

# Crypto-assets regulation in global context

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# Regulation of crypto-assets in Australia

- Intermediaries promoting, trading or mining crypto-assets may require one/more of the following licences/ authorisations/ registration

## Category

- Digital currency exchange providers
- Australian financial services licence (AFSL)
- Australian market licence (AML)
- Australian credit licence (ACL)
- Authorised Deposit-taking Institution (ADI)
- Purchased payment facility

## Regulator

- Austrac
- ASIC
- ASIC
- ASIC
- APRA
- RBA/APRA

## Legislation

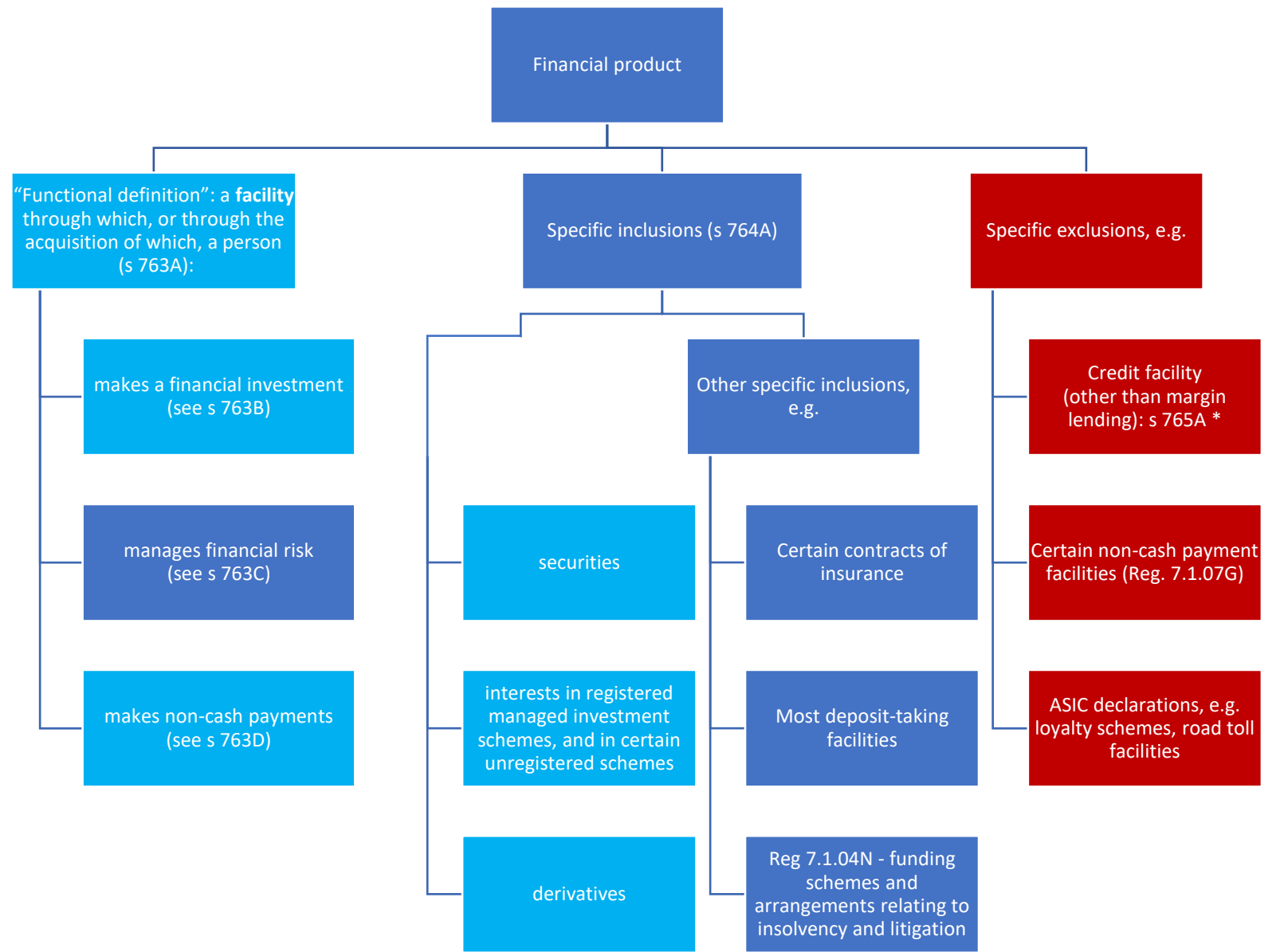
- AML/CFT Act
- Corps Act Ch 7
- Corps Act Ch 7
- NCCP Act
- Banking Act
- Banking Act



