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Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600.
By email: economics.sen@aph.gov.au

Hamilton Locke Submission: Inquiry into the Corporations Amendment (Digital Assets Framework) Bill 2025

Dear Senate Economics Legislation Committee

We welcome the opportunity to submit a response in relation to the Inquiry into the *Corporations Amendment (Digital Assets Framework) Bill 2025* (**Bill**).

We acknowledge the significant work and thinking that has informed the Bill and the Explanatory memorandum (**EM**). Implementing significant legislative reforms for digital assets is no simple feat and we commend Treasury on its technologically neutral approach that seeks to regulate risk-based activities, instead of the digital assets, within the existing Australian financial services laws framework.

We have deep expertise in financial services, specifically the regulation of digital assets and services. We regularly advise clients on the regulatory perimeter for digital assets and services and have engaged with ASIC and Treasury in roundtables and consultations on this topic. In the past few years, we have made submissions to:

- The Crypto asset secondary service providers: Licensing and custody requirements Consultation Paper in March 2022;
- Treasury's token mapping consultation paper in February 2023;
- The Senate Economics Committee inquiry into the draft Digital Assets (Market Regulation) Bill 2023 in May 2023;
- Treasury's Regulating digital asset platforms Consultation Paper – October 2023;
- ASIC's consultation paper 381 on proposed updates to INFO Sheet 225 Digital Assets – February 2025;
- Treasury's Regulating digital asset platforms – exposure draft legislation – October 2025
- ASIC's consultation on ASIC Corporations (Stablecoin and Wrapped Token Relief) Instrument 2025/XXX – November 2025

We are delighted with the opportunity to continue to provide feedback on digital asset regulation.

We thank you in advance for considering the points we have raised in this submission. As always, we are happy to further engage on this in any forum and we look forward to the outcome of this consultation process.

Yours faithfully

[redacted]

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Submission Paper

In response to the Inquiry into the *Corporations Amendment (Digital Assets Framework) Bill 2025*

About Hamilton Locke – Funds and Financial Services

Hamilton Locke is Australia's fastest growing law firm, which is focused on transforming the traditional approach to corporate and commercial legal services. Hamilton Locke is a full service corporate law firm, which is a part of the HPX Group, that delivers essential corporate services across legal, governance, risk and compliance helping businesses grow and thrive.

The Funds and Financial Services Team at Hamilton Locke (formerly, The Fold Legal) has become one of the go-to firms for digital asset, blockchain, fintech and insurtech businesses seeking legal and regulatory advice. Our Funds and Financial Services team is also one of Australia's largest as a result of the merger between The Fold Legal and Hamilton Locke.

We are known for our technical expertise and industry knowledge, which we use to provide practical solutions for our fintech and digital asset clients. Our expertise in financial and credit services is recognised by our ranking in Chambers and Partners Asia-Pacific and FinTech Legal Guides. Reflecting our commitment to client service, we also won Best Law & Related Services Firm (<$30mil) across several specialist categories based on direct feedback from our clients.

Collectively, we have been deeply steeped in the fintech space since early 2013 and we continue to deepen and strengthen this experience as one of Australia's largest and most diverse financial services practices.

We are technical specialists that have a broad and deep understanding of blockchain technology, digital assets, exchanges, Decentralised Autonomous Organisations (**DAO**), alternate platforms and digital asset products and service offerings. Our knowledge of digital assets and services, combined with our traditional financial services expertise, is market leading. We use our industry knowledge and expertise to deliver practical, compliant, and innovative solutions for our clients. We have worked with digital asset exchanges, miners, digital asset payment businesses, digital asset platforms, DAOs and token issuers to design innovative and compliant offerings.

We are a partner and member of the Digital Economy Council of Australia (**DECA**) and InsurTech Australia.

This submission has been prepared by Jaime Lumsden and Nicholas Pavouris.

Our Submission

Please note that the issues in our submission have not been listed in any order of priority or prominence.

Unless specified otherwise, all references in this submission to sections are to sections of the *Corporations Act 2001* (Cth), which will be amended by the Bill once it is enacted.

Digital token and possession

The definition of a digital token is extraordinarily broad, and we understand that this was Treasury's intent for technology neutrality purposes. For example, the concept of digital token is inclusive and broad without any limitation (noting that the regulations may prescribe exclusions), and would readily capture frequent flyer points, copyright, an excel spreadsheet or even a cell in an excel spreadsheet (just to name a few).

