book of record and essential source data in relation to the investments they hold.

The key sectors supported by ACSA members include large superannuation funds and investment managers, as well as other domestic and international institutions.

ACSA works with peer associations, regulators and other market participants on a pre-competitive basis to encourage standards, promote consistency, market reform and operating efficiency.

Note: The views expressed in this letter are prepared by ACSA for the purposes of consideration by ASIC in response to Consultation Paper 381 - Updates to INFO 225: Digital assets: Financial products and services and should not be relied upon for any other purpose. The comments in this letter do not comprise financial, legal or taxation advice and should not be regarded as the views of any particular member of ACSA.