# Financial products and crypto-assets (AFSL and AML regimes)

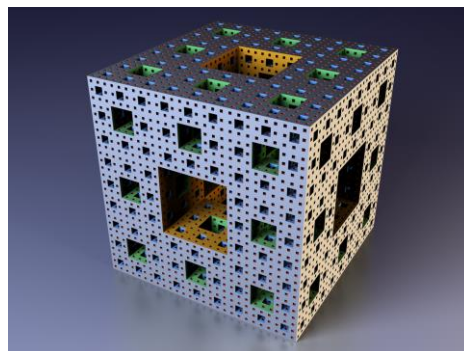
Inclusions often relevant to crypto-assets characterisation questions

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\* DDO obligations including target market determination may apply: see CA s. 994AA(1)(b) and ASIC Act s 12BAA(7)(k), ASIC Reg. 2B

# Exclusions and exemptions (AFSL regime)



- Each financial service is subject to multiple exclusions and exemptions, deriving from the Act, Regs and ASIC Instruments.
- The table at right illustrates those applicable to a **single** financial service, i.e. financial product advice
- Each financial service has a similar structure of exemptions and exclusions
- ASIC has also published extensive regulatory guidance on the various financial services, e.g. RG 36 Licensing: Financial product advice and dealing

Figure 11.2: Summary overview of advice-related exclusions and exemptions

Sources of exemptions/exclusions	Examples of advice-related exclusions/exemptions
<p>I am providing <b>financial product advice</b></p> <p>Unless... Excluded by s 766B</p>	<ul style="list-style-type: none"> <li>• Exempt documents</li> <li>• Advice by lawyers, registered tax or BAS agents</li> <li>• Info about costs/rate of return</li> <li>• Advice as part of claims handling and settling service</li> </ul>
<p>I am providing a <b>financial service</b></p> <p>Unless... Excluded by regulations made under s 766A(2)</p>	<ul style="list-style-type: none"> <li>• Necessary advice in course of exempt service (eg tax advice)</li> <li>• Advice re: voting rights for securities or interests in MIS</li> <li>• General advice re: school banking product</li> <li>• Advice re: allocation of funds for investment among different products</li> </ul>
<p>I must hold an <b>AFS licence</b> to carry on my business</p> <p>Unless... Exempted by s 911A(2)(a)–(j)</p> <p>Exempted by regs made under s 911A(2)(k)</p> <p>Exempted by ASIC instrument made under ss 911A(2)(l), 926A</p>	<ul style="list-style-type: none"> <li>• General advice in newspaper etc whose sole purpose is not financial product advice</li> <li>• General advice re: offer under employee share/incentive scheme</li> <li>• Advice re: medical indemnity insurance</li> <li>• Advice by money management service provider re: basic deposit product</li> <li>• Advice by financial counselling agencies in certain circumstances</li> <li>• Advice re: mortgage offset account</li> <li>• Advice by an 'eligible company' re: issue of member shares</li> </ul>
<p>I must comply with <b>AFS licensee obligations</b></p> <p>Unless... Exempted under the Act</p> <p>Exempted by regs made under ss 926B, 941C(8), 951C, 992C</p> <p>Exempted by ASIC instrument made under ss 926A, 951B, 992B</p>	<ul style="list-style-type: none"> <li>• Advice in a retirement estimate statement that meets certain conditions (exemption from Pt 7.7 Divs 2, 3, 4)</li> <li>• Advice provided through financial calculator (exemption from Pt 7.7 Divs 2, 3, 4)</li> <li>• Small investment advice (exemption from obligation to provide SoA)</li> <li>• General advice in the form of advertising if conditions are met (exemption from obligation to provide FSG; general advice warning)</li> <li>• General insurance product advice (exception from requirement to prove steps in s 961B(2)(d)–(g))</li> </ul>