We understand the policy intent behind this and acknowledge that the important qualifiers are ultimately the concept of 'control' and 'possession'. That is, while many things may be digital tokens, not all digital token will be capable of control as defined and ultimately possessable for the purposes of the DAP and TCP definitions.

We think this approach is considered, but the risk is that the use of the word 'possession', even though it is defined, may be interpreted by courts in light of the traditional concept of 'possession' for property purposes. To avoid this and ensure that the policy intent is maintained, we recommend that 'possession' is replaced with 'held'. We note that currently held is defined solely be reference to possession. We think that as part of this, references to possession should be replaced with more specific criteria outlining how assets should be held. While this may seem semantic, we think this would avoid the temptation to draw on the property law concept of 'possession'.

How should assets be held

We recommend that some baseline requirements be included about how assets in a DAP / TCP are to be held. While we recognise that many standards have been left to ASIC to create, and this may allow more adaptability and flexibility, as a baseline we think that:

- Assets held by a DAP / TCP should be statutorily protected in insolvency (and not merely rely on a contractual trust or similar arrangement); and
- DAPs / TCPs should be limited in what they can do with the assets they hold i.e. they shouldn't be allowed to lend, trade, rehypothecate or otherwise deal in the assets without the express and prominent consent of the asset owner. The definition of a DAP / TCP, and the prohibition against a DAP / TCP doing certain things with digital assets they hold, should be two distinct legislative provisions. This is because if they are bundled, there is a risk that persons may structure their activities to avoid the application of the DAP / TCP requirements in the first place.

We consider this baseline to be important to:

- Protect assets in the event of insolvency; and
- To protect asset owners from DAPs / TCPs unknowingly using / dealing in their assets in ways that creates risk for the owner. At present, it is often common practice for those service providers likely to be regulated as a DAP to use customer assets in any way they please to generate a return (generally for the service provider, not the customer, given that the current operation of financial services laws would mean the passing on of such returns would result in the characterisation of some type of financial product for which an AFSL would be required, and to date many such service providers have not held an AFSL with the appropriate authorisations for such activities). While ASIC may make further standards about if, how, when, and under what protections, a DAP / TCP can deal in assets with consent, we think dealing in them without consent should be prohibited as a minimum legislative standard.

Client money and protection of digital assets and other assets held by DAPs / TCPs

Client money protections is one of the matters that has been left for ASIC to make standards on. The current proposed provisions provide that ASIC can impose standards similar to other standards. There is no restriction on what standards ASIC can impose, meaning it is open to ASIC to refer to the current client money rules in the Act as a "similar standard".

We do not think it is appropriate for the current client money rules to apply to DAPs / TCPs as they are, because those rules require that client monies be held in an account with an ADI, and many digital asset businesses have been debanked and cannot obtain an account with an ADI. Unless the reforms can specifically address the debanking issue, this issue is unlikely to go away by virtue of a licensing regime alone.

That said, we do think that the client money rules are otherwise broadly a suitable framework for digital assets because:

- It does not require a new framework to be built and has been tested over a number of years, so is reasonably well-understood; and
- It provides a statutory trust arrangement which protects customer funds in insolvency.

We do think that the client money rules for DAPs / TCPs should provide for a statutory trust to protect customer funds in insolvency. If the client money rules made by ASIC for DAPs / TCPs only provide for a commercial trust, and not a statutory trust which is bankruptcy-remote, it is very difficult to set up trust arrangements which are protected in the event of insolvency. This is an issue we have explored multiple times in the context of payments providers (often in dule diligence contexts) because the client money rules arguably do not currently apply to non-cash payment facilities, given the way in which the products are issued and the relevant triggers for the application of the client money rules. There is a significant risk that customer funds will be exposed in the event of insolvency of the DAP / TCP in this case.

