



COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

## SENATE

ECONOMICS LEGISLATION COMMITTEE

**Digital Assets (Market Regulation) Bill 2023**

(Public)

TUESDAY, 25 JULY 2023

CANBERRA

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**ECONOMICS LEGISLATION COMMITTEE**

**Tuesday, 25 July 2023**

**Members in attendance:** Senators Bragg and Walsh

**Terms of Reference for the Inquiry:**

To inquire into and report on the provision of:  
Digital Assets (Market Regulation) Bill 2023

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**WITNESSES**

**CALLAGHAN, Mr Simon, Chief Executive Officer, Blockchain Australia [by video link]**

**LITTLE, Mr Gordon, Policy Lead, Blockchain Australia [by video link]**

**SHIRZAD, Mr Faryar, Chief Policy Officer, Coinbase [by video link]**

**Committee met at 10:11**

**CHAIR (Senator Walsh):** I declare open this hearing of the Senate Economics Legislation Committee into the Digital Assets (Market Regulation) Bill 2023. I begin by acknowledging the traditional custodians of the land on which we meet and pay my respects to their elders past and present. I extend that respect to Aboriginal and Torres Strait Islander peoples here today. The committee will be conducting today's hearing via videoconference and in person. These are public proceedings being audio streamed live via the parliament's website, and a Hansard transcript is being made. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence.

Witnesses also have a right to request to be heard in camera. If a witness objects to answering a question, they should state the ground upon which the objection is made, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Commonwealth officers appearing today are also reminded of the Senate order specifying the process by which a claim of public interest immunity should be raised. A copy of the order is available from the secretariat.

The committee has agreed that responses to questions on notice should be provided by Tuesday 1 August 2023. I now welcome representatives from Blockchain Australia and Coinbase. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. I note that Mr Shirzad is appearing from the United States and remind senators and witnesses that parliamentary privilege does not apply outside Australia, but we very much welcome you and thank you for making yourself available in the evening over there US time.

Before we kick off with some opening statements and questions, I want to acknowledge the important role of private senators' bills in our Australian parliament. They provide important perspectives for the parliament when considering critical issues, like the regulation of digital assets. In that spirit, I look forward to the evidence today that will inform our parliament on the best ways forward to approach what I know the committee as a whole sees as an important issue, which is the need for regulation in the digital assets space. With that in mind, I now invite Blockchain Australia to make a short opening statement if they have one.

**Mr Callaghan:** Firstly, I'd like to thank the Senate Economics Legislation Committee for inviting Blockchain Australia to participate today. We find ourselves at yet another pivotal moment in the evolution of digital assets. With the advent of central-bank digital currencies, we will see a transformation of how traditional markets operate through the tokenisation of real-world assets, leveraging technology developed and incubated by cryptocurrency businesses. This maturation of our industry is unsurprising to those who have held an interest in emerging and innovative technologies. In much the same way that spatial technologies have become ubiquitous in our daily lives, the underlying technology of digital assets has the same power to transform how the traditional financial system operates.

Australia has a long history of innovation, and we continue to see the blockchain industry grow and mature, with Blockchain Australia as the peak industry body, currently representing over 125 commercial members, from start-ups to investment banks and from local development shops to global SaaS providers. We represent and advocate for a broad mix of businesses across the industry.

Recently we have seen renewed focus on the effects of debanking. This impacts job creation and Australia's ability to attract foreign direct investment, and I urge the federal government to consider the approach that Singapore is taking to address this anticompetitive practice that impacts many businesses within the broader digital economy, not simply crypto-asset businesses. Furthermore, we have seen the global epidemic of online scams reach a scale of \$3 billion last year. I'm pleased to have joined the advisory board for the ACCC's National Anti-Scam Centre, representing Blockchain Australia and our members, and I commend the government on their efforts in generating a coordinated approach between digital currency exchanges and the banks. This is vital to reducing the opportunities for online scammers to launder money. This, combined with genuine efforts from telecommunication companies and social media companies, where the scams are actually occurring, means Australia should see a reduction in the prevalence of online scams. Blockchain Australia has begun work on

developing an industry led national standard and framework for how digital currency exchanges can effectively reduce their use in online scams.

**CHAIR:** Thank you very much. Mr Shirzad, do you have an opening statement you'd like to give?

**Mr Shirzad:** I do. Thank you, Honourable Chair and members of the committee, for the opportunity to appear before you and discuss both the bill and the government's efforts to address digital asset regulation. I am the chief policy officer at Coinbase. We are the second-largest and only publicly listed crypto exchange globally. We're headquartered in the United States and provide a trusted and easy-to-use platform relied on by users in over a hundred countries around the world. We launched our Australian business in October 2022, led by our country director and managing director for APEC, John O'Loughlen. However, leaders across Coinbase have long had ties to the Australian market, and Coinbase received early investment from big 4 backed Australian venture capital funds, so our history in Australia dates back to prior to our launch there. We are pleased to be here and to be a part of this discussion, and we commend the committee and the government for their attention to this issue.

Crypto technology allows the immutable recordation of ownership interest in tokenised form. This simple but pathbreaking technological breakthrough allows for the adaptation and modernisation of a whole host of applications. In finance it allows economies like Australia, which have well-developed banking and capital market sectors, to take the current financial system and make it more resilient, efficient and able to keep up with the increasing migration of the economy and society into the digital realm. The attention of this government and this committee to this issue could not be more timely or more important. Most financial regulations around the world have developed assuming a heavily fragmented and intermediated market structure. We have an opportunity to create a digital asset regulatory framework not only for today but also that ensures that it is resilient, open to innovation and puts Australia on the leading edge of financial services policy. To that end, if I could, I'd like to share six key principles that I think the committee and the government may want to consider as you develop a framework for digital asset regulation. The first is timeliness. You are right to hold this hearing now. The need for the enactment of comprehensive regulation is with us as we speak. There is a migration of development of talent and investment that's occurring around the world. There is also, commensurately, a tendency for customers to go offshore as domestically regulated exchanges are not available or if they're not offering compelling services. National authorities in places like Australia certainly need to move quickly but thoughtfully, recognising that important advances in proximate regional markets—in this case, Hong Kong and Singapore—are available to customers who may be looking for options. That is why timely action is critical.

The second principle is clarity. Because digital assets are new and a number of elements in cryptomarkets are not recognised in the current framework, defining key terms and concepts clearly and in a manner that maintains harmonisation between the domestic market and international markets is critical.

The third is a focus on outcomes. It's important that regulation does not shoehorn new technology into rules designed for incumbent systems. Digital assets have many unique features, so it is important to adapt the existing rules where those rules are not fit for purpose. We recommend applying the principle of 'same risk, same regulatory outcome'. That ensures a level playing field between the traditional financial sector and the crypto based sector and the flexibility of regulators to tailor rules to ensure the outcomes are the focus rather than the methodologies.

The fourth principle is consumer protection and inclusion. It's always important to ensure consumers are well protected from scams, misleading marketing and other elements that could lead to consumer detriment. A licensing regime for centralised exchanges is a vital step in this journey, as are robust rules for the safekeeping of client assets.

The fifth is promotion of onshore investment. Crypto is a global market, which means that protection of consumers and markets must be crafted in a way to encourage firms to come onshore.

Finally, the sixth is full integration. The domestic regulatory regime is strong. Global accountability is key. This should also allow global players with strong international operations to bring those capabilities to the local market.

**CHAIR:** Thank you very much, Mr Shirzad, for that opening statement and for joining us from the US tonight in your time. I'll kick off with a couple of questions for Blockchain Australia. This is a really important sector to the Australian economy. Would your members expect to see a growth in local jobs if the digital assets sector were subject to some appropriate regulation? Would that give certainty to future growth of the sector?

**Mr Callaghan:** Yes, definitely. Our membership, particularly those within the digital currency exchange area, would likely benefit from regulatory clarity. It would put us in alignment with global standards. I think efforts being made like this bill are really important and an important first step. That's generally the considered approach

within our industry and across our membership. There have been a number of years where efforts have been made in this space, and the entire sector is appreciative of that. We can look to other jurisdictions as well to develop best practice here for Australia to potentially develop and market a global-leading regulatory framework considering the approach of Hong Kong, Singapore and the UK. Even Europe and Dubai are now taking steps in this space, as well as the US. I think our membership and me personally will not be looking to take the approach that the US is by creating regulation via enforcement. I don't think that's the approach that anybody in this hearing session would be advocating for.

If we can get some regulatory clarity on how we deal with these things, it will help in terms of banking. It'll help in terms of how we address those online scams, as we said, although we're taking an industry led approach around that. Providing that the regulation is appropriate, fit for market and in a similar fashion to the approach that was taken with the buy-now pay-later industry, where you didn't just apply existing credit rules to an emerging industry that would have killed it, taking a nuanced approach that is appropriate, that understands the differences between some financial products and some crypto-asset products, is the way forward. Generally, yes, our membership will be supportive. We think it'll create jobs. It will provide global certainty that will help us attract foreign direct investment from companies like Coinbase, creating jobs here in Australia, so it's generally a good thing.

**CHAIR:** As I said in my opening remarks, I think the whole committee is of the view that regulation is needed in this area, so this bill and this hearing are an opportunity to flesh out some of the perspectives on that in general. In your submission, you call for fit-for-purpose regulation, and you've just used that term again. You've talked about there being 'clear guideposts for consumers and a focus on driving innovation and Investment while protecting consumers'. How do we get right the balance between driving innovation and protecting consumers?

**Mr Callaghan:** Protecting consumers is obviously fairly critical in any industry, not just in financial markets or crypto-asset markets—whether it's health or telecommunications. It should be paramount, particularly in your positions, where you're representing the constituents of your various states. We agree with that. I think it involves working with industry, having committees such as this—taking the time to understand the technology and understand the opportunities. Having the right amount of restrictiveness whilst promoting the technology development is a fine line to walk, so I can appreciate the difficulty in your seats, but I would largely say working with industry—and Senator Bragg has talked about developing a parliamentary friends group for block chain technology so that we can help to develop a better understanding within the parliament of the technology and the opportunities. So it would be steps like that to work with industry and understand the challenges, and working with us in terms of developing an industry led approach so that we're able to police bad actors ourselves, remove them from our membership and take similar actions are important.

**CHAIR:** Strong consultation with the sector is required to get the fit-for-purpose approach that you're talking about. I'll just go to some of the perspectives raised in this bill about how we go about the work of doing that and creating that fit-for-purpose model. We've got a number of legal frameworks in Australia in place around the regulation of financial products more broadly, and I think everyone identifies that there's a significant gap in relation to digital assets. This bill creates a few new licensing regimes to deal with that gap. How do you see the need for regulation to articulate with existing regulations as well as possible?

**Mr Callaghan:** My understanding is that workaround licensing is coming with Treasury work on custody. Whether that is required within Australia and how we address that from a national and state perspective and a sovereignty perspective, I think, are important considerations. That potentially opens up opportunities within Australia for businesses to operate in that space. They would probably be the two main areas of interest currently.

**CHAIR:** Do you have advice for the committee on how new regulation and reform should best work in with existing regulation and with international regulation that's out there as well?

**Mr Callaghan:** There are developments in international standards at the moment, not just from an ISO perspective—we've got Scott Farrell in Australia chairing that. We've got the IOSCO standards; Blockchain Australia is developing a response to those. I think it's cherry-picking the best aspects of various jurisdictions and learning from—I don't want to criticise and say 'mistakes'—perhaps shortcomings with the first movers. There is some benefit, in a regulatory sense, in being a second or third mover—it can sometimes be the opposite in business, obviously—if we can look to what Singapore and the UK are doing—and Europe, somewhat, as well. With the existing financial system framework and the AFSL licensing, if it is a financial product, then obviously that's going to apply. But there are going to be instances where it won't apply directly. Having a look at what is taking place overseas is probably a good starting point—again, going back to that collaboration with industry and understanding how these businesses are operating.

**CHAIR:** I'll just ask Mr Shirzad a similar question. We know that the EU's taken a particular kind of approach with their markets in crypto assets legislation, which is sometimes described as a 'filling in the regulatory gaps' approach rather than necessarily layering new forms of regulation. Should Australia, in your view, be taking the same approach of filling in the gaps?

**Mr Shirzad:** I think there's a lot about what Europe did that is important to know. The first thing—and I think that's why this hearing is particularly important—is there's enormous value in any jurisdiction for political leaders to step up and essentially provide a national strategy or a national direction around crypto assets. The technology's quite disruptive as a commercial matter, and it's also disruptive to old habits of regulation. So having a mandate from political leaders who understand that adaptation is necessary to allow, in this case, Australia to participate in a process of modernisation of its financial system—ultimately it requires political leaders to endorse that. I think MiCA did that quite strongly. Even though much of the detail is going to be worked out in the level 2 process and in the development of the technical standards, that political imperative is now unambiguous and clear, and I think that's an important thing for political leaders such as you to keep in mind.

The other thing that MiCA did, which I think is important, is that it took on two immediate priorities which were at hand—essentially the low-hanging fruit of regulation.

One is the regulation of intermediaries—companies like Coinbase who take money from the public and hold assets on behalf of the public. That is a critical, critical function that should be subject to clear, comprehensive and rigorous regulation. Whenever you have any intermediary that takes the money or holds the assets of members of the public, that is something that has to be subject to a clear, well-organised, well-structured and clearly mandated regulatory framework, and MiCA did that with the regulation of virtual asset service providers.

The other thing which it did was provide a regulatory framework around the issuance of stablecoins, which is probably the second low-hanging fruit and regulation. I talk to regulators and political authorities around the world, and the regulations of crypto markets are not actually as complex as they may see at the time. They're simple principles of customer protection, accountability, governance, many of which are in senator Bragg's bill, and he is to be commended for including that. There is a lot in MiCA, in the UK consultation and in other frameworks that Australia can draw from. But I would just urge you and the committee not to lose sight of how important what you are doing is in and of itself. There is a power to it, and I think you should be commended for it.

**CHAIR:** Is Coinbase participating in the Treasury processes that are happening at the moment, the token-mapping process and the work that is going on to develop regulation around licensing and custody? What feedback do you have for us about that process?

**Mr Shirzad:** We did submit comments both to the token mapping consultation as well as the AML exercise that the Attorney-General's office undertook. We look forward to participating actively in the consultation that we understand Treasury is due to issue at some point soon. So we are in active discussion with the Treasury and we intend to submit comments and participate in that process. We very much look forward to that.

**CHAIR:** And would you be looking for legislation in the Australian context that gives as much certainty as possible, that has, for example, upfront rules about how ministers would regulate digital asset services as opposed to leaving that up to regulation and to the parliament to potentially disallow those things? How important is certainty in the final approach for you?

**Mr Shirzad:** In terms of specific provisions, obviously we would probably have to have a more detailed discussion about that, but regulatory clarity and certainty are critical. At this point, the crypto markets are largely an early adopter market. As jurisdictions, particularly sophisticated jurisdictions with well-established law, and highly sophisticated regulators develop clear frameworks around it, it creates an environment in which companies like ours can invest and grow, but maybe more importantly developers and innovators can invest and experiment in terms of creating new products. So there is a balance there in the extent to which legislation provides clarity and gives sufficient guidance to the regulators, whether it is ASIC or anyone else. I don't have a specific answer offhand in terms of what the nature of that balance would be.

**CHAIR:** Finally, before I go to the deputy chair and sponsor of the bill, who is waiting very patiently, just back to block chain, I have a question on your submission which talks about the need for certainty around definitions that are used in this bill, or any approach that we take around what is a digital asset or a digital asset exchange. What are your issues there, and how do you think the parliament could best go forward on those issues?

**Mr Callaghan:** I think the issues of taxonomy are difficult because you can ask 10 different people and you would probably get 10 slightly different responses on what these terms actually mean. They are really vital in



terms of getting a consistent global approach. The Bank of International Settlements has put out a pretty decent taxonomy that we could use as a starting point. They are a global organisation that intersects both the crypto asset industry as well as the traditional finance industries; that would be the first place that I would begin.

**Senator BRAGG:** Thank you very much and good morning to you all. I might start with some questions to Blockchain Australia, if that is okay. I have read your submission where you suggest that this lays out a foundational start. Why is this foundational start so important?

**Mr Callaghan:** Again, to commend the work that you and the committee have taken, not just this year in getting the private member's bill up but also the last number of years in really driving this forward with the previous government. I think this is important from a global perspective so that Australia does not get left behind. It goes back to the history of innovation we have always had in this country. We need to create an environment within which our domestic, national and local providers are able to grow, to flourish and to have some certainty that the businesses that they are beginning—they are employing people, creating jobs, paying taxes—continue to grow, and that they have a clear roadmap and a clear rulebook through which they are going to operate. Esther first touched on this in our fireside conversation during Blockchain Week. Apologies for speaking out of turn around the US, but we don't want to have a situation where the regulators, in five years' time, without having provided guidance or without wanting to engage, turn around and provide enforcement action. That would kill industry, it would move jobs offshore and it would move investments offshore.

We want to create an environment in Australia where businesses, like my counterpart here from Coinbase, are able to also come and operate within the market, bring that regulated approach. They are a public company. We have other regulated DCEs as well within our membership who are international and who are creating jobs here and who, 99 per cent of the time, are doing an excellent, excellent job of it. We need to encourage the innovation, we need to encourage the jobs and we need to encourage the investment within this space. It is vital because this is the technology that is going to be shaping the future of the banking and traditional financial system. This is where the incubation is occurring. From that perspective alone, we should be having an interest in ensuring that Australia plays a leading role globally, and have that consistency with our counterparts.

**Senator BRAGG:** So what is happening now in the market? Is the current situation that it is effectively regulation through enforcement now, or how would you characterise it?

**Mr Callaghan:** I think both the previous government and the current government have done a good job in not undertaking that approach and in taking a global look at what is occurring and providing a measured approach. We have not seen overreach, I don't believe, from ASIC. Providing space for the innovation and the technology to occur is important. We need to continue to protect consumers, looking at what is occurring globally. But I do not think specifically we have had the approach, and that comes back to this bill and the efforts of yourself and the committee. Without that we may have had that approach.

**Senator BRAGG:** What timetable do you recommend for a foundational bill like this to be enacted? When would you like to see it enacted?