■ Exemption under the Corporations Act    
■ Authority for exemption by Corporations Regulations    
■ Authority for exemption by ASIC legislative instrument

# ASIC crypto regulatory guidance

- Submission to Senate inquiry into digital currency, 2014
  - “ASIC considers that it is unlikely that a digital currency is a facility through which a person makes non-cash payments. It follows that digital currencies are themselves not financial products.”
- INFO 219 [Evaluating distributed ledger technology](#)
- INFO 225 [Crypto-assets](#)
- INFO 230 [Exchange traded products: Admission guidelines](#)
  - Including guidance for licensed exchanges on crypto assets underlying ETPs
- Submissions to Senate inquiry, 2021
  - “ASIC makes it clear in INFO 225 that whether a crypto-asset is within or outside the financial regulatory framework **depends on particular characteristics** of the crypto-asset offering. This can cause **uncertainty** for investors and consumers as well as issuers and distributors of these assets. It is a **policy matter for the Australian Government** whether or not there should be clarity on this issue.”
- Speeches ...
  - “These products can have many of the same features of traditional bank deposits, but without (at the moment) the same consumer protections. We are keen to work with the Government and our peer agencies to make sure we have a **fit-for-purpose framework** for the future.” – Wayne Byers, 7 April 2022
  - “Emerging technologies and products, including the expansion of crypto assets and the increasing use of artificial intelligence in the financial services sector, present **entirely new terrain** to be navigated by legislators and regulators.” – Joe Longo, 4 June 2022
  - “It’s not my job to be a **crypto cheerleader**; my job is to protect consumers and administer the law” – Joe Longo, 23 Aug 2022



# INFO 225 Crypto-assets

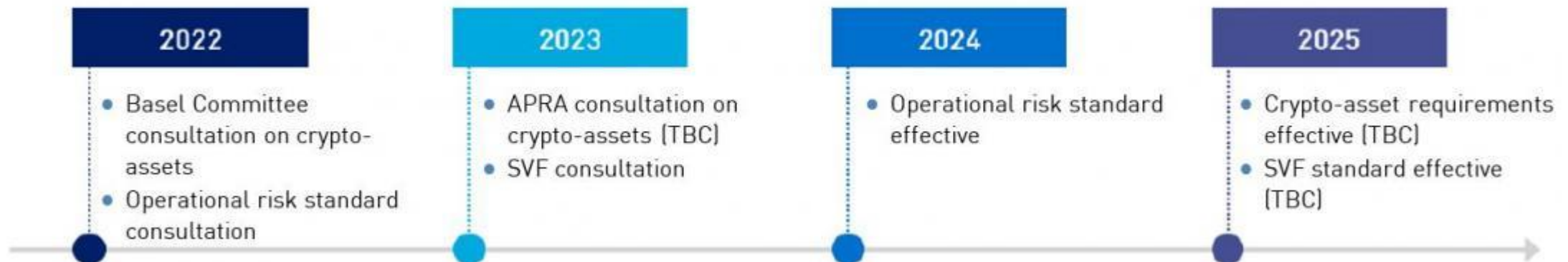
		More info...
Issuers	If you are issuing crypto-assets that fall within the definition of a 'financial product', Australian laws apply, including the requirement to hold an Australian financial services (AFS) licence	RG 1
Crypto-asset intermediaries	If you are <b>giving advice, dealing, providing insurance, or providing other intermediary services for crypto-assets that are financial products</b> a range of Australian laws apply, including the requirement to hold an AFS licence	RG 36
Miners and transaction processors	Where miners and transaction processors are part of the clearing and settlement (CS) process <b>for tokens that are financial products</b> , Australian laws apply	RG 211
Crypto-asset exchange and trading platforms	If you are operating a market for <b>crypto-assets that are financial products</b> , a range of Australian laws apply, including the requirement to hold an Australian market licence	RG 172
Crypto-asset investment products	If you are operating an investment product that offers investors exposure to crypto-assets, a range of Australian laws may apply. <b>[Discussion limited to inclusion as a financial product due to the product being a security, a derivative, an interest in a managed investment scheme, or a non-cash payment facility.]</b>	
Crypto-asset payment and merchant service providers	If the payment service involves a ' <b>non-cash payment facility</b> ' a range of Australian laws apply, including the requirement to hold an AFS licence	RG 185
Wallet providers and custody service providers	If tokens stored by your business fall within the definition of a ' <b>financial product</b> ', you need to ensure you hold the appropriate custodial and depository authorisations	RG 1

