



The Australian Reform Agenda

**Regulating Digital and Crypto-finance:
A Conversation Across Borders**

UCL Centre for Ethics and Law

22 March 2022

Dr Andrew Godwin

**Principal Fellow, Melbourne Law School,
Special Counsel, Australian Law Reform
Commission**





Outline

1. Questions for regulation
2. Current approach in Australia
3. Proposed reforms
4. Comparison with proposed approach under MiCAR
5. Some concluding thoughts



Questions for regulation

- Facilitative or prohibitive?
- Taxonomy/classification of tokens
- Target of regulation
- Regulatory style or method
- Unitary or bespoke regulatory framework?
- Impact of regulatory model
- Regulatory objectives or philosophy



Regulatory objectives or philosophy

- *similar (or same) regulatory treatment for functionally equivalent products* (Australia)
- *same risk, same regulatory outcome* (UK)
- *same activity, same risk, same rules* (EU)
- relevance of general principles, such as technology-neutrality



Current approach in Australia

- Potential for holistic reform?
- Functional approach to the regulation of ‘financial products’

763A of the *Corporations Act* 2001 (Cth) provides that a financial product is a ‘facility’ (defined in s 762C) ‘through which, or through the acquisition of which, a person does one or more of the following’:

 - ‘makes a financial investment’;
 - ‘manages financial risk’; or
 - ‘makes noncash payments’
- ‘...whether a crypto asset is within or outside the financial regulatory framework depends on particular characteristics of the crypto-asset offering. This can cause uncertainty for investors and consumers as well as issuers and distributors of these assets. It is a policy matter for government whether or not there should be clarity on this issue.’
 - Second Interim Report of the Senate (Australia), Select Committee on Australia as a Technology and Financial Centre (April 2021)



Current approach in Australia

- Functional approach to regulation and supervision (Twin Peaks)
- ‘...the authors argue that in Hong Kong, the Twin Peaks model [would be] more effective in regulating capital market integration with mainland China and the ongoing technological evolution of finance than the current sectoral model.’
 - Arner et al, ‘Towards a Twin Peak Regulatory Architecture for Hong Kong’ in Godwin and Schmulow (eds) *The Cambridge Handbook of Twin Peaks Financial Regulation* (CUP, 2021), 192
- The importance of regulatory coordination in achieving a holistic approach.



Proposed reforms

- Australia's reform agenda:
 - Treasury Review of the Australian Payments System (Report, June 2021)
 - Senate Select Committee on Australia as a Technology and Financial Centre (Final Report, October 2021)
 - Australian Law Reform Commission (ALRC), Review of the Legislative Framework for Corporations and Financial Services Regulation (ongoing, 2020-2023)



Payments System Review Report

- Recommendations:
 - The Treasurer should have the power to designate payment systems and participants of designated payment systems where it is in the national interest to do so. The designation power includes the power to direct regulators to develop regulatory rules and the power for the Treasurer to give binding directions to operators of, or participants in, payment systems.’ (Recommendation 7)
 - A defined list of payment functions that require regulation should be developed. This should be used consistently across all payments regulation. The list should be able to change to ensure it remains fit for purpose as technological advancements gather pace. (Recommendation 8)
 - The enhanced Treasury function should take steps to improve coordination between payments regulators, and the alignment of payments regulatory requirements, including with respect to AML/CTF issues (Recommendation 13)



Senate Select Committee Report

- Recommendations:
 - a market licensing regime for Digital Currency Exchanges be established (Recommendation 1)
 - a custody or depository regime for digital assets with minimum standards be established (Recommendation 2)
 - a token mapping exercise be conducted to determine the best way to characterise the various types of digital asset tokens in Australia (Recommendation 3)
 - a new Decentralised Autonomous Organisation company structure be established (Recommendation 4)
 - Treasury lead a policy review of the viability of a retail Central Bank Digital Currency in Australia (Recommendation 8)



Comparison with the MiCA proposal

- MiCAR:
 - Would regulate utility tokens and stablecoins (including payment tokens and asset-referenced tokens), leaving investment and securities tokens to be regulated by the existing EU framework governing financial and securities law
 - Unlike the current approach in Australia, where investment products and non-cash payments are regulated as part of a unitary system of regulation in respect of ‘financial products’, MiCAR would regulate payments separately from investment products
 - How to draw the line between the different categories (e.g. payment tokens and investment tokens)? How to deal with regulatory arbitrage?



Some concluding thoughts

- The impact of technology in defining financial products and asset classes increases the potential benefits of a principles-based approach, supported by clarity in relation to outcomes
- The regulatory net will need to include a broader range of parties, including providers of technology-related services
- There is a need for an adaptive, flexible and efficient regulatory framework
- The question of whether a unitary or bespoke regulatory framework is appropriate depends on a range of factors



THE UNIVERSITY OF
MELBOURNE

Thank you