**Mr Callaghan:** It's difficult to say, given that it is a private members bill—

**Senator BRAGG:** I don't mean to interrupt you, but my question is not necessarily about this bill; it is about the concepts in this bill that you have described in your own submission as foundational. What timetable are you recommending to the parliament for Australia to adopt or enact some sort of foundation bill?

**Mr Callaghan:** In a foundational sense we would like to see that soon. We're generally supportive of the work within the bill, understanding that we really need to get the legislation correct. But from a foundational perspective I think this is a really good start.

**Senator BRAGG:** Do you want to see it enacted this year? What is your timetable?

**Mr Callaghan:** This year would be beneficial.

**Senator BRAGG:** What is happening in the market in the absence of regulation? Are you seeing any of your members or any market participants looking to move offshore, or are you seeing new ideas coming into Australia? What are you seeing?

**Mr Callaghan:** The environment here is still globally competitive because we do not have those enforcement actions because of the efforts of the committee and yourself with this bill. From the perspective of Blockchain Australia we're still see growing membership both domestically and internationally. We're seeing large providers like Coinbase and Fireblocks are coming to Australia and opening businesses, so we're still seeing that. We are continuing to see our local businesses grow as well. On the environment, despite being in a bearish crypto market, as the saying goes you build in winter. We are still seeing opportunities here and growth and the resilience in the

sector. This is not the first time people have attacked crypto, and it has continued to grow over the last decade. The narrative has really shifted from those early years where it was potentially being used in the dark web to today where you are seeing BlackRock submitting an ETF Bitcoin submission with the SEC. The world is developing, the world is changing, and so are we as an organisation and so are our members.

**Senator BRAGG:** How important is meeting that timetable of this calendar year? Is that going to be important to sustain future growth, or are we at risk of starting to slip if we don't get something done this year?

**Mr Callaghan:** I don't think we are at risk of losing growth opportunities. The reason I say that is that it's provided we do not go down the regulation via enforcement route. If something is passed next year, that is potentially okay, considering we'll still have the same environment within which to operate. Companies are applying the existing legislation where they believe and the legal advice is that they are providing a financial product. In Australia we're not in too bad a place.

**Senator BRAGG:** But if we were to be here in 12 months from now and there was no foundational law, it would be more likely that we would have regulations to enforce, wouldn't it?

**Mr Callaghan:** Potentially. It's difficult for me to say. But the one thing I could say to that is about the potential risk, more than the enforcement, I suspect. If Singapore is moving at a faster rate, and Hong Kong is now coming back into the fold to position itself to compete again globally as a financial hub, then that's the broader concern.

**Senator BRAGG:** That's the biggest risk, is it, at the moment?

**Mr Callaghan:** Yes. It would be the movement of capital offshore.

**Senator BRAGG:** Okay. I might ask you about that, Mr Shirzad. What is your view on where Australia currently is in the race to regulate?

**Mr Shirzad:** I think there are early signs—obviously the previous government and then this government have sort of signalled their commitment, and obviously you through your legislation have a commitment to provide clarity to investors and to exchanges and protection for consumers. That's part of the reason we came onshore—because we perceive it as a market that's headed on a trajectory of regulatory clarity and certainty. The sooner Australia acts, the sooner we can build and invest towards a framework that we understand will be stable and resilient for us to grow into. The imperative is heavily driven by a desire by the country to move from the status quo to achieving the potential that crypto can provide.

In terms of time frames, you might find it interesting that MiCA will go live probably no later than early 2025. That's at the outer end. The UK is accelerating their consultation to try to get in front of that timing. So, when you're looking at large global markets in crypto, MiCA provides a date that others are trying to organise around. The Hong Kong authorities did something quite surprising, though. Late last year they essentially out of nowhere decided to signal their interest in bringing in and integrating crypto into their financial system. They were able, over the course of the ensuing nine months, to issue a consultation paper, take public comment, put out a draft regulation, finalise it and have it go live. That's very, very fast, but it's an example of the speed at which markets move to be competitive in the race. Speed is certainly important, but the balance of the rules set is obviously really important as well—making sure it's a framework that's operable, that allows global companies to bring the strength of their global operations to serve the local market and things of that nature. So, the details certainly matter, and I think there are significant elements of that in your legislation.

**Senator BRAGG:** Okay. Well, I'm just going to ask you, to see if I can get a couple of quick answers from you: when do the Europeans go live with MiCA?

**Mr Shirzad:** Early 2025 at the latest.

**Senator BRAGG:** So they're still two years away.

**Mr Shirzad:** Yes, because they just went through the final adoption of MiCA itself, and now they're going through the level 2 process, and then there's a kind of a transition period for—

**Senator BRAGG:** But is there a soft start? Does the licensing system start before 2025?

**Mr Shirzad:** That's an open issue. The way MiCA works is that the European authorities have established the framework and ESMA will develop the specific level 2 technical standards, but the national competent authorities in each of the member states are responsible for the issuing of the licences and a lot of the supervisory decisions. Many of the authorities have signalled an intent to begin licensing procedures even before MiCA goes live so that, at that go-live moment, companies can begin to operate, rather than having the licensing process starting at the go-live moment. So, there's a strong imperative to accelerate. And that 2025 data is obviously the outer end. There's a chance all of this may get done at the outer end of 2024 as well.

**Senator BRAGG:** And the UK?

**Mr Shirzad:** The UK, just from our discussions with them, seem like they're trying to move quite quickly and potentially use what people are now colloquially calling second-mover advantage to draw from some of the strengths of MiCA and some of the lessons they've learned from the consultation process to try to develop a framework that potentially they can have go live ahead of that. Now, they haven't committed to that, but there is some interest in that in the government, from our understanding.

**Senator BRAGG:** Singapore?

**Mr Shirzad:** Singapore has an institutional framework that's in place and live, but there are elements of the Singapore market—for example, their retail market is quite restrictive regulatorily in terms of the amount of retail activity you can conduct there. So it has a very sophisticated market, very sophisticated regulators but not a comprehensive framework for what at the moment it seems to envision for its market.

**Senator BRAGG:** Did you say later this year in Hong Kong?

**Mr Shirzad:** Hong Kong is live now.

**Senator BRAGG:** Japan is live as well, isn't it?

**Mr Shirzad:** Japan is live. They are going through a revision of their rule set at the moment. They were a path breaker, and there is a much more limited set of tokens that can be traded in that market. It's a much more restrictive framework than in most other markets who are adopting crypto rules now.

**Senator BRAGG:** The way this bill is drafted focuses deliberately on the gatekeepers; it's looking to license the gatekeepers, the markets, the custodians. It's not looking to allocate a designation to every single token in the world; it's just looking to regulate the gatekeepers and hold them to certain standards. What do you think of that approach?

**Mr Shirzad:** From our perspective it makes a lot of sense. There is some fine tuning not from your legislation but, for example, in MiCA. There were some areas in which the exchanges were held to account for failures and custody. I only raise that issue to say that it's critical to regulate the intermediaries—the custodians and the exchanges—but it's equally critical to ensure that to the extent that they're being held to account they're being held to account for things that are under their control. There is nothing in your legislation that runs afoul of that principle, but it's worth making the point.

**Senator BRAGG:** I might ask you to answer that as well, Mr Callaghan, and also to reference whether this token-mapping exercise is necessary.

**Mr Callaghan:** To the broader question, the bill is a sensible approach in regulating the intermediaries, but to reiterate Faryar's points, it's important that it's regulating things within their control. On the token-mapping exercise, if it provides the government with a broader understanding and a broader appreciation of what the ecosystem is, then it could potentially provide some benefit. The only concern with token-mapping exercises is that they can become somewhat infinite in nature because there are so many tokens being created. So provided that there is some ring-fence around how you limit that, if it provides the government with an opportunity to understand the space better then it has some merit.

**Senator BRAGG:** It doesn't sound like you think it's absolutely essential.

**Mr Callaghan:** It depends on where people sit and their understanding of the ecosystem, and developing a baseline understanding of that and what the tokens are within that is a good place to start.

**CHAIR:** Thank you, all, for appearing before the committee today. The committee very much thanks you for your evidence, and you go with our thanks.

**BELL, Ms Philippa (Pip), Chair, Financial Services Committee, Business Law Section, Law Council of Australia [by video link]**

**GOMEZ, Ms Angelina, Chair and Director, Digital Law Association [by video link]**

**WILKINSON, Ms Susannah, Chair, Digital Commerce Committee, Business Law Section, Law Council of Australia [by video link]**

[10:59]

**CHAIR:** I now welcome representatives from the Law Council of Australia and the Digital Law Association. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. Does the Law Council of Australia have an opening statement you would like to give?

**Ms Wilkinson:** Yes, thank you, Chair. On behalf of the Law Council of Australia's Business Law Section, I begin by thanking the committee for the invitation to appear today. As context for our role and presence, the Law Council of Australia is the peak national representative body of the Australian legal profession. The Business Law Section of the Law Council was established in 1980 as a forum to focus on business law matters. It currently has approximately 900 individual members and maintains 15 specialist committees and working groups, of which the Digital Commerce Committee and the Financial Services Committee are represented here today.

Both witnesses here are private practice lawyers. We appear for the section in our various committee capacities. That means our ability to put forward policy views on behalf of the section may be limited to matters that we've discussed internally. Our written submission addressed certain key issues relevant to reform that were of interest to members of our committees. We recognise that regulation of emerging technologies can be a complex task. These foundational technologies, such as distributed ledger and blockchain, give rise to a wide range of use cases that cross over traditional legal frameworks and sectors. From where we sit in a law reform perspective of the Law Council, we see this as a critical issue, understanding that it's often unclear how existing law should apply to existing frameworks. We recognise that it's a tall order for law and policy makers and regulators to keep abreast of the use cases and associated legal issues.

The key recommendation that we made in our submission was to avoid any unnecessary duplication and uncertainty in applying both existing or new licensing regimes, with emphasis again on regulation being technologically neutral to the extent possible. Application of existing regulatory regimes should account for the innate dynamism of digital assets and recognise that the addition of rights or features within an asset may mean that the authorisations and the licences can change over time and might also be required in a short time frame. We've suggested that licensing safe harbour provisions could be a practical solution to help digital asset businesses assist with transition to any regime, and we think it's really important to streamline the licensing between Australia and other jurisdictions where appropriate, recognising the global nature of a lot of these businesses and digital asset systems.

Chair, that concludes our opening remarks. We're happy to take questions on these remarks and any recommendations in our submission more broadly.

**CHAIR:** Thank you very much. Does the Digital Law Association have an opening statement?

**Ms Gomez:** Yes, we do, thank you, Chair. On behalf of the Digital Law Association, may I start by saying thank you to the committee for our invitation to appear today. To put into context our role and presence here today, the Digital Law Association is an all-volunteer organisation launched in 2020, dedicated to advancing a fairer, more inclusive and democratic voice at the intersection of technology, law and policy. We currently have approximately 900 members. While I am a private practice lawyer, I appear here today in my capacity as a director and chair of the Digital Law Association. Consequently, my ability to put forward policy views on behalf of the association may be limited to matters we have discussed internally and that form part of our written submission.

Our written submission addresses certain issues relevant to reform that are of interest to our members. We recognise that legislating emerging technology is a difficult and complex task. Our focus is on the balancing exercise between commerciality, protecting and fostering public and private innovation and providing adequate guardrails and certainty to develop and implement legal frameworks and policies for technology and innovation that protect the rights and interests of underrepresented groups to ensure that the benefits of technology can be realised with a minimisation of harm and for the greatest cross-section of society.

Our submission made several key recommendations. They are as follows: a tiered licensing regime to allow licence obligations to be applied, taking into account the nature and risk of the market and the digital assets that

are traded on the platform; to clearly identify the jurisdictional nexus that must exist for foreign businesses to determine whether they are subject to foreign licensing status requirements; and the pursuit of a multi-agency working taxonomy on digital assets that takes into account the likely impacts of emerging technologies with consistency across legislative frameworks.

In terms of 'digital asset' versus 'token', the Digital Law Association encourages the use of technology-neutral language that is suitably flexible to accommodate a wide range of digital assets use cases. Also in relation to the bill, we recommend that its limit be particularly clear to centralised entities, the concern being that it may overlap into decentralised autonomous organisations. We know that a key aspect of this consultation in relation to decentralised autonomous organisations will be to identify the deterministic characteristics and potential regulatory perimeter between centralised and decentralised.

Chair, that concludes my opening remarks. I am happy to take questions on these remarks and any recommendations or subject matter from our submission more broadly.

**CHAIR:** Thank you so much, Ms Gomez. I'll start with some questions for the Law Council. You spoke in your opening statement about the challenges of creating new regulation and the opportunities for streamlining where possible. Your submission does raise some concerns about establishing a new licensing regime in this space. Could you talk us through those concerns?

**Ms Wilkinson:** I think the concern from committee members is that it's already fairly complicated with the existing frameworks. We recognise that digital assets are versatile in what they can and can't do, and characterisation of those assets is really important in terms of understanding how and when they fall within the regulatory perimeter. In terms of recognising that assessment, to the extent that we have existing licensing frameworks and processes, there is a likelihood that businesses will fall within both licensing regimes, and so streamlining those processes will be important.

We recognise that digital assets are, effectively, information and can relate to any number of different packages of rights. With that, we see challenges on the ground of businesses understanding whether they need to comply with one or other licensing framework. So any synergies that we can have between those two to make the practical application and the administration of those regimes more streamlined and efficient will be valuable.

We also recognise that, for many new entrants into financial services licensing, there will be highly innovative smaller players, who won't have the experience and expertise of some of the bigger traditional organisations. So, in the spirit of fostering innovation, trying to avoid unnecessary duplication and overlap will be important, recognising that there will be instances where particular digital assets or tokens will flip between two regimes.

**CHAIR:** Thank you. We all know that regulation is needed in this space, and government is working towards that. This bill offers some ideas on how to do it. You spoke there about the potential to create uncertainty and duplication in the licensing regime, where people under this particular approach that we're talking about today might be required to have multiple licences and be unsure when their AFS licence applies and when these new licences apply. Can you tell us how this particular approach does that and what the concerns are that you might have for businesses operating in the sector?

**Ms Wilkinson:** One concern—please jump in, Pip, afterwards—is that at the moment we see challenges for legal advisers with some of the edge cases as to whether something falls into the financial services regime. For any new licensing regime, it will be important to recognise the grey areas on the edge case and not simply lift and adopt the same definitions or parameters that will create a same grey area in respective digital assets. Does that answer your question? We just need to make sure that we can be—clarity is a key objective here. There is no clarity at the moment for certain edge cases as to whether or not they're in or out of the current licensing regime, so simply duplicating that and having a digital assets licensing regime that inherits some of that uncertainty will not improve the clarity along the edge cases.

**CHAIR:** So your advice to us is that we need to regulate in this space but get it right and have an approach that offers the businesses that you're providing advice to real certainty about how and where they're captured by any new regulation?

**Ms Wilkinson:** Certainty or a process by which they can safely test their interpretation. Given that digital assets or tokenisation can apply to any number of real-world rights, objects, packages or items, there is a risk that we start to stray into overregulation of things that don't deserve it. Here I know the objective of the bill is to regulate the intermediaries, and that's very useful. It's a good place to start. But those intermediaries also need certainty when they're dealing with particular assets in terms of are they dealing with things that should be sensibly licensed or not? More clarity around the application of the regime will be very useful and will avoid entities erring on the side of caution and needing to over-comply.

**CHAIR:** Do you prefer the approach that's sometimes described as the 'filling in the gaps' model—looking at what's out there that needs to be regulated but then looking at the current law first and seeing how it could be adapted and amended to account for these new products that are out there, rather than creating perhaps a bespoke new approach?

**Ms Wilkinson:** I think the Law Council's standard position on legal reform is that, where we can adopt and amend existing laws, we ought to. That's not always possible, but, if every time we look to law reform we add another layer of complexity, we end up with an overly complicated system. So the short answer is: yes, to the extent possible, recognising that digital assets are novel and there are some characteristics that may warrant different treatment.

**CHAIR:** Part of the government's reform agenda in this space is the token mapping consultation to understand the ecosystem in full and how it intersects with Australia's existing regulatory frameworks. Then that consultation, which is being undertaken by Treasury, will inform the next level of licensing and custody reforms. Do you support that general approach that's being taken?

**Ms Wilkinson:** The token mapping exercise, when it was first floated as an idea, was a necessary part of this journey for our country, for the regulators and for the policymakers. The level of awareness and understanding in Australia has matured significantly over the last few years. The token mapping exercise could carry on indefinitely. It needs to be curtailed. It's useful to illustrate the token system, but, when a traditional lens of financial services regulation is applied to digital assets, you run into trouble, because tokens are not static financial products in the way that traditional financial products are. It's a much more dynamic environment, and we do need to understand the true nature of digital assets and the ecosystems that they operate in before we can sensibly figure out how to characterise them and regulate them. In previous submissions that the Law Council made to the CASSP consultation, we supported the token mapping exercise, at least in parallel with those other law reform processes.

**CHAIR:** It sounds like you'd like to see the token mapping move to the next stage of consultation around the licensing and custody reforms which have been announced.

**Ms Wilkinson:** It all goes to clarity. It's clarity and having different agencies speaking from the same taxonomy and understanding different parts of the legal frameworks that businesses are required to comply with. Different agencies are talking about digital assets and their ecosystems in a coherent way. That makes compliance for businesses more straightforward.

**CHAIR:** That process is underway, as well as the mapping with the regulatory frameworks that currently exist. The consultation around licensing and custody reforms is next. One of the questions we all face in this space is taking the right amount of time to do this but not too much time. One of the features of the particular approach that we're talking about today includes a transition period of three months to get the proposed new system underway. Is that realistic? What sorts of time frames do you think we need to see in this space?

**Ms Wilkinson:** Our submission questioned whether three months was a genuinely realistic time frame for both businesses and regulators to understand how quickly a regulator could move and respond to numerous licensing requests. We suggested that a safe harbour may provide a practical solution to help businesses and the regulator work through some of the nuances and complexities of what will be edge cases and that a longer period may set up a new regime for success. At least, in conjunction with a safe harbour, I think having a three-month, drop-dead date by which they must all be licensed and compliant may be too short.