INFO 225 also sets out how prohibitions against misleading or deceptive conduct apply to all ICOs and business involved with crypto-assets, regardless of whether they are financial products or not; and **crypto-assets custody "good practices"** for responsible entities of managed investment schemes

[INFO 225 Crypto-assets | ASIC](#)

# APRA developments

- APRA letter on crypto-assets (21 April 2022). APRA expects that all regulated entities will (inter alia):
  - **Conduct appropriate due diligence and a comprehensive risk assessment** before engaging in activities associated with crypto-assets, and ensure that they understand, and have actions in place to mitigate, any risks that they may be taking on in doing so
  - Apply **robust risk management controls**, with clear accountabilities and relevant reporting to the Board on the key risks associated with new ventures. A high-level summary of the potential prudential risks to be considered for specific activities is provided in Annex A to the letter.
- Annex A prudential risks:
  - Broken out by service type (investments, lending, issuance, services, partnering) ...
  - ... and by risk type (capital, investment, operational, other)
- Policymaking timetable on bank exposures to cryptoassets, by 2025.



# ASIC v crypto... and Parts 7.8A, 7.9A get a workout

Monday 17 October 2022



## 22-278MR ASIC places interim stop orders on Holon crypto funds

ASIC has made interim stop orders preventing Holon Investments Australia Limited (Holon) from offering or distributing three funds to retail investors because of non-compliant target market determinations (TMDs). These funds are:

- Holon Bitcoin Fund ARSN 659 090 294
- Holon Ethereum Fund ARSN 659 090 516, and
- Holon Filecoin Fund ARSN 659 090 614 (together, the Funds).

Thursday 15 December 2022



## 22-359MR Finder Wallet sued for alleged unlicensed conduct and inadequate risk disclosure over Finder Earn product

ASIC has commenced civil penalty proceedings in the Federal Court against Finder Wallet Pty Ltd, a subsidiary of comparison website Finder.com, for allegedly providing unlicensed financial services, breaching product disclosure requirements and failing to comply with design and distribution obligations (DDO) in relation to its crypto-asset related product Finder Earn.

Wednesday 23 November 2022



## 22-324MR ASIC sues Block Earner for unlicensed conduct over crypto-asset based products

ASIC has commenced civil penalty proceedings in the Federal Court against fintech company Block Earner alleging it provided unlicensed financial services in relation to its crypto-asset based products and that it operated an unregistered managed investment scheme.

Block Earner offered a range of fixed-yield earning products based on crypto-assets under the names USD Earner, Gold Earner and Crypto Earner (collectively, the **Earner Products**).