Given we have suggested that the existing client money rules should apply with modifications, then they would need to explicitly apply by way of a new provision. This is because the current provisions, in our view, may not effectively apply, without amendment, for three reasons:

- Client money rules only apply to money received for the purpose of a financial service. Any funds received to acquire digital assets which are not financial products won't be client money and could be exposed in insolvency (setting aside that there could be a question about whether funds are received to trade digital assets that are or are not financial products, and DAPs / TCPs could use this to avoid the rules); and
- Money used to pre-fund a wallet could arguably be money that is paid in connection with a financial service that has already been provided (the issue of the DAP / TCP) or a financial service that will be provided (subsequent dealings in the DAP / TCP), but it could also be argued that the money has been paid to acquire an interest in, or an increased interest in, a financial product (being the DAP / TCP), and therefore is excluded from the client money rules (this is the current state of play in the payments sector, and has created variance in whether customer funds are or are not held in trust and ambiguity as to the correct position as a matter of law); and
- The client money rules should specifically contemplate and apply to assets (whether tokenised or real world) held in a TCP, and not just funds, in order to also provide statutory protection in the event of insolvency. The existing client property rules in Division 3 of Part 7.8 in the Act only apply to property "given" to the licensee by the client. This won't capture real world underlying assets tokenised by a TCP because the client does not give those assets to the licensee. These rules should also capture any transfer of assets (whether digital tokens or not) to a DAP or TCP as a transfer in specie (in lieu of pre-funding with fiat). Additionally, the existing client property rules do not appear to provide any protection in insolvency (unlike for funds) and in our view they should, in order to protect any underlying real world assets held by a TCP and any digital tokens held by a DAP or TCP for a client.

As noted above, the client money rules also need modification to address the debanking issue faced by the digital asset sector. It may be appropriate at this juncture to consider whether it is appropriate to create a non-discriminatory right to a bank account. However, if there is no appetite for this approach, an alternative could include creating alternative ways for digital assets businesses to hold client monies that does not involve a bank account with an ADI. Possible solutions are that:

- Trust accounts could be held with payment service providers offering competing stored value facilities as alternatives to deposit products (noting that such products are still usually backed by wholesale banks and may also not always be accessible to digital assets businesses); or
- Client monies are permitted to be converted to stablecoins and held in segregated digital wallets.

However, we note that even if solutions are devised for client monies rules, it is practically very difficult for digital assets businesses to operate if they cannot access bank accounts and some consideration should be given to solving this.

Separately, we think digital assets (including stablecoins) should be subject to protections in insolvency, but should not themselves be treated as client money. Stablecoins are themselves set to separately regulated as a form of stored value product under reforms for the payment sector, which will likely regulate the fiat that sits behind stablecoins (possibly as client money, though not necessarily), but we don't think stablecoins should be treated as client money (not least because they cannot be held in a bank account with an ADI). See the previous section in this submission "How assets should be held" for our views on how digital assets (including stablecoins) should be protected.

Markets and CS Facilities

We understand that the intent is to ensure that the DAP / TCP regime does not otherwise impact when and how markets and CS Facilities are otherwise licensed and regulated under the Corporations Act and by ASIC, and that, accordingly, digital assets exchanges may be providing services that amount to operating a market or a CS Facility, and will need the appropriate licences.

Appropriateness of the markets and CS Facility licence regime

We do not think these regimes are appropriate or fit for purpose for digital assets markets. The existing markets licence and CS Facilities licence regimes did not contemplate the blockchain when they were designed. While we understand these licences are non-standard and are tailored to the particular applicant, in our view, the applicability and appropriateness of the entire regime should be challenged. This is because the operation of a market or CS Facility as it might exist on the blockchain, as opposed to markets and CS Facilities that exist off chain, are very different.

One example is the operation of atomic settlement on chain. In traditional financial markets, a delay of 1 – 2 business days occurs between when a trade is agreed upon and when it's officially settled. This creates counterparty risk, because the buyer might send payment but not receive the asset, or the seller might deliver the asset but not receive payment. To mitigate this risk, markets rely on intermediaries like licensed CS Facilities. Atomic settlement, however, ensures the exchange of an asset and its payment happen in the same instant. An atomic transaction is one that either succeeds or fails completely, with no middle ground. If any part of the transaction fails, the entire operation is reversed as if it never happened. This eliminates the counterparty risk, as it becomes impossible for half the transaction to complete – either the asset is delivered and payment received, or neither occurs.

This being the case, it begs the question of the value and purpose of applying a costly and highly regulated CS Facility licence regime to manage risks which may already be completely managed by virtue of the use of blockchain technology.

We consider this to be a critical issue for resolution. We are aware than when Canada tried to apply a similar regime, many exchanges left that jurisdiction. We have heard directly from our own clients that are exchanges that they will not apply for these licences because they are too onerous and not fit for purpose – they will restructure or move offshore. This compromises the consumer protections available to Australians, but also impacts Australia's share of this part of the economy.