**Ms Bell:** That's even based on the volume of potential applications and the resources available to process those applications, based upon how long it could take to get a licence application through, say, ASIC. But there are plenty of examples where new regimes have been introduced and new products and services have been brought within the asset licensing regime to compare what the transition period was.

**Senator BRAGG:** Firstly, to the Law Council: basically, you see merit in many aspects of the proposed bill. What do you think are the most urgent things?

**Ms Wilkinson:** Generally, in the digital assets space or from the bill?

**Senator BRAGG:** Feel free to give your views on both.

**Ms Wilkinson:** The clarity around the licensing requirements for centralised entities is an obvious one, and we agree with that. The need to protect consumers and also foster trust and confidence in the digital asset sector is a priority. We see long-term benefits of digital assets to the economy and a need to look at this legislative reform in a broader holistic context for the things required for the digital assets economy and the digital economy. But there is an immediate need for the licensing of intermediate players and custodians.

**Ms Bell:** And even just the clarity, clarity about what that would look like.

**Senator BRAGG:** Did all of your organisations submit to the CASSPr inquiry?

**Ms Wilkinson:** Yes.

**Senator BRAGG:** What happened to that inquiry? Is it something that you know much about, or is it not something you can answer?

**Ms Wilkinson:** In my personal capacity I do, but as chair of the Digital Commerce Committee, I believe the Law Council put in a submission to that inquiry. It's probably beyond the scope of my role here today to speak about that, though.

**Senator BRAGG:** What do you think was the point of junking that process and starting again?

**Ms Wilkinson:** I don't know. It is not for me to answer.

**Senator BRAGG:** Do you think that has impeded our progress? Was there a good policy reason not to proceed with that Treasury consultation?

**Ms Wilkinson:** Not that I am aware of. All of these consultations and the engagement by regulators and policymakers help us to move the dialogue forward and help us to have a more sophisticated and informed view of how to solve these problems and how to regulate.

**Senator BRAGG:** So I understand your testimony, your testimony is that the most important thing for us to do is to regulate the gatekeepers. Is that right?

**Ms Wilkinson:** It is, and it's the low-hanging fruit. It's an easy one. We also see importance in dealing with autonomous systems and protocols that can run independently, but that is beyond the scope of this particular conversation. But it is also a question for law reform more broadly: how do we deal with the treatment of code and automated protocols? In this instance, where we have the need to build consumer trust and confidence in digital assets and tokenised systems, then we need to be making sure that humans and intermediary entities who are active in that ecosystem are playing by the rules, and an appropriate consumer protection framework is an important part of this.

**Senator BRAGG:** That paper came out in March 2022. That is getting on for a year and a half ago. Do you think this is a reasonable timetable for Australia to be working to, taking 18 months? We still appear to be a long way away from landing this, so are we going fast enough? I guess that is my question.

**Ms Wilkinson:** On the speed at which we can deliver regulatory clarity, obviously to do that sooner rather than later would be helpful. But we need to do it in the right way, and we need to make sure that we are not creating an unworkable solution or a regulatory burden and duplication. The market is definitely calling for greater clarity and certainty, but not if it comes at the cost of a regime that creates complications and does not achieve objectives.

**Senator BRAGG:** In March 2022, we had a paper that came out on how to do this foundational style regulation, which we've talked about this morning. Now that's been junked, and there is not yet a new process to look at how there would be licensing of gatekeepers. What is your expectation? What is the market's expectation? What sort of timetable do you think the market believes Australia might be able to get to in terms of regulating these gatekeepers, given it's obviously a very difficult exercise?

**Ms Wilkinson:** It is a difficult exercise, and it's probably—

**Senator BRAGG:** So what is your timetable of expectation now?

**Ms Wilkinson:** The Law Council doesn't have a specific timetable. I think we need to look in context of what's happening in other jurisdictions, and we need to work with industry and regulators to develop the best—

**Senator BRAGG:** I understand that, but what expectation do you have?

**Ms Wilkinson:** I don't believe that the Law Council has a particular expectation. I'm sorry; I won't answer that question.

**Senator BRAGG:** Do any of the other witnesses want to answer?

**Ms Gomez:** For the Digital Law Association, I can't answer that question either. We don't have an expectation of time frame. It's useful to have the regulation. There are markets that are moving very quickly. It's also important to get it right. Beyond that, we don't have a time frame.

**Ms Wilkinson:** We would want to avoid being left behind if other jurisdictions were moving quickly and in a favourable direction that meant we had Australian businesses moving offshore. Given the global nature of these

digital asset businesses, international coherence is very important, and we would not want Australia to be left behind.

**Senator BRAGG:** We just heard evidence that we're behind Japan, Singapore, Hong Kong, the UK and Europe.

**Ms Bell:** One observation is that sometimes there are announcements of intentions before there's draft legislation, and some time frames are sometimes foreshadowed about when those reforms might be introduced. That kind of signalling can sometimes be helpful for the potentially regulated population. Particularly given that these types of laws might be foreign to some of the market participants, the sooner the education process around that gets underway, the better. If you have all these laws out there, but the people who are meant to be complying with them don't know about them, that's also a risk.

**Senator BRAGG:** I take from your evidence today that your clients are not particularly concerned about the process Australia went through to issue a consultation paper 18 months ago, from which nothing came, and I think that's very interesting. In closing, in relation to this token mapping, obviously it was recommended at a time when perhaps conversations were less mature—I think you referred to that in your opening statements. So I guess the question is: how important is this token-mapping exercise now? Do you see it as absolutely essential or more as a time-saving exercise?

**Ms Gomez:** I don't think there is any loss from the token-mapping exercise having been carried out, but there has to be a limit to it, and I think Susannah mentioned that in her answer as well. It's a question of understanding the functions and how the tokens operate in the ecosystem. It expands exponentially, but we've now got to a level of sophistication where there is an understanding of functions and how it plays in the ecosystem. It's at a point where it's about how much you will gain out of continuing with the token-mapping exercise when you have a foundation that's sufficient to have an understanding of how it operates and to start the process of legislation to go to the next step.

**Senator BRAGG:** Thank you.

**CHAIR:** Thank you to all of the witnesses who've appeared in this panel. We very much appreciate the evidence that you've given us. You go with our thanks.



**CHUNG, Mr David, Director, Creo Legal [by video link]**

**LUMSDEN, Ms Jaime, Partner, Hamilton Locke [by video link]**

[11:29]

**CHAIR:** I now welcome Mr Chung from Creo Legal and Ms Lumsden from Hamilton Locke. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. Mr Chung, do you have an opening statement you'd like to give?

**Mr Chung:** I do, yes. Thank you for the opportunity to give evidence today. I'm the founding director of Creo Legal, a boutique commercial law firm based in Brisbane that has serviced clients in the digital assets space Australia-wide since 2017. The firm was founded in July of that year in the midst of the Cambrian explosion of crypto-assets which laid the technological foundations of the industry and brought digital assets out of relative obscurity into common public knowledge. Beginning then and continuing to this day Creo Legal has advised numerous start-ups and small- to medium-sized businesses, including digital currency exchanges, crypto-asset issuers and project founders, digital service providers and investors. Our experience has been at the coalface working with everyday Australians seeking to create value for society.

The single biggest challenge faced by almost every one of our clients over the past six years has been the considerable uncertainty regarding the application of the Corporations Act to digital assets and, more specifically, the financial services regulatory and licensing framework. Resolving this uncertainty is, in my opinion, the most important aspect to achieve with any new legislation focused on digital assets. More broadly, the legislation for digital assets must be smart, sensible, forward-looking and facilitative rather than prohibitive. This means implementing prescriptive requirements only to the extent required to protect the public.

The rate of change of blockchain and related technologies is, from my perspective, even more rapid than that experienced during the late 1990s with the internet boom. This makes it critical that legislation cannot be easily made obsolete by virtue of the organic progression of the industry. In my humble opinion, digital assets are not only here to stay but will increasingly become an important part of everyday life for all Australians in years to come. This presents a remarkable opportunity for the country to embrace the emerging technologies and create a platform for the next 50 years of economic prosperity. Thank you.

**CHAIR:** Thank you very much, Mr Chung. Ms Lumsden, do you have an opening statement that you'd like to give?

**Ms Lumsden:** Yes, please, I do. I am a financial services lawyer who has been practising in this space for 20 years and has been covering cryptocurrency and blockchain for the last five or six. We advise a lot of clients on what we like to call the regulatory perimeter of financial services regulation—that is, we are helping our clients work out when their crypto [inaudible] services and tokens are and are not regulated under the current financial services regime.

We firmly believe that the best approach to regulating digital assets is integration into the current financial services regime. There are a number of reasons for that. This particular bill takes the approach of regulating digital assets under a standalone regime, which creates a number of key issues. I won't go into detail about them, but I will just summarise them very quickly.

It creates inconsistent regulation for the same thing that is on and off the blockchain. We shouldn't necessarily be regulating things just because they're on the blockchain unless there is a clear consumer risk, such as is the case with custody of digital assets. What we should really be looking to do is align the regulation of substantively identical matters whether they are on or off the blockchain. For example, financial products should be regulated identically whether they are on or off the blockchain and commodities that are not regulated off the blockchain should not be regulated merely because they are on the blockchain if they are digitised.

Additionally, when we perpetuate having separate financial services regulation, we continue old barriers to entry and we create new ones. Right now, one of the particular issues we have is there's a reluctance to digitise financial products, because few participants in the market want to be among the first to opt in to the financial services regulation and take on the compliance burden. This bill is not going to solve that particular issue, but also, by creating a separate regime for digital assets, it may create similar barriers for entry for digitisation of commodities, because, if those commodities are now going to be regulated on chain but are regulated off chain, there's no incentive for people to want to digitise them.

There are also a few issues with this bill around proposed markets regulation. We have markets regulation in the Corporations Act for financial service, but it is also a barrier to entry for putting financial products on the blockchain right now. But that regulation is tried and tested, and I think that it's worth taking that existing

regulation and considering how it is appropriate for digital assets. Whereas, this bill proposes what seems to be some form of new quasi-markets regulation by regulating the exchange process to digitalise asset to digitalise asset. It does not recognise distinctions between market models. Our current model in the Corporations Act does. We have concepts like operator market, maker market, broking into a market, and these are distinctions that are important in the digital assets space, crypto exchanges. And there are crypto brokers who are leveraging these existing ideas, but there is no recognition of that in the regulation. Instead, what we have is a move to regulate what we would call OTC trades, which, if you want to use FX markets as a comparison, those are not regulated. So it creates more disparities between different regimes.

There are also some issues around custody. While I think that custody is very important for digital assets, it appears under this current bill that not all digital assets could get the benefit of custody. Financial services would be piped off into the financial services regime, which is fine from a logical perspective in the sense that, if you have two different regimes, you would park it over there. The problem is that current AFS custodians don't necessarily have the capacity to provide that service, which means duplication of licenses inside crypto exchanges, but also some tokens for some reason wouldn't get the benefit of custody at all. If consumers are exposed to custody risks in the sense that their tokens could be lost, stolen or misplaced, I would have thought custody is something that would have been rolled out to all consumers, not just to certain types of tokens.

There are also concerns around stable coins. The stable coin definition captures asset reference tokens, which could include tokens backed by commodities or anything other than currency. Right now, there's a requirement that currency be banked with an ADI, which you cannot do if you're backing it with something other than currency.

In terms of matters that are not addressed by this bill that I think are really critical issues that do need to be covered, one is the fact that the financial services regime right now does not capture all digital assets that have a financial product purpose because of particular definitional issues. For example, the Corporations Act right now relies on a notion of a person doing things, but that is not addressed in this bill. Because we've decentralised tokens and services, sometimes there is no person. So things that should otherwise be a financial product are not captured by the financial services regime right now, and there needs to be a discussion about how that's addressed. More broadly, that spreads out to things like how we manage structures like DEXs. So, when we have decentralised organisations, decentralised exchanges, how do we regulate these entities?

The last issue that I think is not currently addressed in the bill is things like new services which are evolving on digital assets services, like staking and unyielding. Participants seem to be taking the opportunity to leverage a variety of different structures for what is essentially the same service to [inaudible] outcome that they prefer, and that results in mixed consumer outcomes. I think that's also an issue that we need to address when we are developing regulation in the digital assets space.

**CHAIR:** Thank you, Ms Lumsden, for that very comprehensive opening statement. I'll start with a couple of questions for you. I think you've been fairly clear in your submission and in your opening statement there that you've got concerns about approaching the need for regulation in this sector by creating a new bespoke regime, rather than looking at how we might do that by plugging the gaps in the existing regulation. And you've talked about concerns among your clients about duplication of licences and whether there is clarity provided for them about what sort of licence they might need and under what circumstances they might need the financial services licence and under what circumstances they might need a licence proposed by this bill.

We're here to talk about this bill. We're also trying, as a parliament, to tease out the things we should do together going forward to regulate effectively in this space. In your submission you talk about a concept of regulatory arbitrage, and I wanted you to elaborate on the risks of getting this wrong, as a parliament.

**Ms Lumsden:** The idea of regulatory arbitrage is the idea that you don't have consistent regulation across different platforms. This is the risk that people can choose to opt into the regime that gives them the lowest compliance burden. It also means that consumers won't necessarily have the same protections. So, a consumer who buys a digitisation of a commodity, for example, might have higher protections than somebody who purchases the commodity direct. Bullion is potentially an example of that. Gold is not necessarily highly regulated, whereas if we put it on the blockchain and that suddenly triggers a whole new standalone regime then those people who buy gold on the blockchain will suddenly have more consumer protections than the people who don't.

It incentivises providers to structure in ways that give them the regulatory outcome they want and means that consumers have inconsistent protections. It doesn't regulate towards the purpose of a thing. Instead of looking at a thing and asking, what are the risks of this thing?—a security, for example, a share, has similar risks whether it is on or off blockchain, and similar arguments can be made for most products, and then you would look to regulate

them identically—regulatory arbitrage is about where that doesn't happen and there are inconsistent outcomes for different people based on how they have access to product.

**CHAIR:** Do you see that there could be risks to future growth and innovation in the sector if we get this wrong? If we proceeded with some of the concerns you have about this bill and put that in place, do you think there would be risks to the future growth and innovation of the sector?

**Ms Lumsden:** Absolutely. If we get this wrong, regulatory arbitrage won't just be across product structures and whether people want to opt in and out of the blockchain; it'll be around the different structures they use to avoid regulations—people shifting to using DOWS and DEXs to avoid Australian regulation or moving offshore, going overseas. If we produce a regime that does not accurately address legitimate industry concerns about the differences between digital assets, existing regulation and solving problems that are unique to the digital asset sector, we will absolutely see a stifling of innovation in this country, and we will see businesses leaving this market.

**CHAIR:** Thank you. And Mr Chung, you also are generally in favour of proceeding with some form of regulation in the sector, as I understand it, to create greater clarity for people who are operating in it at the moment.

**Mr Chung:** Yes.

**CHAIR:** We all need to figure out what the best way of doing that is. You raise some questions about certainty and uncertainty about the application of the Corporations Act to crypto related businesses that might occur if we were to go down the sort of path that we're talking about today. What are the concerns you have about the uncertainty we could create? And how could we go about avoiding that in the development of future regulation?

**Mr Chung:** I suppose the main thing we need to be aware of or perhaps avoid is to replace one set of uncertainties with another. It is a definitional problem, and the definitions are where we generally come unstuck, because of how dynamic the digital assets space is. In fact, it is almost one of the core part of the ethos of this space that you create something that defies borders and definition, and that is the challenge we face here. Certainly, regulation is a good thing. We need it. All of our clients would be happy to have it, although, perhaps, begrudgingly in some circumstances. But having regulation that is focused on digital assets will be an improvement over having none. But if we introduce a whole new set of uncertainties and with it onerous compliance obligations then perhaps what we have now might even be better. So in terms of the risks of getting it wrong, yes, there are some. The risk of getting it wrong, I believe, is more palatable than not having any regulation at all.

Just to continue the discussion of regulatory arbitrage, many of my clients, even the start-up founders who are still in university, looking to do something in the space are relatively well versed on 'okay, which jurisdiction do we choose here', because it is the crypto space, the digital assets space very much is not anchored by jurisdiction. The choice of jurisdiction in which to anchor your project or business is a relevant one and that is one that is made based on the perception of how workable the rules of the relevant jurisdiction are.

**Senator BRAGG:** This is basically an attempt to try and regulate the gatekeepers. I know you have referred to the definitions in part 1, section 5, where it sets out that a regulated digital asset means a digital asset of any of the following kinds does not include financial within the meaning of chapter 7 of the Corporations Act. It then refers to asset reference token, electronic money token and exchange token. You think there is an issue with the terminology. So you think this is a confusing way to approach it, do you?

**Mr Chung:** Perhaps not confusing so much as it does not solve the key problem, which is when does the Corporations Act apply? This bill kicks into gear where we may consider the boundary to be the functional perimeter of what a financial product, where that is. But where is that, and how does that relate to the tokens that apparently exist or may in the future exist? So, in my opinion, simply excluding financial products within the meaning of the Corporations Act does not really help us or does not help the space move forwards.

**Senator BRAGG:** Why doesn't it help us move forward if you say to a regulated gatekeeper, 'These are the categories of tokens subject to regulations.' Isn't that an improvement on the status quo?

**Mr Chung:** Perhaps it is, if we are talking about the different definitions there. I have raised issues in the submission relating to those as well. We want to ensure that we have clarity about what tokens are captured and that the tokens that are captured do not diminish over time—diminish in number relative to the total number of tokens available.

**Senator BRAGG:** That is a good answer. So how do you think this is going overall? Do you think Australia is moving quickly, or have we been slow? What is your reading?

**Mr Chung:** In my view, progress is progress, and as long as we are having these discussions then I think it is beneficial. Yes, there are other countries that have gone through this process already but that is not to say that we are early or late. Having regulation is important, and as long as we are moving in that direction then that is a good thing.

**Senator BRAGG:** Do you agree with the approach of trying to regulate the gatekeepers here?

**Mr Chung:** I think that is the most practical one. In reality, if someone was to have a desire to acquire crypto currency, they can do that even outside of what we call the gatekeepers. But if there is an easy way that they can use digital currency exchange, for example, and they have confidence in the exchange being licensed and everything is legitimate and their bank is happy to deal with that business then that is what people will use. But if you place an insurmountable roadblock, people will find other ways around it.