- **MIS**
- **Investment Facility**
- **Derivative**

- **Debenture**



# Global regulatory standard-setters

## Financial Stability Board

- Statement on International Regulation and Supervision of Crypto-Asset Activities, Jul 2022
- Global stablecoins: Oct 2022 consultation report; final recommendations expected mid-2023
- Unbacked crypto-assets: Oct 2022 consultation report; final recommendations expected mid-2023
- Monitoring and possible additional policy work on Decentralised Finance (**DeFi**) in 2023

## Basel Committee for Banking Supervision

- Prudential treatment of cryptoasset exposures: final standards released end-2022

## International Organization of Securities Commissions / Committee on Payments and Market Infrastructures

- CPMI and IOSCO final guidance on application of principles for financial market infrastructures to systemic stablecoins that transfer stablecoins, Jul 2022
- IOSCO report on DeFi, Mar 2022
- Crypto and Digital Assets (CADWG) and DeFi Workstreams set up by IOSCO Fintech Task Force, July 2022.
- Public reports expected from both workstreams in end-2023, in the case of CADWG with policy recommendations

## Organisation for Economic Cooperation and Development

- OECD reports on DeFi importance and policy implications, Jan 2022; on Crypto and DeFi - TradFi interconnectedness, May 2022; on CeFi vs DeFi, Dec 2022
- Ongoing work on DeFi

## Financial Action Task Force

- Updated FATF Guidance for a Risk-Based Approach to Virtual Assets and VA Service Providers Oct 2021

## Other bodies

NIST

NIST IR 8408

ISO

ISO 20022

ISO 22739

Ethereum Foundation

ERC-20 tokens

ERC-721 NFTs

ERC-1155 F&NFTs

# Some international regulatory moves

- EU Markets in Cryptoassets (MiCA) Regulation
  - Comprehensive regime for non-securities crypto-assets, stablecoins, asset-referenced tokens
  - Based largely on MiFID securities law with adaptations
  - MiCA will likely take effect no earlier than Q3 2024
- UK – phased approach
  - AML 2020
  - Financial promotions perimeter being extended to cover crypto, AML-registered crypto firms will now be allowed to authorise crypto promotions (previously only FCA-licensed investment firms)
  - Phase 1 GBP stablecoins and Phase 2 other crypto-assets – HMT consultation closes end-April
    - Potentially scoping in other crypto-assets in multiple stages
- US position
  - Executive Order March 2022
  - Congressional consideration of stablecoins and crypto collapses – active but no consensus has emerged as yet
- Singapore/Hong Kong – moving to land/upgrade crypto-assets and stablecoins regulatory schemes in 2023-24, divergent approaches.
  - Singapore Payment Services Act 2019 included digital payment tokens in PSA 2019; guidelines issued in Jan 2022; restrictions on public advertising.
  - Hong Kong recently leaning to a more liberal approach
- Dubai - separate regimes for securities tokens (DFSA) and for non-securities virtual assets (VARA);
- Japan/South Korea – focus on crypto-exchanges and stablecoins regulation
- China – most activities illegal; Chainalysis research suggests market is still very active
  - “Our data suggests that the ban has either been ineffective or loosely enforced.”

# Some common themes in existing or proposed regulation

- Client assets segregation and custody
- Disclosure to clients / content of white papers
- Stablecoins – asset reserves valuation and custody, redemption at par
- Restriction of access or promotion to retail
- Governance, human intervention and senior management requirements
  - Compatibility with DAO structures?
- Conflicts of interest and complex, multi-function groups (eg FTX)
- Risk management including cyber risk, insider risk, 3rd party op. risk
- Accounting for crypto-assets including in custody
- Local presence or legal entity requirements