Impact of markets and CS Facility licence regimes on TCP market

We are starting to have conversations with nascent businesses interested in tokenising real world assets i.e. operating a TCP. As expected, some of the assets that will be tokenised will be financial products e.g. interests in managed investment schemes.

However, in order for such TCPs to succeed, it is not enough that they can tokenise financial products – there must be markets on which the resulting tokens can trade. Otherwise, these assets will remain illiquid (where they are already illiquid) or become illiquid. This defeats the purpose of putting these assets on-chain, which is often to make assets more tradeable where historically investors were locked in for the life of projects (which could be 5 – 10 years in some cases). There is the potential to make funds that are not ETFs tradeable, but also to make investments such as notes / debentures liquid. Even sectors such as horse racing syndicates could be revolutionised by tokenising interests in these syndicates and making them tradeable – as it is usually very difficult for (usually retail) investors to exit before the horse's career has ended.

Most of the enquiries about TCPs we have dealt with come with an expectation they will both tokenise the real world asset and provide a secondary trading facility for the tokens. However, when tokenising real world assets, this becomes impossible – start-up TCPs cannot reasonably apply for markets and / or CS Facility licences in order to comply with the regulations to enable secondary trading.

To make these TCP projects feasible, therefore, these TCP operators would need to list the tokens elsewhere – but they will need to find an exchange that holds the relevant markets and / or CS Facility licences in order to do so. At present, exchanges are indicating they will universally move away from any trading model that requires them to hold these licences.

This means that applying markets and / or CS Facility licensing regimes to digital assets markets runs the risk of severely limiting the ability for TCP operators to tokenise Australian financial products. Australian financial product issuers will need to look offshore to tokenise their financial products – which may be limited if offshore operators do not want to deal with Australian financial services requirements for those financial products, or alternatively may compromise consumer protections if those financial products are then offered or traded on a TCP or market which falls outside the Australian jurisdiction (e.g. where a decentralised exchange is used).

Perverse outcomes

We also think that applying markets and CS Facility regimes to digital assets may have some perverse outcomes which are contrary to the intended consumer protection and purpose of the Bill.

As part of stakeholder discussions, Treasury pointed to the exemption to the definition of a financial product in section 765A(1)(l), which provides a facility will not be a financial product if the facility is a financial market or CS Facility. Our reading of this exemption is that a facility cannot be a DAP or TCP if that ***same facility*** is a financial market or CS Facility. The facility may be the same if there is one set of terms and conditions that applies to all trading and at least one of the trading pairs has one financial product (and note this may be necessary to facilitate trading pairs where only one of the pair is a financial product). This has flow on implications from a custody perspective as:

- The asset holding rules would not apply to the facility for any digital tokens (whether financial products or not). This is because a facility cannot be a DAP / TCP if it is a financial market or CS Facility, which means any asset holding rules made under section 912BE that would apply to a DAP / TCP would not apply to the financial market or CS Facility. This means any non-financial product digital tokens will not be subject to any kind of custody rules;

- The financial market or CS Facility will not be required to be authorised to provide any custodial or depository service by virtue of the exemption in section 911A(2)(d), which provides that a person is exempt from the requirement to hold an AFSL if the financial service is, or
is provided incidentally to, the operation of a licensed market, or a licensed CS Facility, operated by the person;

- To the extent an operator holds an Australian Markets Licence, any conditions imposed on that licence in relation to custody are likely to be limited to digital tokens that are financial products and will not extend to digital tokens that are not financial products.

This is likely less of a significant issue for traditional markets / CS Facilities, as in general they do not hold assets for extended periods of time and are not in the business of custodying them. This is not the case for digital assets, which are routinely custodied by the same platforms that provide the trading functionality. We wanted to highlight this issue, given the premise for the DAP / TCP reforms are to address digital asset intermediaries and the risks associated with custodial arrangements (see paragraph 1.21 of the EM). This being the case, the implications of treating digital assets exchanges as subject to markets or CS Facility regimes seems contrary to the policy purpose, given that it runs the risk that significant volumes of client assets will remain outside any form of asset holding regime, which is both counterintuitive and counterproductive.

Recommendation

We recommend that digital asset “markets” and “CS Facility” regimes be explicitly excluded from applying to platforms that meet the DAP / TCP definition, in favour of the application of the DAP / TCP regime, its asset-holding standards, and trading rules. It would also be more appropriate to ensure this covers concepts such as “transfer and escrow” matters, because clearing and settlement principles don’t work in the context of atomic settlement.