**Senator BRAGG:** So your testimony is that there is no emergency here, that we are making progress and that, at this rate, as long as we pass a law in the next five years, it is all good?

**Mr Chung:** With respect, I live my life with a sense of urgency and I think that is what we should all do. I would certainly prefer to see legislation come in sooner rather than later. But as I mentioned earlier, there are risks of getting it wrong, so as long as we are having these discussions and moving on the right direction then that is a good thing.

**Senator BRAGG:** Thank you for your submissions.

**Mr Chung:** Thank you very much.

**CHAIR:** Thank you very much to both of you for appearing before the committee and for giving your evidence. We very much appreciate it. You go with our thanks today.

**BERG, Associate Professor Chris, Private capacity [by video link]**

**MORTON, Dr Elizabeth, Private capacity [by video link]**

**SCHOLFIELD, Mr Sinclair, Director, Treasurer and Executive Sponsor of Digital Assets Working Group, Australian Custodial Services Association**

**TRAVERS, Mr David, Chief Executive Officer, Australian Custodial Services Association**

[11:52]

**CHAIR:** I now welcome representatives from the Australian Custodial Services Association, Associate Professor Berg and Dr Morton. I understand information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. Thank you for being here with us today. Does the Australian Custodial Association have a statement you would like to give? Please proceed if you do.

**Mr Travers:** Yes, we do. I'd like to thank you for the opportunity to give evidence today. I would just do some opening remarks around ACSA, and Sinclair will give some detail on our submission. The Australian Custodial Services Association is the peak industry body representing members of the Australian custodial and investment administration sector. It was founded in 1992. Members of ACSA include JP Morgan, HSBC, State Street, the BNP Paribas, the Bank of New York Mellon, Citibank and Northern Trust. Collectively, the ACSA members hold securities and investments in excess of \$4.7 trillion in value of custody and assets under administration for Australian clients, for institutional investors, such as industry funds and retail funds and corporate superannuation funds as well as life insurance companies and responsible entities for wholesale and retail investment funds. We do not have any members that provide direct retail custody services.

ACSA recognises that crypto and digital assets are emerging rapidly in Australia as both an asset class and a fungible currency that can change the nature of trading, settlement, transacting and safekeeping for traditional assets, for new digital assets and for digital contracts. A key priority for ACSA is ensuring that the future regulation allows for efficient and effective market operations and ensures adequate investor protections, particularly for institutional and wholesale investors and the related custody and safekeeping services. Sinclair is going to give some insight into the key points from our submission on the bill.

**Mr Scholfield:** Good morning, senators. In respect of the proposed bill, firstly, ACSA agrees that the proposed policy objectives for regulating digital asset exchanges and custodians are sound. We advocate that future regulations and laws be consistent in approach and terminology with other key global jurisdictions and with existing Australian regulations and laws.

ACSA believes that there needs to be acknowledgement of the existing AFSL licence regimes and obligations. This includes consistency in licensing outcomes and regulations across AFSLs and any other licence framework. Licensing requirements must recognise the different roles that AFSLs fulfill in trading, settlement and the safekeeping of assets. New regulations and laws should look through the technology, and digital assets should be treated similarly to comparable, traditional financial products with similar licensing disclosure and other requirements. We believe that different roles, such as investment advisers, exchanges, fund administrators and custody services, need to have specific licensing arrangements and that those need to be consistent, where possible, with AFSL requirements for traditional assets. ACSA does not support domestic custody location requirements, as we believe this would hinder the ability to achieve scale and for Australian markets to maintain international competitiveness.

Regulations and laws must recognise established institutional investment requirements and concepts, including notions such as trusts, nominee and omnibus holdings, bankruptcy remoteness and limited liabilities for custodians. It is important that services such as asset administration services are not caught in the regulation by virtue of the fact that they may include ancillary services for digital assets and remain consistent in regulatory form with traditional products. We support the need to have regulation introduced and implemented as soon as possible but, equally, that this regulation is created in a considered manner. Thank you.

**CHAIR:** Thank you very much. Do the academics have an opening statement they would like to give?

**Prof. Berg:** We'll let our submission stand for the most part. I would just like to emphasise that this is an incredible opportunity for Australia. I would, however, like on to pass to my colleague to emphasise a point in our submission around taxation.

**Dr Morton:** Thank you for this opportunity to appear today. The bill seeks to establish needed regulation for emerging technologies, and we support this step. We recommend attention is maintained on issues surrounding

the taxation of the crypto economy, whether for this bill or for future proposed reform. The crypto economy may be described as one of the biggest digital revolutions since the internet and the impacts are felt by all taxpayers, not just business.

Treasury indicated that over one million taxpayers are to lodge income tax returns which include gains or losses from crypto activity. The ATO have issued thousands of letters to taxpayers, urging them to declare their crypto activities. They are concerned that there is significant noncompliance in the industry which creates risks for government revenue collection. It is evident from annual individual tax gap reporting and marketing from the ATO on key tax focuses. This issue is more pervasive than the introduction of GST or Single Touch Payroll. We've already seen the younger generation engage with the technology, and they may have never engaged with the tax system before, so we are concerned that taxpayers are not aware of the tax implications of their activities or find it too difficult to address the tax implications. Unlike traditional investing, there is a confusing and unavoidable overlap between crypto as a commodity and the community in which it is used with creativity and innovation and with the identity of those who use it. This makes applying existing legal and economic frameworks difficult. The tax system is predicated on older, more clearly defined and local activities. We need to ensure that the tax system is fit for purpose for a disrupted, global, digital economy. Whilst we debate the merits of regulating this space, we urge that tax stay on the agenda. We welcome any additional questions on this topic or our submission. Thank you.

**CHAIR:** Thank you so much, Dr Morton. I'll start with some questions for ACSA. I think, broadly, the thrust of your statements and your submission is that you'd like to see regulation in this space, but we need to get it right. You've talked about needing an approach that looks at what's going on around the world in this space and that, if possible, pursues global harmonisation. Why is that global harmonisation so important to your members? What should the parliament learn from the way in which this bill approaches that, and how should we perhaps approach it differently?

**Mr Scholfield:** Thank you for the question. Our view is that certainly where assets, whether they be digital or otherwise, are defined as investable they should be treated as internationally fungible. That means that we need to be recognising the jurisdictional approach and regulation of markets in which those assets are traded. That's been the approach we've taken with traditional assets throughout the course of time.

I think the other component is that we really want to make sure that, from a domestic perspective, there is a focus on the fact that there are many different players within the financial services ecosystem. Just as the AFSL requirements today cover those in different senses—that is, custodians are treated differently to an investment adviser—we would advocate for the same approach being applied to any digital asset regulation.

**CHAIR:** Thank you for that answer. Your submission and a number of the submissions talk about a preference for drawing digital assets, where appropriate, into the current AFS licensing regime. You spoke about that in your opening statement. How do you see this bill sitting with that, and why is it important to your members to try to integrate with the current licensing model instead of, perhaps, creating more bespoke licensing layers.

**Mr Travers:** I would suggest that that view comes from our experience in seeing how traditional assets are also starting to move towards the digital asset framework, and we are concerned that having multiple licensing regimes or different regulatory frameworks can create the potential for regulatory arbitrage by participants. Today we're seeing proof of concepts that are operating across a number of different traditional assets, be that managed funds, fixed interest or private equity, and we would expect that those types of assets should all fall within the one framework for licensing and not be separated purely because of the fact that they sit on a digital platform as opposed to what would be a more traditional process oriented framework. It really comes down to that regulatory arbitrage type concern.

**CHAIR:** What are the potential implications of that sort of arbitrage for the sector—for certainty in the sector and growth in the sector but also, critically, for consumers in the sector as well?

**Mr Travers:** We see that there is the potential for different standards to be applied to the different licensing frameworks. An organisation could choose to license itself under the least restrictive requirements in order to provide those services, and that could impact the competitive nature of the industry because you would have people operating under different frameworks.

**CHAIR:** Are you able to comment on potential consumer issues there?

**Mr Travers:** We don't have any direct retail clients; it's all institutional and wholesale that we deal with.

**CHAIR:** Okay. Thank you. Deputy Chair?

**Senator BRAGG:** Thanks very much. Just to ACSA: on the custody issues, do you have a view about how we should manage the foreign dimension of this? I know you mentioned in brief in your submission that you think

we should have licensing obligations that support the global nature of crypto and digital. How do you think that would work?

**Mr Travers:** Our view would be that, if a financial product is operating in a jurisdiction outside Australia, the licensing obligations should have similar characteristics to those in Australia. I don't think we would be suggesting that financial products should be able to go into markets that don't have the same governance and standards as Australia would have. I guess it's staying out of the Wild West, if you like, but staying in the mainstream regulatory frameworks around the US, the UK, Europe and so forth.

**Senator BRAGG:** This bill doesn't go down a financial product route, so where does that leave us?

**Mr Travers:** ACSA supports having regulation that is aligned to the AFSL and the financial product requirements.

**Senator BRAGG:** I understand that, but what if that's not the decision of the parliament? I'm trying to work out what you think would be the best way for Australia to set up custody laws for digital assets, which would allow us to have a domestic industry that is competitive and not overly burdensome.

**Mr Scholfield:** In our submission, we advocated for the carving out of certain types of digital tokens or assets. I guess our view is that, if it's a financial product, then it needs to be within the AFSL regime, which is tried and tested and has the Corporations Act and other regulation already surrounding those assets and the way in which they're dealt with and for things like any type of issue resolution and so forth.

**Senator BRAGG:** Let's say, for example, that bitcoin is not going to be a financial product in your preferred world and the parliament decides that it's one of the tokens set up under this bill or a bill or a law like this. Would you want to see domestic custody arrangements as mandatory for that bitcoin, or would you be open to seeing something which was more global in nature with some domestic obligations on the entity?

**Mr Scholfield:** I would say the latter because, again, whatever type of asset we're talking about, if it's globally traded and fungible and needs to be monitored, stored and accounted for, we're looking for regulatory alliance or application of considered positions around regulation in line with other major jurisdictions.

**Senator BRAGG:** I might just ask you, Professor Berg, how you think the government is going with the timetable here. How do you think we're tracking in relation to regulating digital assets?

**Prof. Berg:** I think we actually face a degree of urgency, and we've faced that degree of urgency particularly in the last couple of years. We've got a fairly good idea about the low-hanging fruit in this space that I think the bill addresses quite clearly and consistently, so we'd urge the parliament to work on the low-hanging fruit. The point I'd just like to make is that it's a very large industry by this stage and it's a very complex industry. From an academic and theoretical perspective, it raises some really interesting questions, but the consumer harms that we have seen—the things that parliament should be concerned by because we've experienced them—are things like exchanges going down and allegedly having defrauded customers or taken their money and so forth, and potential questions around fiat backed stablecoins.

Those are really quite concrete harms. We know what they are. We've seen them. We know largely how to regulate them. So we've got a choice. We can just target those, or we can try to have some sort of grand, comprehensive thing that targets every possible future. I clearly favour the former. I think that we have problems right now. Those problems can be tackled. This bill tackles them. We can talk about some specific language in the bill, but that strikes me as urgent, and it strikes me as an opportunity as well because we're in this grand global competition where we can attract business and financial services to Australia. Now is the opportunity to take that.

**Senator BRAGG:** So the low-hanging fruit is regulating the gatekeepers?

**Prof. Berg:** Yes, and this bill covers that. The two big gatekeepers are the exchanges—most people engage with cryptocurrency through exchanges, and we should be making sure that they do so with adequate custody rules and with reasonable prudential requirements as required—and potentially stablecoins as well. There aren't any major Australian fiat backed stablecoins, but that's an opportunity for us. If we can establish a regime that allows people to release Australian-dollar backed stablecoins, that's an opportunity not only for Australian consumers but for the Australian footprint in the global financial system that we can capture and we should capture.

**Senator BRAGG:** Last year in March, there was a Treasury paper called the CASSPrs paper, which looked at regulating the markets here as gatekeepers. That was 15 months ago. What process do you think is needed to regulate these gatekeepers? I mean, that's already been attempted, so what do you think the government should do now?

**Prof. Berg:** I don't think it's a challenging problem. I think the question is: Will parliament prioritise it? Will the government prioritise this as an industry? We are now more than a year past some of the really big downturns in the cryptocurrency industry that revealed many of these problems to be serious consumer harm problems. Now is the opportunity. We should have acted on it before, but certainly we have all the knowledge necessary to act on that low-hanging fruit. So, yes, to support your argument there, I do think it is urgent. It is not necessarily a difficult thing; it just requires a bit of oomph on behalf of the parliament.

**Senator BRAGG:** Thank you very much.

**Prof. Berg:** Thank you.

**CHAIR:** Thank you, Deputy Chair, and thank you to all the witnesses who have appeared on this panel. We really appreciate your evidence, and you go with our thanks. The committee will now break for lunch.

**Proceedings suspended from 12:13 to 13:08**



**BAXBY, Mr Matthew, Chief Executive Officer, Australia and New Zealand, Revolut Payments Australia [by video link]**

**JAMIESON, Mr Scott, Chief Compliance Officer, Australia and New Zealand, Revolut Payments Australia [by video link]**

**PERCY, Mr Adam, General Counsel, Swyftx [by video link]**

**CHAIR:** Welcome. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. Thank you all for being here for us this afternoon. I now invite you to make a short opening statement, if you have one. Mr Percy, would you like to go first?

**Mr Percy:** We thank the economics committee for the opportunity to contribute to this important discussion on the Digital Assets (Market Regulation) Bill and the effect of regulation of crypto assets in Australia. I am General Counsel and Chief Risk and Compliance Officer of Swyftx, a leading cryptocurrency trading platform with close to 700,000 Australian customers. As an Australian founded and headquartered business, we have been a consistent contributor to the discourse on crypto asset regulation in Australia. We welcome the chance today to continue that contribution.

It is an important moment for the committee to be discussing this bill and regulation of the crypto industry more generally. Looking around the world, we can see jurisdictions charting different paths. In Europe the EU has passed a relatively comprehensive regime for markets and crypto assets regulation. The UK is consulting on a similarly comprehensive set of measures whilst at the same time rolling out near-erm measures to bring crypto advertisement within its financial promotions regime. In the Middle East, Dubai has gained recent notoriety for its relatively light-touch VARA regime and bespoke regulator. In China, following a ban on crypto asset trading, Hong Kong has surprisingly emerged with its own regulatory regime, allowing the practice to resume, albeit under very strict controls for retail investors. The United States is struggling to gain traction on bipartisan legislation, though a number bills do exist. At the same time, the entire global crypto industry watches on as US regulators continue their enforcement-by-regulation approach, running cases against crypto asset issuers and service providers alike. Most recently, the Monetary Authority of Singapore has recently announced final position on obligations relating to custody and operational requirements, continuing its well-trodden path of bringing the crypto industry into its regulatory purview, albeit with stringent requirements for retail investors.

At the same time, multilateral organisations such as IOSCO and the Financial Stability Board have released a suite of recommendations urging jurisdictions to harmonise their regulatory regimes to ensure consistent regulatory treatment where the same activities and same risks persist across borders.

Against that backdrop, as we discuss what effective regulatory systems look like Australia, I offer three observations at the outset of this session. First, because the crypto industry is complex, fleshing out the detail of regulations will be difficult; however, the advancement of regulatory regimes within and among jurisdictions provides a wealth of material upon which we can and should draw.

Second, as we seek to ensure that the regulatory settings applied are fit for Australia's purposes, we should not shy away from our existing framework. As Swyftx has stated consistently from consultations in early 2022, we think the existing financial services licensing regime can be appropriately modified to accommodate crypto assets. Furthermore, given the thrust of regulatory reform assets to date have focused on the financialisation of crypto and harms perpetrated by centralised bad actors, we think it is appropriate that the existing financial services laws should be tailored rather than creating separate bespoke regime.

Third and finally, as we seek to adopt regulatory settings to find the appropriate balance between consumer protection and innovation, we need to keep in mind what makes the Australian crypto industry different from other jurisdictions and how that suggests what the appropriate balance should be. From an investor perspective, the data suggests Australian investors are progressive adopters of crypto asset investment. Whether the research comes from ASIC, the Tech Council of Australia or industry-specific data, it all points toward Australians being unafraid to engage with the new technology and investment classes.

From an industry perspective, it is also critical to appreciate the diversity of business models among what are colloquially referred to as 'crypto exchanges'. Swyftx, for example, operates as a broker, facilitating competitively priced access to a much wider range of crypto assets than would be the case were we restricted just to the domestic market. These differences have important applications when we talk about topics such as custody, client money, instantaneous transaction settlement and others. Accordingly, we think it is imperative that policymakers understand the impact that particular policy choices could have upon different aspects of the crypto industry. At

the end of the day, the variety of business models that exist in Australia do so because Australians want them to and will continue to want them to.

We thank the committee for its consideration today and look forward to assisting with any questions it might have.

**CHAIR:** Thank you very much. Revolut?

**Mr Baxby:** Scott and I welcome the opportunity to share with the committee our point of view on the draft legislation. We've been actively participating in the discussion on the regulation of cryptocurrency through various forums since about 2020. I'll start with a brief introduction to Revolut by way of business context and our current crypto offering, and I'll save commentary on the legislation itself for any questions you might have on our submission.

Overall, Revolut was founded in the UK in 2015. It had a very simple proposition: design to enable customers to easily send, spend and exchange foreign currency across the world at better prices. Since then, Revolut has expanded its feature set and is now considered one of the world's fastest growing fintechs. Our vision is to build a financial super app with a broad range of features. Globally, we have more than 30 million retail customers across 40 countries, and the group employs more than 6,000 people.

Since obtaining its Australian financial services licence and publicly launching in Australia in August 2020, Revolut Australia has surpassed 350,000 sign-ups. We've grown the team in Australia from three people to 48. We started with a prepaid debit card and stored-value account, which operates similarly to a bank account with the added value of automated budgeting tools. Since then, we've introduced a number of new major features for our Australian customers across the everyday payments, wealth and trading, small business and lending verticals. Our mission is really to put Australians back in control of their finances, enabling them to manage their entire financial life in one place. We try to do this by offering better value and a better experience.

