

# Financial Services Update

17 October 2023

## Government proposes new regulatory framework for digital asset platforms

### Treasury proposes folding digital asset platforms and digital asset providers into existing financial services regime

On 16 October 2023, Treasury released a Proposal Paper titled 'Regulating Digital Asset Platforms' (**Proposal Paper**).

#### What does the Proposal Paper propose?

In the wake of recent high-profile failures of digital asset platforms, and the consumer losses associated with them, the government is proposing to leverage Australia's financial services laws to regulate digital assets platform providers.

Broadly speaking, Treasury has proposed to require digital asset platforms that hold over a certain threshold of Australians assets (\$1,500 for an individual and \$5 million in aggregate) to obtain an Australian Financial Services Licence.

The proposed framework would recognise certain asset holding arrangements as a financial product (a digital asset facility). The existing AFSL framework would apply to any person 'carrying on a financial services business in Australia' in relation to a digital asset facility.

This would mean that digital asset platform providers would then need to meet all general licence obligations including:

- providing financial services efficiently, honestly and fairly;
- managing conflicts of interest;
- having a dispute resolution system
- meeting solvency and cash reserve requirements
- keeping and submitting financial records
- producing product disclosure statements; and
- monitoring for and disrupting market misconduct.

The Proposal Paper also clarifies that a platform provider must comply with any obligations that apply generally to the provider of a 'financial service' and any obligations that apply generally to a person issuing or dealing in a 'financial product', including:

- the requirements to provide information and assistance to ASIC, including adhering to the [reportable situations regime](#);
- the requirements to notify and remediate account holders affected by reportable situations;
- the requirements to prepare and submit financial records, statements, and audits;
- the prohibition on conflicted remuneration;



- the [design and distribution requirements](#) for retail clients;
- the prohibition on unconscionable conduct;
- the prohibition on [hawking financial products](#); and
- the requirements for providing financial product advice.

## Specific Obligations:

In addition to the above general licence obligations, the Proposal Paper also seeks to impose specific obligations that take into account the nature of the digital platform and the risks associated with the tokens that platform offers.

These additional obligations include:

- **standard form platform contracts:** each digital asset provider will be required to enter into a standard contractual arrangement with users that creates the digital asset facility, together with additional minimum standards for functions paired with the facility as applicable.
- **minimum standards for holding tokens:** this includes a requirement to create a platform entitlement to represent each asset held by the platform.
- **standards for custody software:** custody software must be continuously monitored and routinely audited. Tokens must only be held with the assistance of custody software service providers.
- **standards when transacting in tokens:** token holders will have sole discretion to decide on and provide instruction on transactions in relation to their platform entitlements. Platforms must introduce "listing criteria", which is a document outlining the systems, policies and procedures for making tokens available through the platform. Digital asset platform providers will need to notify ASIC of any suspected market misconduct.

## Additional obligations for certain digital asset activities:

The Proposal Paper also seeks to apply additional obligations to four specific activities involving non-financial products offered by digital asset platforms.

- **Trading** – the exchange of digital asset platform entitlements between account holders.
- **Staking** – the participation in validating transactions on a public network.
- **Tokenisation** – the creation and exchange of entitlements backed by tangible and intangible assets.
- **Fundraising** – the sale of entitlements to fund the development of products and services.

This is done via the concept of 'financialised functions', which seeks to address the ease in which a digital 'asset' which is not a financial product and therefore not typically subject to the financial services laws can be 'financialised'. At a high level, the four financialised functions seek to provide consumer protections that meet the level expected for 'financial' investments.

## Scope of the proposed framework

Also of interest is that Treasury defines a "token holder" as a person in possession (factual control) of a token and to whom the token-linked entitlements accrue

As a result, Treasury considers the regulatory perimeter of the new regime would extend to any businesses with the ability to "exercise, coordinate, or direct 'factual control' over the assets in a real and immediate sense". In practice, this will provide ASIC with the ability to pursue a wider range of digital asset platform providers (such as decentralised exchanges and other DeFi providers more generally).

# What you need to do?

Consultation on the Proposal Paper closes on 1 December 2023, any submissions should be lodged before this date.

Treasury has flagged further consultation on exposure draft legislation in 2024, which will then be followed by a 12 month transitional period once the legislation becomes law.

## Key contacts



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