AUSTRALIA REMAINS IN REGULATORY PURGATORY **AFTER A DECADE OF CRYPTO POLICY DISCUSSION**

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Australia's regulatory approach to cryptocurrency and digital asset exchanges has been characterized by a series of parliamentary inquiries and conflicting consultations, culminating in legislative inaction and regulatory uncertainty. The lack of a clear legislative framework has forced the Australian Securities and Investments Commission ("ASIC") to adopt a reactive "regulation by enforcement" posture, shifting from its initial focus on providing guidance to actively pursuing enforcement actions against digital asset businesses. Recent enforcement actions in 2024, including cases against prominent cryptocurrency exchanges and wallet providers, highlight the challenges faced by both regulators and businesses. We argue that continuing down the path of "regulation by enforcement" will lead to further uncertainty, stifle innovation, and continue to hinder the Australian digital assets sector.

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01
INTRODUCTION

An estimated 4.5 million Australians have owned digital assets.[2] This widespread adoption of digital assets has emerged despite a decade of regulatory uncertainty. Australia has a strong international reputation as a business-friendly jurisdiction with strong public institutions, a stance towards free trade and open markets, a sophisticated financial system generally welcoming of foreign capital, a highly skilled labour force, and a consumer base that tend to be early adopters of new technologies. These characteristics create a business landscape that is generally viewed as safe, dynamic, and conducive to innovation. However, Australia's reputation is being seriously compromised when it comes to digital assets and cryptocurrency businesses. To mark this ominous anniversary, this article charts the history of regulatory guidance, parliamentary inquiries, competing consultations, and failed legislative efforts.

The absence of comprehensive legislation for digital assets has led Australia's corporate regulator – the Australian Securities and Investments Commission ("ASIC") – to move its posture from light-touch guidance to a reactive "regulation by enforcement" approach, offering a brief explanation of the key enforcement actions taken by ASIC in 2024. Finally, the article argues that rather than continue down the regulation by enforcement pathway, a minimum viable legislative reform package is needed to foster a transparent and predictable environment for cryptocurrency and digital asset innovation and investment in Australia.

02
A SHORT HISTORY OF SENATE INQUIRIES, COMPETING FEDERAL GOVERNMENTS AND CONFLICTING TREASURY PROPOSALS

Regulating a sector as dynamic and rapidly evolving as the digital economy is inherently difficult. Policymakers are confronted with a classic pacing problem. As emerging technologies and business models continuously accelerate, policymakers find themselves racing to adapt or apply legislative and regulatory frameworks. The novelty of cryptocurrencies and digital assets challenges existing financial regulation frameworks that were built largely around an industrial economy.

Regulatory frameworks can provide legal certainty to new businesses, provide common standards for operating, and provide other regulated entities (e.g. banks, insurers) with the conference to transact with these new businesses. But there is a balancing act required to ensure consumer protection and stability in financial markets while encouraging innovation, consumer choice and economic flourishing. Regulators cannot know the path of a new technology. If the regulator applies its hand too hard, regulatory costs will drive activity offshore and rob Australian consumers of the benefits of innovation. If the regulator applies its hand too early, nascent businesses will strongly influence the regulatory frameworks, potentially placing barriers to future competition and innovation.

It is wrong to say that cryptocurrency and digital assets were ever "unregulated". A range of statutes apply to businesses regardless of industry such as the Australian Consumer Law (which includes prohibitions on misleading and deceptive conduct, unconscionable conduct, and unfair contract terms, and imposes a range of consumer guarantees for goods and services). Other statutes have been updated to impose general obligations on new businesses, such as the 2017 changes to anti-money laundering and counter-terror financing laws that extended to digital asset exchange businesses.[3]

What is unclear is the extent to which financial services regulations apply to cryptocurrency and digital asset businesses. Do businesses offering cryptocurrency and digital asset services require a license to operate (and comply with the obligations that go with it)? On this question, Australia has a long legislative and regulatory history. We summarise some of these initiatives in the table below, before exploring how these different attempts relate to each other.