This concept of a 'financial super app' includes giving customers exposure to alternative asset classes, including cryptocurrency. Revolut Australia launched its crypto services to its Australian customers in late 2020, and it has seen steady, organic take-up. The gap we saw in the market was a simple, safe and transparent way for customers to buy, hold and sell crypto assets through a linkage to their Revolut digital money wallet. Revolut Australia operates what we term a 'walled garden' approach to cryptocurrency. This requires customers to convert from fiat currency to crypto. The crypto can only be transferred to another user within the Revolut ecosystem or reconverted to fiat currency. As such, the cryptocurrency cannot be withdrawn or transferred to an unknown party, which we believe mitigates a number of key risks. Revolut customers can access around 100 different tokens. We do not offer the ability for customers to buy or sell stablecoins and do not currently issue digital tokens.

Overall, whilst we've observed lower trading activity in crypto post COVID, we continue to see strong interest from consumers in wanting to learn more about cryptocurrencies and blockchain. This prompted us to launch what we've termed a 'learn and earn' initiative. As the name suggests, the feature enables users to learn about cryptocurrencies via a series of short courses and earn cryptocurrency at the same time. In its first week of launch, 23,000 lessons were completed. We saw this as one step towards advancing financial literacy amongst Australians, including developing a better understanding of the risks and volatility associated with the asset class.

As I said, we haven't sought to recommunicate what we had in our submission, but I'm obviously very happy to take any questions that the committee might have.

**CHAIR:** Thank you very much indeed. Thank you again to all of you for making time for us this afternoon. I might start with Mr Percy. I'll ask you to elaborate on some aspects of the three points that you made for us in your opening statement. You talked about a preference for regulation in this space, which I think everybody understands is needed and progress needs to be made towards. You talked about a preference for regulation aligning with the financial services licence regime as opposed to, I think, what you called a bespoke model. Can you elaborate on why that's important to you?

**Mr Percy:** Sure. There's a little bit of context to that, going right back to the CASSPr consultations, which were led by the good work led by Senator Bragg.

When Swyftx was evaluating its current business and its anticipated future business—how we were going to grow as a company—although of course a spot crypto trading platform currently didn't fit within the financial services framework it was pretty clear to us that any new product or offering that we were looking at rolling out was going to require us to venture into the AFSL territory. That was a really big motivator for us, because, when we're looking at what we have to build internally in order to do the things we want to do, that's the direction that we're looking. At the same time—and I've expressed this view in other places as well—when you look at the

activities of a crypto exchange or a broker, when you look at why customers are coming to our platform and why they're engaging with what we do and why they're buying the tokens that they're buying, by and large it's because they want to see the value increased; they're coming to make an investment. That's very similar if not the exact same motivation as to why you would go to a share trading platform to buy, say, Aussie listed shares. So, while I appreciate that the risks inherent in, say, a particular crypto assets token would be different from a particular share listed on the ASX, I do think the fact that the activities are broadly the same means that there are similar risks present, so we should be looking for the same regulatory treatment.

These are a lot of the factors that informed our thinking at the time. And I suppose a final thought—and it's probably been expressed in previous sessions today as well and no doubt will be by colleagues of mine appearing in future sessions—is that if we're going to build and uplift our internal processes and things to align with regulatory requirements then I'd much rather have to do that with one single regime than have to accommodate separate regimes that maybe cover the same territory and there's that risk of doubling up. That's a view we've held for a while, and as things have unfolded it's a view we continue to hold.

**CHAIR:** Thank you. And that question you raised about the potential for duplication, or doubling up, which is I think the term you used: is that more of an issue perhaps for newer and smaller companies? Is there a risk if we don't get that regulation right that we might impact innovation in some negative way?

**Mr Percy:** I suppose that could be the case. Certainly if you are a more mature company and you already have an AFSL in place because you offer traditional financial products and services then you've already got the compliance infrastructure stood up. The gentlemen at Revolut will be able to speak to this, I would imagine. If you look at it from that perspective, if you've already got that set up, and then a new regime is introduced, is there the potential to have to set up duplicate processes? Does it become an inefficient process? But if it's simply an additional authorisation on the existing framework that you've already built—this is all theoretical, of course, at this stage—there is that risk that a separate regime introduces a bit of dissonance between the respective requirements.

I appreciate that until we see what exactly the rules will be we're speaking in terms of academic possibility. But I think you can see where, generally speaking, if we're all aligning with these existing frameworks there's a much higher likelihood that we get consistent outcomes between the different authorisations.

**CHAIR:** Okay. Thank you. And I think you said you'd like to see any Australian regulation aligned with international regulation. I think that was your first point, or part of your first point. But you also said in your third point that we need to have an awareness about what's different about the Australian jurisdiction. How do you balance those two things? What should we learn from and how should we articulate with, if we can, the international regimes that are out there? And what do you see as being specific to Australia that we need to think about?

**Mr Percy:** To answer the first part of your question, let's start with the latter part: what is it about Australia that makes us a different type of market, and what are the special features that we need to be mindful of? I can't speak for the entire Australian blockchain industry, but I can certainly speak to the experiences with it. Swyftx was founded in 2018 out of a clear desire by its founders, Alex Harper and Angus Goldman, to provide better access to a broader range of crypto assets at more competitive prices than was the case at that point in time. It used to be the case that if you wanted certain tokens you had to set up accounts and offshore exchanges, and there were pretty obvious pricing arbitrages between jurisdictions. What they built was the broker model. They're a newer entrant in the grand scheme of the exchange participants that have been out there, but they've achieved pretty incredible success in just a few years, which I think speaks to the level of demand that's here in Australia. They'd much rather deal with an Australian based broker that's facilitating, by themselves, a range of global liquidity providers at really competitive prices. There's a real preference for that—as opposed to, say, if I want token X and I can only get token X on an exchange platform that's located offshore, and so I have to go do that. It's just a much better customer experience.

That's something that perhaps isn't as obvious in a country like the United States, where they have 330 million people, and so they can create much more competitive market dynamics even within themselves—the same thing with China if it wanted to really open up and welcome crypto-asset trading there. We have those dynamics at play, and that's why companies like Swyftx exist.

So then you come to 'Here's the Australian landscape; what requirements do we need to ensure that we're mindful of if we want to preserve and foster the future innovation of this domestic market?' I think that's where you can start to see that divergence among countries. We're not all thinking about things like custody in the same way. You can see that, over in the EU, they're taking a bit more of a principles based approach to that, whereas in

a jurisdiction like Hong Kong, they have said that, of all the assets you manage, you can only have two per cent of those assets on what are called 'hot wallet storage'. So there are some very different approaches to things.

I think, given that we have a diversity of business model here domestically, we need to be mindful that highly prescriptive requirements in any particular area might inadvertently be almost impractical for certain businesses to be able to comply with, as opposed to others. We wouldn't want to see an outcome where policy settings are picking winners and losers based on highly prescriptive requirements.

**CHAIR:** I'll just go to Revolut and ask that same question, as Mr Percy referred to you in his answer. Do you have views or thoughts about having a bespoke model or aligning with existing regulation where possible? What are the concerns that you might have with whatever model the parliament might ultimately adopt, in terms of the risks of doubling up and duplication and the impact of that, potentially, on innovation?

**Mr Jamieson:** Our view has always been that it would be most logical to regulate crypto as an extension to the existing Corporations Law through the existence of Australian financial service licences. I think we're very much aligned with Mr Percy's comments on this. The actual infrastructure already exists. The industry knows ASIC well. ASIC is already experienced, in its role, in regulating consumers across financial services, and we think there are so many similarities to what would ultimately be needed for crypto regulation that it would make sense for it to be regulated in a very similar way to what currently exists for financial services. As Mr Percy said, we think it could be done relatively easily legislatively by including a new class of financial product within the current definitions that already exist within the Corporations Law. We think that's probably easiest both from an implementation point of view and also from the point of view of current providers like us who actually already operate under a financial services licence. It would, as Mr Percy said, remove possible duplication in our internal governance. Once we have established that we have the right governance process in place with the right people in place, it's a relatively easy step to establish that we are also qualified to offer crypto services. It is certainly a much less cumbersome and less expensive process than it would be if we had to comply with a whole new regime and demonstrate to a new team, even if it was within the same regulator, that we have all of those governance arrangements in place. Overall, we think the system is already there and it is convenient to use the system that already exists.

**CHAIR:** In your submission you raise a point that I don't think we have ventilated yet today, which is around the importance of consumer protections. I think you raised issues around whether the approach that is envisaged with this particular bill would require additional consumer protections to be put in place. Are you able to elaborate on consumer protections?

**Mr Jamieson:** Sure. That ties in to the comments I was making about the inclusion as a financial product. Already under the Corporations Act and the ASIC Act there are a lot of consumer protection provisions that relate to how products need to be marketed and how they need to be distributed. A recent example of that was the introduction of design and distribution laws a few years ago through ASIC that require that all of our financial products are appropriately targeted to specific target markets. Along with that there are all sorts of requirements about misleading and deceptive conduct in the way you promote and advertise material. If we were considering a completely new licensing regime that did not involve those current laws, the legislature would need to think about how we are going to deal with those consumer protection issues and how we could possibly bring those in to the existing regime without having to set up yet another set of legislation to deal with all of those things.

Again, the easiest way to do that would be to declare crypto assets as a class of financial products, and then you automatically would have the coverage of those existing consumer protections. It may be that you need to amend those protections a little bit and maybe not necessarily amend the legislation. Perhaps ASIC might need to amend its guidance around some of those areas, but in general the protections will already exist.

**CHAIR:** Thank you very much. Deputy Chair?

**Senator BRAGG:** Basically, my understanding of the Revolut submission is that you think that we are generally heading in the right direction with the bill, but we should try and harmonise with other jurisdictions and work on a similar timetable to other jurisdictions that we would want to compare ourselves to. Is that correct?

**Mr Jamieson:** Yes. Our suggestion was particularly that we have reference to what the Financial Stability Board is doing in Europe, and we have seen just in the last week that that board has produced its recommendations. I do see that there is some fairly good alignment between a number of the recommendations and the proposals that are put forward in this bill. But we think there are probably a few others that could be reflected upon and go a little further or could be approached a bit differently than the bill approaches them. One of the things that we particularly see there, which is set out in another section of our submission, is the proposal that the way in which the regulation is implemented takes into account the appropriate risks of the participants.

We look at the risk in a couple of different ways. Firstly, we look at the risk of the actual products that are being marketed. Secondly, we look at the risk of the actual participants that are marketing those products. We think that there are some inherently very risky products. They could be the ones that involve derivatives or things like privacy tokens, where it's very difficult to track where money is going. We see those things as much more risky than very vanilla exchanges—or to the point of Revolut, which has an even more limited range of what you can do with your crypto tokens.

We would see an appropriate regime as being able to reflect the risk of the products and the participants so that a riskier participant with riskier products would be required to show a high level of governance and potentially a higher level of capital, and potentially satisfy the regulator to a somewhat higher level in the licensing regime.

**Senator BRAGG:** How do you think the government and the parliament are going in terms of regulating crypto? Are they moving fast enough?

**Mr Baxby:** I think, Senator Bragg, we've been supportive of regulation from the start for a few reasons. One reason—I think you even call it out in the explanatory memorandum—is that putting in place a ticket to play is likely to mean the industry grows up a bit faster. We think it's something that should be expedited for lots of different reasons, such as ensuring that the industry is operating at an appropriate standard, that at the end of the day consumers are properly protected and that there is stability around the system. I think all of those features are really important. We'd like to see that accelerate. It feels like we've been talking about this for a few years now. There are some really clear options in front of the government, either extending the existing licensing regime or a regime that's outlined in the bill in terms of determination by the minister. I think, as Mr Percy outlined, every other international jurisdiction, or a number of the more mature ones, are moving at pace on this. Those original submissions we made about the risk of Australia being left behind are real, in our view.

**Mr Jamieson:** I might add to that. We're not suggesting that we try to get exactly the same regulation in every country, because we understand that can never happen. Different regimes are set up differently, and we'll never be able to regulate in exactly the same way. But having a set of principles that can be delivered globally is something that I think we should be working towards. I think that those FSB recommendations are a good start. They do focus primarily on financial stability, as opposed to consumer protection. But I think, if we can take those principles and then overlay the key things that we want to achieve in consumer protection on top of those recommendations, that's a pretty good set of principles to be trying to adhere to internationally.

**Senator BRAGG:** These are questions for Revolut, and I have some questions for Swyftx. How far behind Singapore, Japan, Hong Kong and the UK are we?

**Mr Jamieson:** In terms of years, I can't really answer that. I know that—

**Senator BRAGG:** It's years, isn't it? It's years, not months, isn't it?

**Mr Jamieson:** For Singapore, you would say that. I'm not sure that I would necessarily say that for the UK, but I can't say that I'm an expert in that either.

**Senator BRAGG:** What about the EU? Aren't they about to enact the MiCA provisions in this area?

**Mr Jamieson:** I think maybe Mr Percy might help us out there.

**Mr Percy:** It's a progressive time line, as I understand it. If, hypothetically, we were operating in the EU, I think it would be about 2025 when the full implementation would be complete.

**Senator BRAGG:** The point is we are years behind Singapore, aren't we?

**Mr Jamieson:** It is fair to say that we are, but I think Singapore in all that time has been considering and reconsidering where to set its regulation. I do not think they had all the answers three years ago.

**Senator BRAGG:** We will hear from a lot of lawyers and public servants today, right? You are representing the market here today, so I am asking you where we are up to from a competitive perspective. One is a global business; one is an Australian business. My reading of the situation is that we are not even close to getting a government bill here for you to look at. There needs to be another process before we even get to a bill. How long do you think we can drag this out for? The question is: If we are already behind now, how much longer is it reasonable in the opinion of the market for the government to take to land an actual bill? I am not talking about a consultation paper or some other paper from Canberra. How much longer is it reasonable for the market to wait for a piece of hard regulation?

**Mr Jamieson:** Matt, do you have a view?

**Mr Baxby:** It is difficult to put a time frame on it. I will answer your question in a slightly different way, or pose a slightly different question, which is: How has it slowed us down? It does weigh into our decision-making around the certainty of the regime we are operating in. Part 2 of that is we said from the start that an appropriate

ticket to play for the industry is important in building consumer confidence in the sector overall. So, back to those macro points about is there a risk of Australia being left behind in terms of additional investment, enabling an industry that has potential to have some real benefit around acceleration of cross-border and some of those other things, I think, those risks do exist. We said from the start we would like to see an accelerated regime.

**Senator BRAGG:** Have you reduced investment or hired fewer people because of the slowdown in crypto regulation?

**Mr Baxby:** It is difficult to be specific about that. One hypothesis of post COVID-19 is there has been slightly less demand. Our experience of that has been some consumer perception that the industry is unregulated, with questions around are there financial implications of investing in the asset class. FTX added to that in terms of some of those concerns. The potential flow-on impact is less demand as a result. Less demand means less likely to have product innovation in the space. That is the interconnectedness. Rather than the standing back and saying we missed out on some investment because of that, we have been incredibly well supported in terms of growing out our Australian franchise in terms of Revolut's footprint. I think regulation would help in making the case for why we should invest further in the crypto vertical thrust.

**Senator BRAGG:** My last question to Revolut is: If there is no regulation this time next year, do you think you will be investing more or less in Australia?

**Mr Baxby:** We have a very solid pipeline of investment in Australia. We are in the fortunate position of not being solely focused on crypto currency as part of that. We have bold plans.

**Senator BRAGG:** I'm asking you in relation to crypto.

**Mr Baxby:** It is very difficult to say. Back to that central point about is it denting consumer demand, that is one of our hypotheses—that is, there is a lack of certainty in the market around that. As I said, demand usually attracts investment, so I think that could be one aspect of it.

**Senator BRAGG:** Going to Swyftx: Mr Percy, do you think the government and the parliament are going fast enough in relation to regulating crypto?

**Mr Percy:** I think I come at this from the perspective of a younger entrant in the Australian crypto industry, and that is that the time line that's been set by the government is one that we are able to make business decisions around in terms of building and uplifting towards what we anticipate the regulatory standards will be. What I mean by that—this is connected to your questions to Revolut around investment and whether we are going fast enough, all those questions together—is that in order to get anything done in terms of building for organisational capability it requires some sort of combination of time, people and money, and usually there's a trade-off there. I think it's pretty well documented that crypto businesses are not making very much money these days compared with what they were making a couple of years ago.

From Swyftx's perspective it's pretty well documented that we've had to go through some layoffs over the past year or so, whereas in other market conditions we might say, 'Tell us the requirements and we'll build for it and be ready in two weeks'. That's just not the case these days. But I think what is pleasing is that although with a change in government there's a change in priorities and a change in where crypto regulation falls in that mix we nevertheless would say that we've got enough certainty around an anticipated time line, and frankly that gives us the time that we probably need to build to be able to comply with what I expect will just be a very robust set of regulations.

**Senator BRAGG:** Alright. You might be waiting a long time! But thanks a lot.

**CHAIR:** Thank you very much. I'm resisting asking a follow-up question; Senator Bragg, you can hear me doing it, and I'm resisting! So, I'll thank you all very much for your evidence today. And the committee thanks you for the time you've taken to be with us. You go with our thanks.

**BOWLER, Ms Caroline, Chief Executive Officer, BTC Markets [by video link]**

**MILLER, Mr Jonathon, Managing Director, Australia, Kraken Exchange Australia [by video link]**

[13:47]

**CHAIR:** Welcome. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. Do you have a brief opening statement, Ms Bowler?

**Ms Bowler:** No, not from us.

**CHAIR:** Thank you. Mr Miller, do you have a brief opening statement?

**Mr Miller:** Yes, I do.

**CHAIR:** Please go ahead.

**Mr Miller:** For some context, Kraken was founded 12 years ago—almost to the day—and has grown into one of the world's leading digital asset businesses, and we're very proud of our commitment to compliance and a collaborative approach such as this with policymakers here and also globally. As you might know, we're an exchange, and our primary business is matching buyers and sellers of crypto assets. We've got about 10 million clients globally. We have a global team of about 2,000 professionals across 70 countries, including Australia, and we service Australia through our Australian subsidiary, which is Bit Trade Pty Ltd, which trades as Kraken Digital Asset Exchange.

We welcome the inquiry into this bill, and I've got some high-level points that won't take too long to go through but that can I think be summarised in three parts. Firstly, we believe strongly in the need for bespoke regulation. Regimes that take lessons from tried and tested financial services principals are the way to go, but a bespoke regime will allow a balancing act between protecting consumer rights and allowing for innovation, and we think this bill's a good example of that.