# Australian proposals

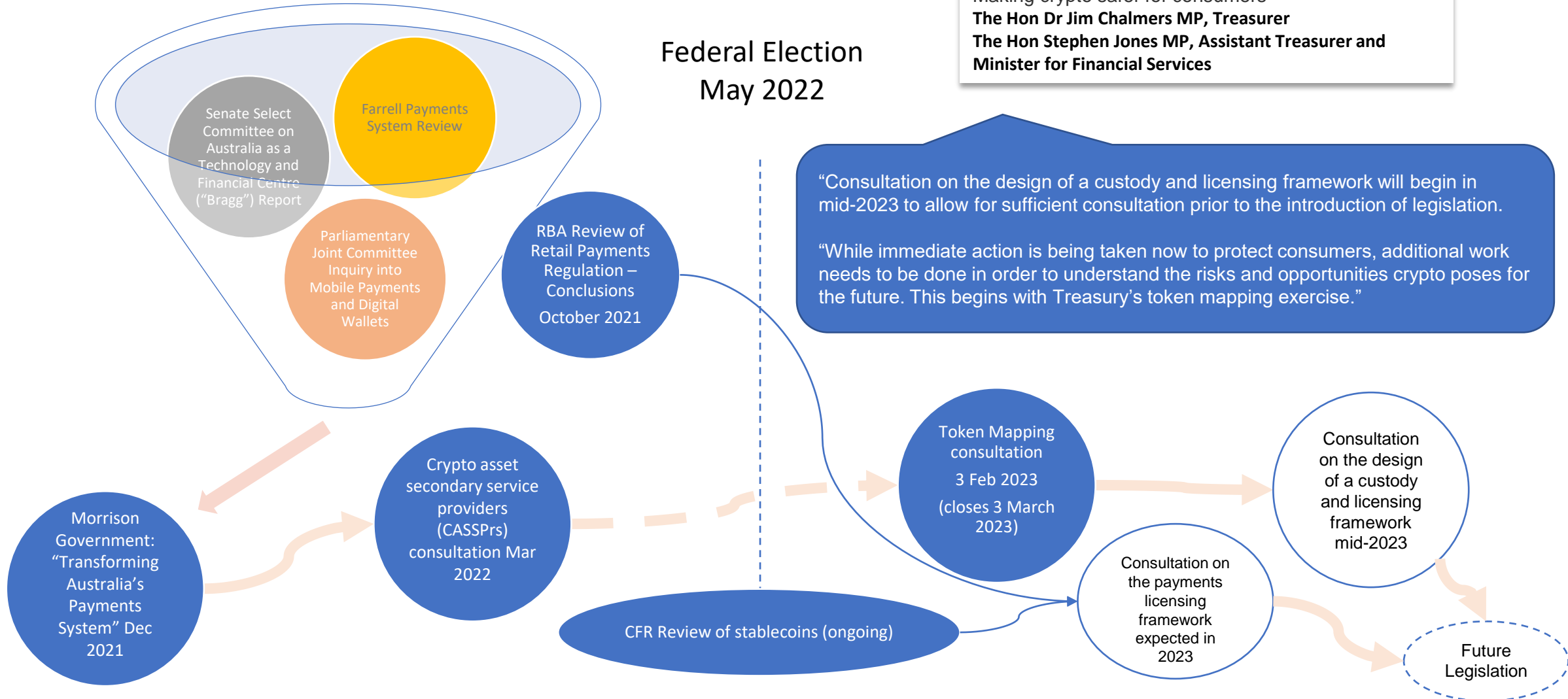
Federal Election  
May 2022

3 February 2023

Making crypto safer for consumers

**The Hon Dr Jim Chalmers MP, Treasurer**

**The Hon Stephen Jones MP, Assistant Treasurer and  
Minister for Financial Services**



# Treasury Token Mapping consultation paper Feb 2023

- Technology neutrality
- Functional approach to regulation
- Emphasis on the functional limb of the financial products definition, and goes broader than INFO 225



- No exhaustive taxonomy proposed.
- Separate chapters on intermediated crypto assets and public token systems, including DeFi
- “While smart contracts are often touted for the removal of counterparty risk, this may be replaced by or aggravate a user’s exposure to: (a) technology risks (e.g. a ‘bug’ in smart contract code) (b) model risks (e.g. an unsound economic mechanism) (c) compliance risks (e.g. blacklisting by smart contract applications) (d) unknown risks (due to the experimental nature of these systems).”
- “The following questions aim to commence the process of understanding what a financial regulatory framework might look like in a future where these unique elements of the crypto ecosystem continue to grow and develop.”
- Consultation closes 3 March 2023, 28 days after opening; short by international standards.