2 Australian Crypto Survey 2024: Gen Z Leads the Way, SWYFTX BLOG (August 2024) https://swyftx.com/blog/australian-crypto-survey-2024/.

3 *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act* 2017 (Cth).

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Table 1: Selected Digital Asset Regulatory and Legislative Moves in Australia 2014-2024

Year	Selected Regulatory Changes, Proposals, Actions
2014	• Senate Economics References Committee Digital Currency Inquiry (Dastyari)
2015	• Senate Economics References Committee Report "Digital Currency—Game Changer or Bit Player?"
2017	• Parliament passes AML/CTF Amendment Act requiring digital currency exchanges to register with AUSTRAC • ASIC releases initial INFO 225 guidance on ICOs and crypto-assets
2019	• Senate Select Committee on Financial Technology and Regulatory Technology Inquiry (Bragg) • ASIC updates INFO 225
2021	• Senate Select Committee inquiry renamed to Australia as a Technology and Financial Centre • ASIC updates INFO 225 • Senate Select Committee Final Report recommends bespoke licensing regime • Morrison government agrees to create new licensing regime
2022	• Treasury (under Morrison government) releases consultation paper proposing CASSPrs licensing framework • Federal election • Albanese government does not proceed with CASSPrs framework • Albanese government announces Token Mapping Exercise
2023	• Senator Bragg introduces Digital Assets (Market Regulation) Bill (not passed) • Treasury releases Token Mapping Consultation Paper • Treasury releases second consultation paper proposing to regulate digital assets as a financial product requiring an Australian Financial Services License
2024	• Expected Treasury legislation does not materialise • ASIC releases consultation on proposed changes to guidance INFO 225

Our timeline begins in 2014 when the Australian Senate's Economics References Committee commenced its inquiry into digital currency – chaired by Australian Labor Party Senator Sam Dastyari. At this point in time ASIC's position was summarised by the Committee as follows:

> … digital currencies themselves do not fall within the legal definition of 'financial product' under the Corporations Act 2001 (Corporations Act) or the Australian Securities and Investments Commission Act 2001 (ASIC Act). This means that 'a person is not providing financial services when they operate a digital currency trading platform, provide advice on digital currencies or arrange for others to buy and sell digital currencies'. However, some facilitates (sic) associated with digital currencies may fit within the definition as financial products.[4]

In 2014, the Committee ultimately recommended a wait-and-see approach and a self-regulatory model led by the peak Australian industry association:

> The committee recommends that the Australian government consider establishing a Digital Economy Taskforce to gather further information on the uses, opportunities and risks associated with digital currencies. This will enable regulators, such as the Reserve Bank of Australia and ASIC, to monitor and determine if and when it may be appropriate to regulate certain digital currency businesses. In the meantime, the committee supports ADCCA's continued development of a self-regulation model, in consultation with government agencies.[5]

The next major development occurred in 2017, where cryptocurrency and digital assets were booming thanks to Initial Coin Offerings ("ICOs"). In response, ASIC issued guidance Information Sheet 225: Initial coin offerings and crypto-assets (INFO 225), since updated in March 2019 and October 2021, and a further update planned in 2025.[6] In its initial iteration, ASIC took the approach that existing financial services laws would apply to cryptocurrency and digital asset businesses if it fell within the meanings of existing regula-

4 Senate Economics References Committee, Parliament of Australia, *Digital Currency—Game Changer or Bit Player*? 10 (2015).

5 *Id.*

6 Australian Securities & Investments Commission, *Consultation Paper 381: Updates to INFO 225—Digital Assets: Financial Products and Services* (2023), https://asic.gov.au/regulatory-resources/find-a-document/consultations/cp-381-updates-to-info-225-digital-assets-financial-products-and-services/.