Secondly, we are critically in support of global regulatory alignment. This is a global technology, and regimes that are not harmonised interjurisdictionally create risks of regulatory arbitrage. We're seeing this kind of balance of existing principles and bespoke regulation being played out globally, and we should be doing the same. The EU and the UK come to mind specifically. MiCA has already been mentioned today, I believe, but we'll also raise that as a regime to look to, particularly because it's got similar policy goals, I think, to traditional regulation—protecting consumers, outlining good conduct, governance practices and rationalising an approach to licensing.

The final point that'll we make is that we should absolutely recognise the global nature of the technology and the power and potential of global businesses—in particular, the interplay between local entities, such as our model here, where we have a local regulated footprint, and international-scale: global services businesses, global crypto firms can really provide consumers the best of both worlds, in particular liquidity, security and custody. These are scalable solutions that will have net benefit for the client if they can touch local entities that are regulated reasonably but then make use of the upside of large business. We all believe that regulating exchange venues is important. Similarly, custody is extremely important. But I think the nuance there with respect to local versus international should be absolutely considered. Once again, thanks for your time. I'm happy to talk more on any of these items.

**CHAIR:** Thank you very much, Mr Miller. I'll just start with some questions for Ms Bowler. Your submission strongly supports the approach being taken in the EU with MiCA, which we've been hearing about today. What is it about that approach that you welcome?

**Ms Bowler:** Clarity. What I appreciated when reading through the earlier drafts, in particular, was the clarity and detail that they gave with regard to things like the capital requirement amounts, the time frames and so forth. Certainly one of the points that really jumped out at me was the time line that they gave for applicants to receive a response to their application for licensing. I believe it's three months, according to that regulation. It's really helpful, from a business point of view and from a client point of view—it's retail clients in particular that I'm thinking of here—that there is a known time frame of how quickly it's going to take for their applications to be successful or otherwise, as the case may be. So that was really helpful.

Also, as I said, those capital requirements and understanding a little bit more on the detail, I think, really helped me, as a CEO looking at investments into the business, to understand where it is I need to put those investments and what those investments can be quantified as.

**CHAIR:** How important is it that in the Australian environment we get the level of detail right, particularly around some of those issues that you've just raised there—for example, minimum capital requirements—and that there be transparency and certainty in whatever we do going forward?

**Ms Bowler:** Yes, absolutely, I think we should get that detail right—looking at what's happening in other markets, MiCA, as you know, is a great case in point for that. It's not likely that there will be a global harmonisation across all of the economies with regard to their approach to crypto. There are going to be certain nuances at national levels. But, certainly as a guideline for how Australia can approach it, it's really helpful to look at those large and significant trading partners, such as the European Union and others. So, for us as a business making business decisions, by looking at the framework that they've put forward, I have something concrete to base decisions and plans on. So I think it's a key point for Australia.

**CHAIR:** What about the reporting functions? I think your submission raised that as a question about this particular bill, along with whether it's specific enough at this stage about capital requirements and so on. What reporting functions do you think a bill should include? How important is it that you know what they might be?

**Ms Bowler:** Yes, I think it's good. With the kind of wider reading I've done on the subject, I know that previous submissions made reference to the FSB, IOSCO and so forth. I kind of look at the requirements that those supernatural bodies are putting forward, ask, 'What am I going to have to pull from that? What do we need to look at from traditional finance?' and try to collate that into our forward planning for the business. That kind of thing gives me a sense of guidance. As I said, I'm using traditional finance requirements as a guideline or a baseline for what we need to do. I think too there are going to be some unique and specific crypto reporting requirements likely for our regulator, but I'm not necessarily across at this point in time what their requirements will necessarily be. I think that is something that will probably naturally evolve, but to get a good baseline in place is really helpful for us as a business.

**CHAIR:** Yes. One of the discussions we've been having in the committee today is about certainty in planning and timing around any reforms we do. This particular bill, which raises debate on these sorts of issues for the parliament to think about, envisages a three-month transition period for companies to adopt the measures. How does it sit with you in terms of sort of certainty and time to plan?

**Ms Bowler:** I think that three months is probably a little too brief a time frame even if we just look at the question around custody, because custody reaches into a broad amount of our business, and obviously the main thing is the security concerns around custody. Certainly when we on-boarded previously with a custodian it was certainly a longer time period than three months. As it stands at the moment I'm quite comfortable with where we sit in terms of our custody relationship and so on, but, if I have to make changes and if the business has to make changes, I don't think three months is going to be sufficient for us to be able to make informed decisions about the subject and also then do any technology rollout that may come from the back of it. In terms of that, I think three months is probably a little bit too tight to respond.

**CHAIR:** Okay. So you're broadly supportive of reform in this area that gives regulatory certainty and proper time frames for people to consider what's coming and plan for it and, where possible, to use and sort of align with international models. Is that broadly—

**Ms Bowler:** Yes, that's broadly fair. The thing with IOSCO, FSB et cetera is that we know directionally where we're heading. We can see that; we can read the tea leaves in terms of where that's going. So for us, probably to the point that you're making, the quicker we can appropriate that within the Australian regulatory regime would be for the better, but we can certainly take our direction from what we are seeing from IOSCO, FSB et cetera already.

**CHAIR:** Thank you very much. Deputy Chair?

**Senator BRAGG:** Ms Bolwer, I'd like your view on how this is all going. Do you think that the parliament is moving fast enough on regulating digital assets?

**Ms Bowler:** I don't necessarily know the time line that the parliament is working towards. I think that's probably to my earlier point. As a business I can already see where we're going as an industry. I know that internationally a lot of those rules are being set, so we're kind of taking those as guide points as to what we're working towards. My expectation is that we will see a movement coming out of Australia by the end of this year. I certainly know that we're going to see the first results of the classification model. I think that should be coming out at the end of this month and the start of the next.

The thing is, Senator, irrespective of what sector you're working on, I don't think anyone is ever happy at the pace of government. I think everybody would always like things to happen quicker than they do. But, from our point of view, we can already see the direction the industry is going to be going in so we're planning ahead for



that already. Certainly I think that everybody would like things to work a little bit quicker, but I suppose that's the nature of government, isn't it?

**Senator BRAGG:** It can be. It doesn't have to be that way. In March 2022 there was a consultation paper on the regulation of digital asset markets. My sense is that the next logical step after that would have been draft legislation. We're now in almost August 2023 and I don't think there's any plan to see any draft legislation on the regulation of your business and businesses like yours for some time. If this isn't dealt with by this time next year, you'd be relaxed?

**Ms Bowler:** If this isn't dealt with by this time this year, I don't necessarily know that 'relaxed' would be the language I'd use. I would expect that we would have further guidance coming out of the work that Treasury has done so at least we could have an indicative time line of when this would be done, but I suspect that, with the anticipated return of larger volume trading in crypto markets across the world, this may expedite—but I'm not here to tell the government what to do. The government is likely to tell me what to do. I give due respect to that process.

**Senator BRAGG:** I'm trying to get a sense of market expectation here. Obviously, the parliament's role here is to make sure that we are responding to community needs. There's a large body of evidence to support the proposition that these organisations you're working in would be regulated. The timetable that was expected from March 2022 has not been met in any way. I'm quizzing you on whether or not you are concerned about the new timetable that we're now working to, and it is not clear to me when you could expect to see a bill passing parliament. Maybe I can ask you this way: if we get to the middle of next year—a year from now—and there has been no bill passed in the parliament, would that be in line with your expectation, and do you have a view on that?

**Ms Bowler:** It would be in line with my expectations. I don't anticipate that there will be a bill passed in the Australian parliament by this time next year. I don't think the parliament will move that quickly, but I also don't think that there will be a vacuum of information coming out on it. I think we'll still get that direction. It's not really on us from the business side to try to push government; it's on your respective side, senators, to push that agenda forward. We're dependent on you guys helping us out with this by trying to expedite it as much as you can within the government organisations. There's only so much that we can do from the business side.

**Senator BRAGG:** Do you think we are keeping pace with our competitors?

**Ms Bowler:** I think it's reasonable to say that Singapore, Europe and the UK are pulling ahead globally. I think that's a reasonable point to make. There are other major economies, though, that likewise have stalled or are going off in different directions. Look at the United States, for example. It's going in a very different direction from the rest of the major economies. There are differing paces. I think Australia can take a greater leadership role, particularly within the region, if not internationally. I'm excited, as the head of an Australian exchange, to be a part of that. Do we need appropriate and proportionate regulation to do so? Yes, we do, but, as I said, my expectation is not that we're going to see that in the next 12 months. I hope to see it in the next 18 to 24.

**Senator BRAGG:** Your view is that Australia can't lead without its own house in order?

**Ms Bowler:** That's a reasonable response to any situation, yes.

**Senator BRAGG:** Your testimony is that Singapore, the UK and the EU are pulling ahead of us. If that were to continue and we weren't able to keep pace, what would that do to the decisions your business and other businesses make about investing in Australia? Do we get to a point where businesses consider whether they should maintain their Australian domicile?

**Ms Bowler:** BTC Markets has been around for 10 years without specific digital asset regulation, so the absence of that regulation is not going to put me out of business. We're still committed to the Australian market. We're staying where we are. That will remain unchanged. I think it likely that we will continue to invest in this space. This is our business. This is our bread and butter. We're not going anywhere in that regard.

I think that, instead, the issue for us will be perhaps looking at expanding overseas to get a license. Perhaps we will look at the UK, Europe or Singapore, as examples, to get a license. Obviously, we're aware of the regulatory arbitrage, but there's also the credibility issue: proving our credibility by getting that kind of licensing requirement. If it drags on much longer for Australia, I think that would be an important point for us. I think that's the point. Certainly, when I look at the national exchanges here in Australia, there is so much that is good and there are so many well-run businesses. We need to be able to champion that, and having appropriate licensing would be a part of that. That is my view.

**Senator BRAGG:** That is very helpful, thank you. Mr Miller, you are a New York parent company. Is that right?

**Mr Miller:** US incorporated company with head offices in the US.

**Senator BRAGG:** In New York or Wyoming or somewhere else?

**Mr Miller:** No. One thing I did not mention at the outset is the fact that we are regulated in multiple jurisdictions, and Australia is now an outlier. We have a footprint in the US that is centred now around two aspects of the business. One of those is our banking licence in the US, which is an SPDI licence, and the other is our crypto business, which is unlicensed, the US also being a bit different to the rest of the world. We are regulated in multiple other jurisdictions. A big part of our business is in the UK and EU, and many member states of the EU are passing legislation aligned with and in advance of MiCA. The UK and the FCA are working on their own regime. We are most certainly a global company but headquartered as .co.us.

**Senator BRAGG:** Did you say Australia is the only market in which you are not regulated?

**Mr Miller:** No, not the only market but one of the remaining markets that does not have a bill either in play or being debated. We service hundreds of countries, and many of those countries do not have legislation. But of the countries where we have an office and an entity, it is now one of the jurisdictions without a pathway to license.

**Senator BRAGG:** How do you see the race to regulate here? How far behind is Australia compared to the countries we usually compare ourselves with?

**Mr Miller:** I think certainly some are more advanced. There are bills before the houses in various jurisdictions that we would call ourselves comparable to through a regulation lens, in particular the UK, Europe and Singapore. Some of those bills have different characteristics. It's previously been pointed out that Singapore has a very AML/CTF focused bill, whereas the UK has a bit more consumer protection. It's the same with the EU. These are regimes that we point to, and the MiCA regime is the only one we can point to here because it's on a pathway to law and implementation. They have similar principles to what we would expect and what I think is outlined in the proposed bill, so your bill. We are certainly nowhere near that here, as is pretty obvious, and it is very clear to us that there is a gap.

**Senator BRAGG:** Are we behind Singapore?

**Mr Miller:** Singapore's regime is quite different to the principles set out in this bill. It is very AML/CTF focused, and interestingly the application of the bill has been a little bit more disjointed. I would say that in some respects we are ahead of Singapore when it comes to a reasonable degree of space for innovation. Singapore is a tough regime at this point in time, due to [inaudible]

**Senator BRAGG:** [inaudible] Japan, the UK and the EU?

**Mr Miller:** It's fair to say that they have bills in play in those regimes, yes.

**Senator BRAGG:** How fast do you think the Australian government is going on crypto regulation? Is it fast or is it slow?

**Mr Miller:** I think it is measured, which is a good thing. However, I would suggest that we are yet to see enough from the government as to the shape of the potential legislation. That obviously carries some risk for players in the market because it is uncertain. It still remains uncertain.

**Senator BRAGG:** Is that impacting on any decisions you are making about investment or employment?

**Mr Miller:** Yes, I would say it is fair to say that uncertainty makes it hard to make decisions. There are lots of layers to that. In particular, I think it's well known that there are businesses in Australia that are deciding that other regimes are more certain for them. It is well known that banking relationships for crypto businesses are hard to manage because there is uncertainty in the market. It is well known that consumers have a tough time assessing the options. In particular, larger, more regulated firms struggle to make a decision about risk when they have nothing to measure that risk against. So there is certainly a downside to uncertainty. In terms of our specific context, we are very committed to Australia and its market. We have been for many years. But it is tricky to make decisions when you don't have a clear view.

**Senator BRAGG:** It sounds like we are a very crypto-unfriendly country based on your testimony. We are obviously trying to remedy that through this bill and through encouraging the government to do some more work here. We thank you very much for your time today.

**CHAIR:** I thank all of the witnesses on the panel. We very much appreciate the time that you've given us. Thank you.

**BACINA, Mr Michael, Partner, Piper Alderman [by video link]**

**HENNESSY, Mr Liam, Partner, Clyde & Co [by video link]**

**PIROVICH, Ms Joni, Principal, Blockchain & Digital Assets - Services + Law [by video link]**

[14:12]

**CHAIR:** Welcome. I understand that information on parliamentary privilege and the protection of witnesses in giving evidence to Senate committees has been provided to you. Do you have any additional comments on the capacity in which you are appearing?

**Mr Bacina:** I'm also the chair of the board of Blockchain Australia.

**Mr Hennessy:** I'm also an adjunct professor of Griffith University.

**Ms Pirovich:** I'm also the regulatory and interoperability lead at a not-for-profit that advises 80 of the biggest DAOs in the world.

**CHAIR:** Thank you all for being with us this afternoon. Mr Bacina, do you have a short opening statement to give?

**Mr Bacina:** Yes, thank you. I will just speak very briefly. We have seen a lot of movement in the cryptocurrency world and the blockchain world in the past 12 months, much of it negative headlines and certain bright elements continuing to grow. Many of those today who are expert in the space and others who have given testimony today will speak to this growing industry and the value that it can bring.

I applaud the efforts of both Treasury and the parliament in moving to bring a potentially fit-for-purpose regulatory scheme into place. There has been a lot of really useful material in several versions of this draft bill, and we know the Treasury consultation is ongoing. I've had the benefit of reading some of the other submissions and think that there are some adjustments that could be made and a lot of really good material in there that could continue to grow and, hopefully, both preserve protections for users and consumers and embrace the innovation that Australian needs at this time.

**CHAIR:** Mr Hennessy, do you have a brief statement?

**Mr Hennessy:** Yes, thank you. I echo Mr Bacina's comments about the efforts made by both parliament and the Treasury. I think that there is a significant foundation to support both industry and consumers from the work that Senator Bragg and his team have done and also the work of Treasury. Seeing the two combined to create a fit-for-purpose framework for Australians to compete globally is why we're here today and is certainly the hope of many in this country.

**CHAIR:** Thank you. Ms Pirovich, do you have a brief opening statement to give?

**Ms Pirovich:** Yes, I do. Thank you for the opportunity to be here today. Having been exposed to the bespoke regimes around the world, I would just say that the importance of government support is paramount, and we've seen extremely positive results out of the CBDC research pilot and incredible support out of ASIC, giving each of the participants what regulatory relief is required under the existing regime or the licences required. This is with no modifications to the existing law, but it is the result of a partly government funded and partly industry funded CBDC pilot with government support, including ASIC and RBA support. We are potentially now in the lead globally on CBDCs and stablecoins. We've still got to keep up there, but this is an extraordinary example that we should take. Yes, I'm a supporter of bespoke regulation, but this needs to be called out as something that Australia is doing well with multiple agencies. Crypto token activities are a multidimensional beast where we need cooperation—interagency and with government, including Treasury. So it's been thrilling to see that over these past months.

**CHAIR:** Thank you very much, Ms Pirovich. I will just kick off with a few questions. I'll start with Mr Hennessy. We've had some discussion, if you've been following any of the hearing, about the difference between bespoke approaches, which have just been referred to again in this panel, and an approach to regulation that works as much as possible within the existing AFSL regime. Do you have evidence for the inquiry about how you see that? Do you prefer an approach that fills the gaps and aligns with existing regulation, or are you more in favour of the bespoke model?

**Mr Hennessy:** Thank you for your question. I am in favour of a regime that utilises the existing infrastructure. It is already a challenge to explain different licences to incoming participants in Australia—for example, the difference between an AUSTRAC digital currency exchange licence and an AFSL. To have a proportionate expansion—and I do mean 'proportionate expansion'—of chapter 7 and the licensing regime is certainly my

preference. I don't understand the complication of that. Having had the benefit of reading the submissions as well, I understand that several industry participants have the same view.

**CHAIR:** Thank you. One of the issues that we haven't canvassed yet today in the hearing, but which your submission does canvass, is how NFTs are dealt with in this particular bill. Your submission calls for the bill to identify with some clarity which tokens are not caught under the licensing regime. How do you view NFTs in this bill, and how do you think they should be treated?

**Mr Hennessy:** Thank you for the question. I think that it's hard to generalise with NFTs given the breadth of their nature, but, if an NFT is simply representative of a picture, for example, which a 14-year-old has created in their basement, I don't think that it warrants the attention of law enforcement. Similarly, if it is an NFT that allows some sort of governance right in a DAO that Joni has created, again I don't think that ASIC should be interested in our activities there. I note that MiCA over in the EU hasn't touched the subject of NFTs. I would hate to stretch our regulators' resources beyond their current remit needlessly because we don't appreciate the differences between 14-year-olds making pictures of crazy frogs, or whatever it is that they're doing these days—I don't pretend to understand gen Z.