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tory categories. For instance, if it looked like a managed investment scheme, it would be regulated like a managed investment scheme. If it looked like a derivative, it would be regulated like a derivative. And so on.

This seemed like a sensible starting point – apply the existing law as it stood. But over time the industry perceived that many cryptocurrency projects and digital asset applications were likely to be treated as managed investment schemes (requiring financial services licenses and extensive regulatory obligations). This treatment was often a category error because there was no central manager. Other business models such as cryptocurrency exchanges and decentralised autonomous organisations, as well as activities such as staking, did not have traditional parallels under existing corporate and financial services laws. These challenges were the subject of the next round of senate inquiries.

In 2019, the Australian Senate again considered cryptocurrency and digital assets in the context of a broader inquiry into Financial Technology and Regulatory Technology.[7] This inquiry was chaired by Liberal Party Senator Andrew Bragg.

In 2021, the Senate inquiry was amended to look specifically at "opportunities and risks in the digital asset and cryptocurrency sector" (in addition to other matters) and renamed the Select Committee on Australia as a Technology and Financial Centre. In the Committee's final report, 9 of the 12 recommendations related to cryptocurrency and digital assets.[8] This included recommending a bespoke regulatory regime for regulatory certainty:

The committee recommends that the Australian Government establish a market licensing regime for Digital Currency Exchanges, including capital adequacy, auditing and responsible person tests under the Treasury portfolio.[9]

The Australian Treasurer Josh Frydenberg, on behalf of the Morrison Liberal National government (a centre-right coalition) agreed in principle with this recommendation.[10]

In March 2022, the Australian Treasury released a consultation paper "Crypto asset secondary service providers: Licensing and custody requirements" which identified the regulatory challenges in the following terms:

> The current definition of a financial product, which was written prior to the invention and proliferation of crypto assets, does not provide sufficient clarity as to the intended regulatory treatment of a wide variety of novel crypto assets. Industry has reported difficulty in determining whether the financial products and services regime or the consumer law regime applies to their products.
> …
> Crypto assets can be programmed to provide a large variety of different rights and features and have a significant number of expanding and novel use cases. This makes classification complex and uncertain – especially when consumers, industry and regulators are attempting to identify whether it should be treated as a financial product.[11]

Treasury proposed a bespoke licensing framework for Crypto Asset Secondary Service Providers ("CASSPrs"), separate from the existing financial services regime. In its consultation paper, Treasury expressly disclaimed the call to regulate all cryptocurrency and digital assets as financial products because "...the principles for regulating crypto assets are not identical to those behind financial product regulation and should not be treated as such."[12] Further, the decentralised and programmatic features of blockchain-enabled digital assets meant that Treasury considered "key market failures intrinsic to financial products are not necessarily intrinsic to crypto assets."[13] Accordingly, secondary service providers would be regulated for exchange, trading and custody provision services – but the underlying tokens would not be specifically regulated. Further, the proposal maintained a clear distinction between centralised crypto asset businesses and decentralised platforms and protocols.

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7 Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, *Inquiry into Financial Technology and Regulatory Technology*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology/FinancialRegulatoryTech.

8 Select Committee on Australia as a Technology and Financial Centre, Parliament of Australia, *Final Report* (Oct. 2021).

9 *Id.*, Recommendation 1.

10 Australian Government, *Australian Government Response to the Review of the Australian Payments System and The Senate Select Committee on Australia as a Technology and Financial Centre: Final report and the Parliamentary Joint Committee Corporations and Financial Services report: Mobile Payment and Digital Wallet Financial Services* (Dec. 2021), 16.

11 Australian Treasury, *Crypto Asset Secondary Service Providers: Licensing and Custody Requirements* (Mar. 2022), 7-8.

12 *Id.*, 12.

13 *Id.*, 13.