**CHAIR:** So you think that the crazy frogs, which you just referred to, need to be very explicitly excluded from a bill like this?

**Mr Hennessy:** I do. I think that Senator Bragg has contributed positively to the landscape, both in terms of energy and in terms of the drafting. And the feedback from people like my very respected colleagues Joni and Michael here—where I think that further positive development can happen is in the definition of 'digital assets', and, if we carve out the crazy frogs and if we carve out the NFTs connected with some struggling musician in Fitzroy, that can only be to our benefit. I don't think Mr Longo is interested in regulating musicians in Fitzroy, with whatever the music is that they're putting out at the moment.

**CHAIR:** I think you've just gone to my next question, which is: how do we go about defining a regulated digital asset? There are views that it might be a bit of a catch-all and, potentially, problematic at the moment. It's obviously challenging to do that work. Where do you think we should go with that work?

**Mr Hennessy:** I think—and I hope I'm not misunderstanding Ms Pirovich's earlier comment—we can stand on the shoulders of some of our colleagues in the UK who have done good work in terms of granulating what a digital asset is. And then, if we want to further granulate in Australia on a principles basis rather than a prescriptive basis, we can certainly do that. Certainly, in my view, the UK forms a good framework for the granulation of digital assets which, at the very least, will put us on par with a crypto friendly nation with whom we are very close and with whom we have a lot of bilateral trade. That is the point in my mind.

**CHAIR:** Thank you. I think you've heard today that there's a tension between acting quickly in an environment that's moving globally whilst at the same time making sure that we get it right. One of the earlier witnesses talked about the challenges of replacing uncertainty with uncertainty—I think that was the phrase that was used. How have you found the approach the government is taking to regulate digital assets, through the token mapping consultation and then flagging the consultation on licensing and custody of crypto assets?

**Mr Hennessy:** This licensing regime and the framework we put in place will support an industry that is critical to our economy and critical to our consumers who are suffering from scams. I think that it is important to make haste slowly, and I think that the government has done a good job in terms of the token mapping paper, in terms of flagging the consultation that is coming out and, in terms of informal and formal meetings, signalling when we can expect legislation to come out. I do think it's sensible and proportionate, and, added to Senator Bragg's efforts, in terms of his private member's bills, we are in a good position to take things forward as a nation. Could things be faster? Are other nations doing things differently to us? Sure, but it's important to get things right. We have the ability to outcompete some other nations, which would be very nice.

**CHAIR:** Thank you very much. I will go to the deputy chair, and, if we have any time, I'll have some further questions. Deputy Chair?

**Senator BRAGG:** Thank you very much. I might just ask all three witnesses, starting with Piper Alderman, whether they think we are on track to maintain our position as a potential leader in crypto regulation.

**Mr Bacina:** I think that's a very difficult question to answer, because there's been a lot happening, and there are a lot of competing priorities for parliament to consider around regulation. I think there are important steps that have been happening in the right direction, and because this is such a foundational technology, as Mr Hennessy said, it's important to get it right and make haste a little slowly if necessary, because this is foundational; it will underpin so many things in the near future. So, there is a balance. But I definitely echo Ms Pirovich's comments about standing on the shoulders of the developments that have happened overseas. I think a huge amount of effort

has been put it, which is effectively open sourced by the material that's shared in MiCA and in the UK that we could use to help jump closer to the front of the pack. Australia is not a country where we regularly say that we punch above our weight. I would love to be able to say that firmly about the crypto and blockchain industry. I think there are certain complications that need to be dealt with and hard questions and policy settings that need to be set, and these things do take time.

**Senator BRAGG:** Okay. I'm sort of looking for clearer answers. Do you think we're keeping up? Or are we in the middle of the pack, or what?

**Mr Bacina:** I would say that we would be viewed globally as being in the middle of the pack at best. That would be my short summary.

**Senator BRAGG:** Okay. Ms Pirovich?

**Ms Pirovich:** I perhaps will be a little bit more brutal. Apart from traditional finance and these opportunities around CBDC and stablecoins, there has been a mass exodus of talent and capital from Australia since around mid-2022, and that's not coming back anytime soon unless we have a bespoke regulatory framework or clarity in how the existing regime applies. And this is about exchange services, custody, advisory, because with CBDC and stablecoins we've already seen that there is a lot of support going behind that. But that's where the traditional institutions are playing, and they perhaps have more of the capital to play.

But if we want to capture startups, innovation, talent, entrepreneurship and jobs then we are behind, and we're not even in a place of having a lot of talent still left here, because it's been attracted overseas with entrepreneurship grants, bespoke regimes and well funded agencies, such as VARA in Dubai. You can speak to MiCA. The list goes on and on, and I see this in the work I do globally. I'm sorry to say it, because I love Australia and I wish we had more innovation staying here.

**Senator BRAGG:** But is that mass exodus you speak of partly due to the government changing its priorities and its timetable in relation to regulating crypto?

**Ms Pirovich:** I think it's due to a number of reasons—the timetable, not so much, because, as we're seeing with CBDC and stablecoins, the existing regime can work when the agencies and the government and Treasury throw their weight and support behind understanding how it needs to work. And ASIC, when they produce the regulatory guidance around custody, were actually ahead of the bespoke laws that have come out since in Japan, Dubai and Hong Kong. And we have an opportunity now, with your bill, Senator, as a great framework, to frame things at a very high level, because these things change. It needs to be more principles based to keep up with the dynamism of the industry. If I was to look to Hong Kong for the very detailed custody guidance, there's nothing stopping me from doing that, but at least I have the high-level perimeter established in Australia in a bespoke fashion that gives clarity, that gives a perimeter and that gives the agencies a better pronunciation of their mandates in this sector.

**Senator BRAGG:** Mr Hennessy?

**Mr Hennessy:** I have nothing to add to what Mr Bacina said. I think it's middle of the pack.

**Senator BRAGG:** I want to take you to where we got to with the last attempt to regulate crypto markets, which was a Treasury paper from March 2022. I would have thought that the next natural step after a consultation paper would be draft legislation. At this stage, my sense is that we're probably not going to see any draft legislation from the Treasury for some time. So, if we end up here again 12 months from today without any bill having passed the parliament, what do you think that would do to the market expectations, particularly around investment and employment in Australia?

**Mr Hennessy:** With respect, Senator, that's based on a hypothetical that I don't think will play out in actuality. From what I can see, people can take issue with what Treasury may be doing, and it's a diverse country, but I do see a lot of goodwill from Treasury in terms of engaging with what is a very complex issue. They're coming out with their consultation paper shortly. Who knows how long it takes to make legislation! I'm not a parliamentarian. I don't agree with the premise of your question. I don't think we will be here in 12 months, having not moved further. Between you and the government, I have every confidence that you're going to move the needle.

**Senator BRAGG:** I like your optimism. Are there other views?

**Mr Bacina:** I will weigh in on this one. Going to Joni's point: in terms of regulators and those who have the power to move the needle and support projects, whether it's the granting of exemptions or just coming out and being supportive of positions, or clearer regulatory guidance being issued to give people really bright lines, that is a practical step that could be taken outside of parliament. So, if we were here in a year without regulation having been passed, if there were nothing of that nature from regulators giving any practical guidance that could help

people, that would be terrible, but that's a hypothetical. I agree with Mr Hennessy that I don't think we'll be in that position. I think we will get to a point of having licensing around exchanges and custody because the industry is in furious agreement that that should occur, and there is that lead globally and so much material globally that we can take and build on to get it done. I think that is an important step in helping regulators—going to Joni's earlier point—to be more supportive of things like pilots and other things, so I think it will help. But I don't think it's a binary choice; I think there are quite a few factors in there.

**Ms Pirovich:** I fully echo what Mr Bacina has said. Nothing further.

**Senator BRAGG:** So market expectations are that there'll be a bill passed next year; is that right?

**Mr Hennessy:** Yes.

**Senator BRAGG:** Do you think it will be a bill similar to the bill we're reviewing today?

**Mr Bacina:** It depends how similar, Senator, but I would think, broadly, yes. The kind of regime proposed in your private member's bill is sensible at that framework level. The devil is in the detail when it comes to legislation, of course.

**Senator BRAGG:** The point here is that, after 15 months of this parliament so far, we haven't seen a bill from the government. The development of this private senator's bill itself demonstrates to the market that it is possible for Australians to put these concepts into law—in draft form, at least. So surely the ambition you've outlined of doing this within a year is realisable. As you say, Mr Hennessy: it's really a matter for the parliament, isn't it?

**Mr Hennessy:** Again, I'm a humble lawyer. I don't presume to know how parliamentary processes work. I do know that there is a backlog of Treasury legislation quite outside of this crypto bill, including ones that affect the Australian population at large. I don't know how these things are prioritised. Between your own good work and Treasury's own good work, which has limited resources to dedicate to these things when faced with increasing inflationary pressures and geopolitical situations and inquiries like this, I do have an optimism that we will get to a place which, if it may not satisfy everyone in Australia, will be pretty darn good compared to Singapore, Hong Kong, and at least staunch what exodus there may be in Australia—to Ms Pirovich's point earlier on.

**Senator BRAGG:** My last question is really around whether you think Australian businesses will maintain their domicile and whether they will continue to invest in Australia if there is going to be a domestic regime and, if there is not in a year's time, whether some of the perhaps larger domestic businesses might seek licences offshore?

**Mr Hennessy:** If I can just jump ahead of my colleagues on that one, I do think the tax domicile is a great question and one of the omissions of your bill, because when I look to the US, they are supporting the digital assets industry with tax concessions and various other concessions to make it easier to do business in that country. This goes back to the point of Ms Pirovich earlier on. Licensing is great. Licensing is important. We all want licensing from a consumer perspective and from a business perspective. What we also want to see is our regulators and policymakers engage with the bankers, with payment providers, with the taxation authorities, to support and nurture what is an incredibly important industry in and of itself that will pay a lot of revenue to us, and the consumers who want access to that. Gen Z are not buying houses. People in my team are buying memes and other crypto tokens. From a tax domicile perspective, I hope so, but I hope that is because we are doing something broader than just focusing on licensing in this country.

**Ms Pirovich:** It doesn't make economic sense to start up in Australia with the high tax rates and not enough tax incentives to the entrepreneurs to pay for the high cost of living and child care here. It is more of a scale-up destination at this point, and a scale up to retail. So if we can correct the consumer protections for retail in a proportionate manner, as Mr Hennessy has mentioned numerous times, and if we can do that in the space of 12 months, then that is bang-on in time for when the first wave of MiCA starts being applicable. Organisations would have already invested compliance effort to be compliant with MiCA, so Australia is a hop, skip and a jump to attract those businesses and more opportunities over to here, but possibly at the scale-up stage. We are missing out on the start-up innovation and the wealth events, which our tax revenues do rely on, so we are missing out on the innovation, the entrepreneurship and the wealth events here and just becoming a net importer, and enjoying services rather than benefiting from the prosperity of the innovation here.

**Senator BRAGG:** I want to ask one final question, which is more a reflection of what the last witness said from BTC Markets—that they would consider looking at acquiring a licence offshore if there were not sufficient regulatory improvements in Australia. Is that an outlier position or something you hear in the market?

**Ms Pirovich:** Yes, that is consistent—

**Mr Hennessy:** I hear that in the market. Crypto exchanges in particular, digital currency exchanges, are looking at where they need to have licensing globally and the potential for 'passporting' of licensing so that they can send that message they are compliant and doing the right things. I would only add to the previous point of Ms Pirovich: this is a difficult area to regulate because it is so mobile. It is not like traditional industries, so it is important to have the right policy settings.

If I can make sure one point is clear, a point across a number of the submissions is that key definition in this act around what regulated digital assets are and, critically, where the line is drawn on what is a financial product and what is not. Obviously putting a financial product on the blockchain should not exempt someone from financial services laws but neither should adding a blockchain to something to bring it within a regulatory perimeter that creates additional costs. To Mr Hennessy's point, if someone is buying pictures of houses instead of saving for a house, fine but it does not need to be regulated in that way.

At the moment, that is probably the No. 1 grey area. We saw the recent noise around the Ripple case in the United States. They've, of course, left it until the courts have come forward to say: 'Okay, fine. This token by itself is not a security.' The UK has put out some really excellent guidance, in the Law Commission's recent report on digital assets, around properly identifying crypto assets as a third kind of personal property, which gives you that foundational basis to give people confidence to make investments and build businesses, knowing that this foundational element of this thing that they're dealing with is being treated in an appropriate way, which helps regulators as well. That's the No. 1 point. If I were to change one thing in the draft bill or give a message for Treasury, it would be to make sure that perimeter is set appropriately, because the bill as it stands carves it out to say that these things, if they're not a financial product, fall under these categories, risking that double licensing perhaps falling over the top and not addressing the critical phase. As lawyers, we spend an awful lot of time looking at whether these are tokens or financial products, or, more accurately, what are the risks that they're financial products, because of that range of definitions.

**Senator BRAGG:** Okay. So the answer is that what was said is not unusual.

**Mr Bacina:** Correct.

**Senator BRAGG:** Others have said to the market and to lawyers that they would look to offshore regulation.

**Mr Bacina:** Correct, and they already are. There are digital currency exchanges based out of Sydney that have gone to get Singapore licences, for example, because there is a regime there, and that is a way for them to signal to the market that they meet standards that have been set by the Singaporean government.

**CHAIR:** I need to wrap up, Senator Bragg, so this will be your last question.

**Senator BRAGG:** My last question is: if these markets are going to go offshore for licences, what does that do to our domestic investment and employment prospects?

**Mr Bacina:** There's an obvious answer to that one: it's less. We'll become an importer of the technology instead of an exporter of it. At the end of the day, I'd love to see the innovation and jobs stay in Australia, but we need that regulatory certainty for that investment to take place and for people to build businesses here and keep them here. We have a wonderful environment and an excellent culture, and people are here, I would argue, for the most part because they love Australia and they want to be here. Making it a bit friendlier can help tip the needle in bringing people here to stay for longer. Those people might otherwise be building overseas and bringing to another country those jobs and that revenue—including, fundamentally, tax revenue that would help the government as well—that could be brought to Australia instead.

**CHAIR:** Thank you very much to all the witnesses on this panel. We very much appreciate the advice that you've given to the committee today. You go with our thanks.

**Proceedings suspended from 14:43 to 14:52**

**ADAMEK, Mr Chris, Assistant Director, Capital Markets, Payments and Financial Innovation Branch, Financial System Division, Markets Group, Department of the Treasury**

**CHOUCAIR, Ms Molly, Senior Executive Leader, Markets Enforcement, Australian Securities and Investments Commission [by video link]**

**COLEMAN, Mr Adam, Senior Manager, Reform Policy and Mutual Evaluation, Australian Securities and Investments Commission [by video link]**

**CONNOLLY, Mr Ellis, Head, Payments Policy Department, Reserve Bank of Australia [by video link]**

**LUU, Ms Nghi, Assistant Secretary, Financial System Division, Markets Group, Department of the Treasury**

**MENZ, Mr David, Acting Director, Crypto Policy Unit, Financial System Division, Markets Group, Department of the Treasury**

**MOSSOP, Mr Daniel, National Manager, Reform Policy and Mutual Evaluation, Australian Transaction Reports and Analysis Centre**

**THOMPSON, Mr Chris, Deputy Head, Payments Policy Department, Reserve Bank of Australia [by video link]**

**CHAIR:** I now welcome representatives from the Department of the Treasury, the Australian Transaction Reports and Analysis Centre, the Australian Securities and Investments Commission and the Reserve Bank of Australia. I understand that information on parliamentary privilege and the protection of witnesses giving evidence to Senate committees has been provided to you. I remind the committee that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

Thank you all very much for being there. It's usually the practice that these departments and agencies don't necessarily have an opening statement. Is that correct, or would anybody like to give a short opening statement? I'll take it that nobody wishes to give an opening statement, and I'll go straight to some questions for Treasury. I'll go straight to aspects of this private senator's bill. Many of the submitters to the inquiry expressed a preference for regulation and reform that work within the existing regulatory framework and laws. Some noted that the proposed bill could create regulatory confusion and arbitrage. Has Treasury identified any aspects of the bill which would make it unclear how digital asset services are regulated or create a potential for arbitrage?

**Ms Luu:** As many are aware, we have been working on a consultation paper that will be released shortly. We've been speaking to a range of stakeholders and looking at a range of information, including looking at the digital assets bill. Regulatory arbitrage is a key issue that we are looking at as part of our consultation paper, but we have not considered every aspect of that draft bill. I'll check with my colleagues Mr Menz and Mr Adamek to see if they have anything to add.

**Mr Menz:** I think, as was pointed out by many of the submissions to the bill, the key point where regulatory arbitrage could arise is where maybe what is a financial product is potentially carved out because it uses a DLT solution, or blockchain solution, or where a DLT solution is brought into the financial system just because of a technology it uses. We commend those submissions for pointing that out. They are very similar to the submissions that we have received for our token mapping consultation as well. We are keeping these in mind for our future work.

**CHAIR:** We've had a number of submissions today that say it's just generally important for future reforms to pursue a regulatory reform approach that, where possible, operates within existing regulations, particularly the Australian financial services licence regime. What advice is Treasury getting from submissions to your own process about that?

**Ms Luu:** The submissions to the token mapping paper are publicly available, and a number of those submissions point to the appeal of having an AFS-style regime. It is probably too early to say what will be in the consultation paper, so it's probably a policy matter that should be referred to government.

**CHAIR:** The bill asks ASIC to take on a large portion of designing and regulating digital assets. Would the role of designing such regulation generally sit with Treasury under the current arrangements?

**Ms Luu:** Yes. Treasury provides policy advice to the government, and ASIC administers the law.



**CHAIR:** One of the issues that have been raised in the hearings in relation to this bill is whether it does or doesn't capture NFTs. From your reading of the bill or from the submissions, do you see a cause for confusion there?

**Mr Menz:** I think that, given the definitions that currently sit in this bill, there are multiple ways that you could potentially interpret them. I imagine a fulsome explanatory memorandum and tighter definitions could help get around this. I think, when we talk about the concept of NFTs, there's also a bit of a mismatch between how people may talk about them casually and the technical nature of them. NFTs are a data structure only, not necessarily a point to an exact form of holding. In our token mapping, we pointed out that it is ultimately what is underlying the token rather than the token itself that decides how it should be regulated or looked at, and NFTs are just another way of structuring data in a token form.