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In 2019, the Australian Senate again considered cryptocurrency and digital assets in the context of a broader inquiry into Financial Technology and Regulatory Technology"

In May 2022, the Federal election resulted in a change of government after the Australian Labor Party (centre-left) won a majority of seats in the House of Representatives. In contrast to clear momentum from the Liberal National government, the Labor Party Opposition did not take a clear position on cryptocurrency and digital assets reform to the election. However, in coming to government, Labor shelved the CASSPrs proposal and legislation was not introduced into Parliament. New Treasurer Jim Chalmers and his Assistant Ministers Stephen Jones and Andrew Leigh accused the previous government of acting too "prematurely" and instead announced that the Treasury would undertake a new "token mapping" exercise.[14]

The purpose of token mapping was "identifying the key activities and functions of products in the crypto ecosystem and mapping them against existing regulatory frameworks"[15] It was a clever play by the Albanese Labor government. The token mapping was a recommendation of the Liberal Party led 2021 Senate inquiry[16] – meaning that the new Liberal Opposition could hardly complain about it being undertaken. The practical effect, though, was to stall any legislative reform until the Albanese Labor government had formulated an alternative policy position. Announced in August 2022, the token mapping consultation did not actually commence until February 2023.

The token mapping report flagged that "the Government will release a consultation paper proposing a licensing and custody framework for crypto asset service providers in mid-2023."[17]

In the meantime, Senator Bragg introduced legislation in the form of a private members bill which sought to implement "a licensing regime for digital assets, and for reporting requirements in relation to the reporting of the circulation of central bank digital currencies."[18] The bill was broadly aligned with the CASSPrs proposal in that it proposed a bespoke regulatory framework for cryptocurrency and digital assets – focused on service providers rather than assets. The Senate referred the bill to the now Labor-controlled Senate Economics Legislation Committee (committee) for inquiry, and ultimately recommended that the bill not be passed, reasoning that the government had its own bill forthcoming.[19] That bill still remains to be seen.

The Treasury did issue a second consultation paper in October 2023.[20] It reflected a significant change from its earlier position – proposing to regulate cryptocurrency and digital assets in the same way as other financial products by introducing a new type of financial product to be known as a "digital asset facility." This would require all secondary service providers and the issuers of digital assets to hold the appropriate Australian Financial Services License – a markedly heavier regulatory burden than the previously proposed bespoke regime. Setting aside the conflict with Treasury's earlier report, there is merit in leveraging the existing AFSL framework. ASIC already understands and has processes in place for implementing and monitoring this framework. Legal and other business advisors already understand this framework. Making everything a financial product means that there are no twin systems – that is, a crypto assets framework for some businesses and products and an AFSL framework for others. The consultation process concluded in December 2023. Legislation was anticipated in 2024 but has not eventuated.

Australia's decade-long effort to regulate cryptocurrency and digital assets highlights the difficulty of massaging new technologies into industrial-era frameworks. But competing governments and conflicting proposals have kept Australia in a regulatory purgatory, while other jurisdictions in the APAC region – notably Singapore and Hong Kong – have managed to enact clear licensing regimes.

14 Stephen Jones MP, Assistant Treasurer & Minister for Financial Services, *Work Underway on Crypto Asset Reforms* (Media Release, Aug. 22, 2022), https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/work-underway-crypto-asset-reforms.

15 Australian Treasury, *Token Mapping Consultation Paper* (Feb. 2023), 7 https://treasury.gov.au/consultation/c2023-348145.

16 Select Committee on Australia as a Technology and Financial Centre, Parliament of Australia, *Final Report* (Oct. 2021), Recommendation 3.

17 Australian Treasury, *Token Mapping Consultation Paper* (Feb. 2023), 9.

18 Explanatory Memorandum, *Digital Assets (Market Regulation) Bill* 2023, 6.

19 Senate Economics Legislation Committee, Parliament of Australia, *Digital Assets (Market Regulation) Bill 2023 Report* (Sept. 2023), 42-43, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/DigitalAssetsBill2023/Report.

20 Australian Treasury, *Regulating Digital Asset Platforms* (Oct. 2023), https://treasury.gov.au/consultation/c2023-427004.

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03 A CHANGE IN REGULATORY POSTURE

The lack of progress towards a regulatory framework for cryptocurrency and digital assets has left ASIC in a bind. While it is understandably hesitant to engage in policymaking without clear legislative direction, it also cannot permit firms to operate in potential breach of the law. This tension has forced ASIC to change its regulatory posture from one issuing guidance to a "regulation by enforcement" approach. This change has been explicit – with ASIC Chair Joe Longo stating that after already providing guidance part of ASIC's regulatory strategy was to test the regulatory perimeter.[21] Under this approach, businesses only learn that a particular practice requires a license or must comply with particular corporate regulations once ASIC commences enforcement proceedings and the Courts make rulings.

Regulation by enforcement changes who gets to draw the regulatory perimeter – the Parliament has not acted so the regulator brings the question to the courts. As Commissioner Alan Kirkland has stated to an industry event:

We are not afraid to pursue cases where the law might be considered unclear. In our legislative and judicial system, the courts are the ultimate arbiter of these matters. This approach applies to all sectors under our regulatory remit – and is no different for crypto.[22]

We are not afraid to pursue cases where the law might be considered unclear"

So while 2024 did not see legislative developments, this did not mean a quiet year for the cryptocurrency and digital asset industry. Over the last year, four significant enforcement actions were concluded in the Federal Court of Australia:

1. In February 2024, the Court *in ASIC v Web3 Ventures (Block Earner)* considered two products offered by digital currency exchange Block Earner.[23] The 'Earn' product allowed users to lend cryptocurrency to Block Earner in return for fixed interest payments. The 'Access' product provided users with access to decentralised finance ecosystems. ASIC successfully argued that the Earn product was a managed investment scheme and a financial investment (although the Court rejected a further alternative ground that the product was a derivative) meaning that the exchange had contravened the Corporations Act by providing this product to consumers without the appropriate license. ASIC were unsuccessful on the Access product, casting serious doubt on the existing regulatory framework's reach into decentralised systems. In a separate judgement, the Court relieved Block Earner from having to pay a financial penalty for its breach of the law – noting amongst other factors that there was legal uncertainty, the company had obtained legal advice and had acted honestly and reasonably.[24] This shows that the Court's discretion to provide relief can act as a safety valve against uncertain regulatory frameworks. ASIC has appealed.[25]

2. In March 2024, the Court in *ASIC v Finder Wallet* dismissed proceedings finding that the 'Finder Earn' product was not a debenture (requiring an Australian Financial Services License). Finder Wallet's customers could use Australian dollars held in their account to purchase Finder's cryptocurrency, TrueAUD, and transfer it to Finder Wallet to earn an agreed interest rate for a certain term. The earnings were converted back to Australian dollars before transferred to the customer. The Court held that this arrangement was not a debenture for a number of reasons including that there was a deposit or loan of personal

21 Bits of Blocks, "ASIC Doubles Down on Crypto Strategy" (Apr. 25, 2024), https://www.bitsofblocks.io/post/asic-doubles-down-on-crypto-strategy.

22 Australian Securities & Investments Commission, "Crypto and Digital Assets – Policy, Regulation, and Innovation" (Speech, Mar. 20, 2024), https://asic.gov.au/about-asic/news-centre/speeches/crypto-and-digital-assets-policy-regulation-and-innovation/.

23 *ASIC v Web3 Ventures Pty Ltd* [2024] FCA 64.

24 *ASIC v Web3 Ventures Pty Ltd (Penalty)* [2024] FCA 64.

25 Australian Securities & Investments Commission, "24-128MR: ASIC Appeals Court's Decision to Relieve Block Earner from Liability to Pay a Penalty" (Media Release, June 18, 2024), https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-128mr-asic-appeals-court-s-decision-to-relieve-block-earner-from-liability-to-pay-a-penalty/.