**CHAIR:** For the benefit of the committee, can you tell us the intention of the token-mapping consultation?

**Mr Menz:** The intention of the token-mapping consultation was to expand our knowledge about the ecosystem, specifically with regard to how tokens should be approached in the financial system and how they interact with the financial services and financial products framework. As our paper explored, there are many difficulties and also overlaps with where the current system can be applied. It also allowed us to explore the businesses, both from services built around tokens and services providing access to tokens for Australians. There are a wide variety of business models, and our token-mapping paper, the submissions to it and the subsequent roundtable shone a light on how broad that range of businesses and service models is. We learned quite a lot in that time, which has gone into what will be our upcoming consultation paper for licensing.

**CHAIR:** Are you able to give us any update on when the consultation that you just referred to is likely to start?

**Ms Luu:** We expect the paper to be released within the next few weeks.

**CHAIR:** Is that a consultation on custody and licensing arrangements?

**Ms Luu:** Yes; correct.

**CHAIR:** How has the EU's MiCA regulation informed Treasury's work? How is Treasury viewing the opportunities for learning from the EU's reform?

**Mr Adamek:** We've looked at a range of the regulatory frameworks that are being proposed and implemented around the world. The EU one provides us with a lot of insight into how something could be designed. It shows where there are differences between the financial services type of regulation and where there needs to be changes. So I think it's a piece of work that certainly will be reflected in our consultation paper.

**CHAIR:** How is Treasury approaching the issue of certainty in definitions in preparing for the consultation that will come next?

**Ms Luu:** We have a number of people that are involved in some international working groups, including the Financial Stability Board crypto working group. We liaise very closely with our financial regulators, who also have a lot of touch points with international organisations. The paper we will be releasing shortly will discuss some concepts and ideas. There will be opportunities when the legislation is drafted—in the exposure draft—for comment, and some of this will need to be laid out in the explanatory memorandum.

**CHAIR:** Can you describe to us what consultation you've broadly undertaken with industry around token mapping and the work on custody and licensing. What general engagement with industry are you having on these issues?

**Mr Menz:** As is available on the website, we received 91 submissions to the token mapping paper. I believe eight of those were non-public and 83 are thus available on the Treasury consultation website. We reviewed all of these, making internal summaries of what we thought were the key takeaways from those. We have conducted six round tables directly on token mapping, and I think that there would have been over 50 attendees to those. They included lawyers, DCEs, a couple of academic round tables, the DeFi community and consumer groups. Since then we have had, I would say, definitely over 15 bilateral meetings with stakeholders, both industry and our regulators, international agencies et cetera, to expand on our understanding from the token mapping and then also help develop our future work in regard to licensing and custody because of how complex this ecosystem is and how many different business models provide services to the industry.

This in-depth stakeholder liaising is really important. It can be quite hard to create fit-for-purpose legislation without a sound understanding of the industry itself. A lot of stakeholder interactions have been happening since then and will continue to be ongoing.

**CHAIR:** Can you give us an indication of how ASIC currently intersects with the digital asset services that are covered by this bill and, broadly, what guidance you've provided up to this point?

**Ms Choucair:** There are a number of crypto asset related products in Australia that do currently clearly fall within ASIC's jurisdiction, so the approach we take to those products is the same as we take to anything else that comes within our jurisdiction. For example, derivatives over crypto fall within our jurisdiction, as do ETP and managed investment schemes that might have exposure to crypto assets. In terms of broader guidance, we have released info sheet 225, which seeks to provide industry with guidance in relation to various products that crypto asset service providers might issue or offer and the regulatory treatment that might apply to those products. There is high-level guidance available to industry in terms of how we say the current regime might apply to crypto asset products out there.

**CHAIR:** Has ASIC recently acted against a crypto exchange and, if so, for what reason?

**Ms Choucair:** We don't have any enforcement action against a crypto exchange. But there has been licensing action, if I can describe it that way, into a couple of crypto asset providers. That has been in relation to their crypto derivative business specifically. They have only been licensed by ASIC in relation to that narrow set of activities. We do not currently license the exchange activities, and those actions related to FTX and also to Binance.

**Mr Coleman:** It's worth observing that currently whether a crypto product is a financial product is a very complex question to answer, and it's also case-by-case specific, which raises the question that other stakeholders have mentioned around perimeter and certainty.

**CHAIR:** I'm not sure how closely ASIC has been able to look at the bill, but it does give ASIC a particular different role, as we have just canvassed with Treasury. Would ASIC encounter resourcing issues if it were required to administer and regulate a new licensing regime, particularly the one that is proposed in the bill and particularly in the time frame that is envisaged?

**Ms Choucair:** It's difficult to answer that with a degree of certainty today. I think, in terms of the bill, as we understand it, there's a lot still to be determined through ministerial rules. Until such time as that detail is available, it would be difficult to give a confident answer around the resourcing implications.

**Senator BRAGG:** I've just got a few questions for Treasury. What resourcing do you have currently working on the crypto reform agenda?

**Ms Luu:** I should probably go back to the beginning of the year, because we had an ASIC secondee in our team. We currently have around four to five people working full time on the licensing paper. Of course, we do connect to other parts of the department that have touchpoints with crypto related issues, such as our colleagues in Revenue Group who are part of the Board of Taxation work they do on the taxation side of things.

**Senator BRAGG:** Is it five people?

**Ms Luu:** Yes.

**Senator BRAGG:** What's the purpose of the team?

**Ms Luu:** The team is called a crypto policy unit. They deal with crypto policy in general.

**Senator BRAGG:** Who heads the direction?

**Ms Luu:** That sits within my branch, which covers payments and financial innovation, and then that branch sits within the Financial System Division in Markets Group.

**Senator BRAGG:** Are all these five people working on the licensing and custody issues?

**Ms Luu:** Yes.

**Senator BRAGG:** Is there any work being done on debanking, CBDCs or anything else like that?

**Ms Luu:** Yes. There is a separate team called 'financial innovation', and some of their responsibilities include working with the Reserve Bank on CBDCs and debanking.

**Senator BRAGG:** I want to go to the statement from the former Treasurer in relation to the implementation of crypto reforms. In relation to the markets and custody reforms, according to the 2021 paper, these were supposed to be done by the end of 2022, with advice to government by the middle of 2022. Then I imagine legislation was to be done in 2023. Obviously there was a change of government, but what exactly has been the reprioritisation here? What has been the decision taken to slow this down so much?

**Ms Luu:** I wouldn't necessarily characterise it as 'slowing down'. What we did do was prioritise the token-mapping exercise with the change of government. As part of that process, what we heard from stakeholders was

the need to take a considered approach and to move at a measured pace. The government committed to putting out a paper in the middle of this year, and we are on track to do that.

**Senator BRAGG:** Did you work on the March 2022 paper *Crypto asset secondary service providers: licensing and custody requirements*?

**Ms Luu:** Yes. My team did. I wasn't involved, although I did read the paper. The team that is currently working there now did work on that March paper, yes.

**Senator BRAGG:** What do you think of that paper?

**Ms Luu:** I think we learned a lot from it. We had a great range of submissions, which set us up very nicely to think about token mapping and to think about this next paper that will be coming out in a few weeks.

**Senator BRAGG:** Am I right in saying that that was a paper about licensing and custody requirements?

**Ms Luu:** Yes, it was, but in the interim, since that paper was released, we've obviously had a number of developments globally as well as things that have happened here domestically.

**Senator BRAGG:** Well, that's always the case. That's what happens in life: things happen. But your testimony is that it was about licensing and custody arrangements. So, what's the paper that you're about to put out on? What does that involve?

**Mr Menz:** The paper that is to come out is in regard to licensing and custody requirements. It will propose a more fulsome and testable level of potential obligations on service providers in the industry, and hopefully it will provide a framework that people are able to respond to quite specifically so we are able to take onboard comments and get towards some legislation drafting.

**Senator BRAGG:** Okay. So, we do one paper on licensing and custody on 21 March 2022, and then we do another paper on licensing and custody requirements in August 2023. Is that right?

**Ms Luu:** Yes, with the token-mapping paper in between.

**Senator BRAGG:** What is the next step after this second paper on the same issue?

**Ms Luu:** We will, subject to the government's views, be looking to draft legislation. That will be our next step.

**Senator BRAGG:** When you issue a consultation paper, do you usually progress to drafting legislation?

**Ms Luu:** It depends. Sorry—what do you mean?

**Senator BRAGG:** Well, if I was the Treasury and I issued a consultation paper on crypto regulation, a logical next step might be that I would then issue some draft legislation—maybe an exposure draft. So, I'm asking you: do you usually prepare draft legislation after you've conducted a consultation?

**Ms Luu:** It depends on the government. If they want us to move that quickly, if there are things we learnt from the consultation that require refinement and a further consultation paper, that is an option.

**Senator BRAGG:** Okay. So, my question is: you conducted a consultation in March 2022 on crypto market regulation, but you didn't progress to developing draft legislation, did you?

**Ms Luu:** No. We had a change of government.

**Senator BRAGG:** Was there an instruction to not progress draft legislation?

**Ms Luu:** No, there was no instruction. We released the paper in March and the election was called soon after.

**Senator BRAGG:** I am a politician. I understand the electoral cycle, for better or worse. I'm trying to understand the process in your department. What was the decision to not progress with draft legislation?

**Ms Luu:** I'd have to look at the time lines. I think the paper may have closed at around the time of the election, so there was no opportunity to consider whether to move straight to thinking about drafting legislation.

**Senator BRAGG:** But hang on: this is not about politics; I'm asking you about your processes. You work for the government of the day; I get that. But the reality is that the Treasury issued a consultation paper and a decision was taken at some point not to progress with draft legislation. I'm trying to work out whether that was a decision taken that was minuted, or there was some process around that decision, or whether it just didn't happen.

**Ms Luu:** No, we were never given instructions not to progress legislation.

**Senator BRAGG:** So, Treasury decided not to progress legislation?

**Ms Luu:** No, we were asked to prioritise token-mapping with the new government, and so our focus—

**Senator BRAGG:** Okay. Now we're getting somewhere. So the decision taken was to not progress that paper and just to junk that. Is that right?

**Ms Luu:** The direction was to consider the broad landscape of what was happening in crypto, to put out a token-mapping paper and then to move to licensing and custody.

**Senator BRAGG:** What was the reason for that licensing-and-custody paper being junked?

**Ms Luu:** I think at the time it was a very—

**CHAIR:** Senator Bragg, I'm just going to intervene. I've heard the same question asked about five times and I'm concerned about that. I'd ask you to move forward with your questions.

**Senator BRAGG:** Sorry, Chair, but this is a hearing on a process matter, and I'm asking a question which hasn't been answered.

**CHAIR:** As you know, I am extremely fair and judicious with my chairing and with the sharing of time, but I am concerned about repetitive questioning. But I'll allow the witness to answer the question as she would like.

**Senator BRAGG:** It's actually not repetitive. I'm just trying to understand what decision was taken. There's a lot of secrecy around this, and I think it's unnecessary. So the question, which is not a question I've asked before, is: why was this paper determined to be deficient in some way? What was the reason it wasn't progressed?

**Ms Luu:** We were asked to focus on token-mapping.

**Senator BRAGG:** Okay. Thank you for clearing that up. But now we're back to the future, in effect, according to your testimony, because we're back to doing licensing and custody some 15 or 16 months later. Is that right?

**Ms Luu:** Yes—after the benefit of the token-mapping paper.

**Senator BRAGG:** So we're back to where we were. How much money was spent on that consultation which commenced on 21 March 2022?

**Ms Luu:** There would have been the resourcing cost of the staff working on it.

**Senator BRAGG:** Have you been given any specific funding for these issues?

**Ms Luu:** No.

**Senator BRAGG:** No. Okay. What exactly do you think the token-mapping exercise will provide to the second crack at the regulation of markets and custody?

**Mr Menz:** The token-mapping provided some key insights into the ecosystem. It provided key insights into the types of tokens and how they interact with the financial services framework or the financial products framework. As we have seen, it can be quite difficult to draft legislation in regard to crypto assets and crypto-asset service providers without a sound understanding of the ecosystem. We have gained key insights from those submissions and the roundtables that we had with the industry and other stakeholders since then, so I think that we're in a much better place than we were previously. As you understand, it is a very complex area that covers a lot more than just the financial system, and tokens are being used for a large variety of use cases, not just financial services. So there's more knowledge, more tempered, and a deep understanding.

**Senator BRAGG:** That's very good to hear. We look forward to seeing that. When will that be released?

**Ms Luu:** Within the next few weeks—that's our understanding.

**Senator BRAGG:** And who will release that?

**Ms Luu:** It will be the Treasurer or the Assistant Treasurer.

**Senator BRAGG:** What's the next step after that?

**Ms Luu:** We will, clearly, have a four- to six-week consultation process, review submissions, undertake some meetings where appropriate and conduct some roundtables as well, and, obviously, work with our regulators.

**Senator BRAGG:** Are you expecting to go to draft legislation this year?

**Ms Luu:** I couldn't answer that question. It's probably a matter for government.

**Senator BRAGG:** Do you think it's important that there is some regulation put in place during this parliamentary term?

**Ms Luu:** What we've heard from stakeholders is the importance of having some regulatory framework in place.

**Senator BRAGG:** So the answer is yes?

**Ms Luu:** Yes.

**Senator BRAGG:** Do you think we're on track to achieve that?

**Ms Luu:** That's a matter for government.

**Senator BRAGG:** Okay. I just have some questions for the Reserve Bank. How's it going? Good?

**Mr Connolly:** Very well, thank you.

**Senator BRAGG:** That's good. What's happening over there? What's happening with your CBDC?

**Mr Connolly:** We've been conducting a CBDC pilot project with the Digital Finance CRC, as well as with some involvement from Treasury. It's been focused on the question of what the use cases are for a central bank digital currency in Australia. The project actually recently closed the phase of the use cases being run. We found it to be a very valuable project. There's been a lot of interest from industry, and some quite innovative use cases were put forward as part of the project. We think the project opens some avenues for further research and exploration with industry, particularly on the use of central bank digital currencies for things such as the settlement of tokenised assets. We very much maintain an open mind on the possibility and the case for a central bank digital currency to emerge in the future.

**Senator BRAGG:** That's good. I have a question for Treasury. Sorry, Treasury, to be so annoying. I just wanted to ask you whether the Treasury uses AI as part of its work.

**Ms Luu:** We certainly use it in terms of thinking about things in the early stages, but we do not rely on it or use it for any final decisions or analysis that we do. But it is a useful tool. For instance, for public submissions that are available, AI can be very valuable for that in giving a summary, but it does not replace the need to do one's own due diligence over it.

**Senator BRAGG:** Which applications do you use?

**Ms Luu:** I can't speak for everyone that's on the team. We would have to take that on notice.

**Senator BRAGG:** Do you use it in the crypto team?

**Mr Adamek:** Sure. We've experimented with using it for things, but generally, in a similar way to how you might look at Wikipedia, you type something into one of these chatbots, it tells you something, and you assume that it's wrong until you've verified it. It's not a core piece of our work procedures, that's for sure.

**Senator BRAGG:** Do you use it to draft consultation paper content?

**Mr Adamek:** Definitely not.

**Ms Luu:** No.

**Senator BRAGG:** I have questions for the RBA. I wanted to ask you about the stablecoin part of the bill. Have you had a chance to review that component?

**Mr Connolly:** At a very high level. We very much support the appropriate regulation of stablecoins in accordance with the principle of same activities, same risks, same regulatory outcomes.

**Senator BRAGG:** So you think that's a reasonable approach?

**Mr Connolly:** From our perspective there is a need to regulate stablecoins in Australia, particularly payment stablecoins that could end up being used in the payment system—so some form of regulation is appropriate. I think we would defer to our colleagues at Treasury as to the specifics of how that regulation should be put in place.

**Senator BRAGG:** I think you're more likely to give a generous answer, so I won't ask them about that!

**CHAIR:** One question for AUSTRAC. I think you made a submission to the inquiry outlining the work that AUSTRAC does with digital asset exchanges and questions around money laundering. My question is whether you have any advice for this particular hearing around any implications for AUSTRAC of this particular bill, in the way it's drafted today.

**Mr Mossop:** AUSTRAC is already regulating in this space. We come at it with a very different lens. We're looking at anti-money laundering, or money laundering and terrorism financing risks, and looking in our registration process at preventing criminals and their associates from managing, operating or controlling a digital currency exchange. We see a lot of complexity around products in the space, so we think there is a need to get the settings as right as you can from the outset but leave some wriggle room. That is part of the thing with a fast-evolving and constantly changing product line; that's going to be really important. We have similar questions around the coverage of non-fungible tokens. In our space we have the benefit of regulating not the currency but the providers; that gives us the leverage to do what we need to do.

When we are designing these, we particularly want to think about those international standards. We have international standards set by the Financial Action Task Force that relate to how digital currency exchanges—or

virtual asset service providers, as they're called in that space—can operate. Part of that is around the fit-and-proper-person controls that need to be in there. I would think looking at those things holistically is going to be really important, to look at whether they have those consumer protections and also whether they have those protections at the front to prevent the wrong people controlling those businesses.

**CHAIR:** Those are the sorts of issues you're looking for as legislation comes to the parliament in general, whether it be through the government or through this private senator's bill?

**Mr Mossop:** That's right. At the moment we have that legislation in place to be able to do that registration. We provide a form of registration for digital currency exchanges, and we will look at those fit-and-proper-person tests. We'll also look at some technical capacity they have to meet money laundering requirements and also look at their business operating model. We bundle a few things of our regulatory function in with that fit-and-proper-person test. We think, in a registration process, there is an opportunity to streamline that and think about how we might combine those to provide relief to industry. How that plays out is part of the consideration that's happening at the moment. Whether you have complementary systems or a single system, that's all to be worked out.

**CHAIR:** Thank you very much. I think that concludes the questions the committee has for you today. That concludes today's hearing. Thank you to all the witnesses who appeared and to Hansard and Broadcasting for their assistance. The committee has agreed that responses to questions on notice should be provided by Tuesday 1 August.

**Committee adjourned at 15:34**