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property (i.e. the cryptocurrency) not rather than "money". ASIC has appealed the decision.[26]

3. In May 2024, the Court in *ASIC v BPS Financial Pty Ltd* considered the 'Qoin' facility which was a system for making and receiving non-cash payments between customers and merchants, using the Qoin wallet.[27] Non-cash payment facilities are regulated as financial products and require an Australian Financial Services License. The Court held that the Qoin wallet was a financial product. Contrary to ASIC's submissions, the Court did not find that other elements of the Qoin facility – including the decentralised Qoin blockchain and smart contracts – were not part of the regulated financial product. ASIC again had its regulatory perimeter curtailed.

4. In August 2024 the Court in *ASIC v Bit Trade Pty Ltd (Kraken)* found that the Kraken digital currency exchange failed to comply with design and distribution obligations (relatively new financial regulations introduced in 2021) when offering a margin trading product to Australian customers.[28] The Court found regulatory breaches where margin trades were repaid using national currencies but not – as ASIC had also contended – where debts were settled using cryptocurrencies. In a separate decision, Kraken was ordered to pay a civil penalty of $8 million (more than the $4 million Kraken submitted but much lower than the $20 million ASIC was pressing for).[29]

In these actions, ASIC has tested various parts of the financial services regime, and the results have not gone one way. The cases show that even where ASIC was successful it still overestimated the extent of its regulatory domain. The Federal Court appears to be consistently dismissing those parts of the claim that relate to decentralised cryptocurrencies and decentralised finance. That the Court did not accept all over ASIC findings underscores the fact that there is regulatory uncertainty. Taking these enforcement actions to test the boundary of the law is placing the cost of that discovery on Australian businesses in the form of legal fees and the threat of civil penalties. ASIC is not at fault for trying to fill the regulatory void, but continuing down this "regulation by enforcement" path will lead to further uncertainty (as each legal case is fought on its own facts, so a result in one case will not necessarily translate to the next) and stifle innovation – robbing consumers of these benefits.

04

WHAT'S NEXT?

Australia's protracted struggle to devise a clear regulatory framework for cryptocurrency and digital assets betrays a deeper institutional inertia — if the parliament and the treasury can not regulate the low hanging fruit of centralised digital currency exchanges and custody providers to ensure minimum standards of consumer protection, it has far less hope of grappling with the more sophisticated public policy challenges that digital assets and blockchain technology bring. While the impending Federal election (to be called no later than May 2025) injects some urgency, any meaningful legislation likely would not surface until the second half of that year.

Factoring in the requisite committee reviews, legislative debate, and transitional arrangements, a fully effective regulatory framework could still lie well into 2027 — an astonishing 13-year period since policy discussions first commenced. Meanwhile, the global context has shifted markedly. Most recently, a pro-crypto electoral result in the United States blunts the regulation by enforcement approach that has taken hold in that jurisdiction.

In an ideal world, policymakers might well design a bespoke and light touch legislative scheme for digital assets — one that accommodates novel blockchain architectures and encourages more innovation in decentralised finance. But the pursuit of this unicorn framework risks entrenching the status quo. The cost of delay is not zero – protracted deliberations, consultation fatigue, and regulation by enforcement incurs tangible costs to market participants, deters foreign investment, and leaves consumers adrift. The time has well and truly come to get on with it.

> *"In these actions, ASIC has tested various parts of the financial services regime, and the results have not gone one way"*

26 Australian Securities & Investments Commission, "24-068MR: ASIC Appeals Finder Wallet Decision" (Media Release, Apr. 10, 2024), https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-068mr-asic-appeals-finder-wallet-decision/.

27 *ASIC v BPS Financial Pty Ltd* [2024] FCA 457.

28 *ASIC v Bit Trade Pty Ltd* [2024] FCA 953.

29 *ASIC v Bit Trade Pty Ltd (No 2)* [2024] FCA 1422.

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