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30 September 2022

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The Board of Taxation
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The logo for Ashurst, featuring the word "ashurst" in a lowercase, bold, sans-serif font.

Dear Board of Taxation,

1. INTRODUCTION

Thank you for the opportunity to provide feedback and comments on the issues raised in the *Consultation Guide – Review of the Tax Treatment of Digital Assets and Transactions* dated August 2022 (**Consultation Guide**).

Ashurst is a leading global law firm and is one of Australia's largest law firms. The Ashurst tax practice is one of the largest tax practices among the law firms. Ashurst advises clients across all industry sectors, including ASX-listed companies, large multinationals, private companies, funds, financial institutions, and governments.

This letter sets out our comments in response to certain issues raised and questions asked in the Consultation Guide. We note that these comments are only our initial feedback with respect to the Consultation Guide, and we are available to discuss any of our submission points further with the Board of Taxation or to participate further in the consultation process. There will no doubt be more specific comments to be made and our submissions may evolve as consultation continues.

2. TOKEN MAPPING

The Board of Taxation's Consultation Guide is in response to a request by the former Treasurer Josh Frydenberg, on 8 December 2021. The then Treasurer requested, broadly that the Board of Taxation review and make recommendations on an appropriate policy framework for the taxation of digital assets and transactions in Australia. The Board of Taxation is required to report back to the current Government by 31 December 2022.

On 22 August 2022, Treasury announced that they would be undertaking a 'token mapping' exercise in order to "identify notable gaps in the regulatory framework, progress work on a licensing framework, review innovative organisational structures, look at custody obligations for third party custodians of crypto assets and provide additional consumer safeguards".¹

The Government also promised that a public consultation paper on token mapping is to be released soon.

¹ Joint media release of Hon Stephen Jones MP, Hon Jim Chalmers MP, and Hon Dr Andrew Leigh MP dated 22 August 2022 (<https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/work-underway-crypto-asset-reforms>)

For the reasons given below, we consider that the Board of Taxation's consideration on the tax policy framework for digital assets should be deferred until the 'token mapping' exercise is completed. Further, we believe that the tax policy framework for digital assets should be developed in conjunction with, and not separately from, the general legal and regulatory framework for digital assets, so that there is a consistent and coherent legal, tax and regulatory framework for these assets.

3. **OUR VIEW**

It is our opinion that providing analysis and suggestions on the taxation treatment of digital assets as part of the Board of Taxation's review whilst Treasury undertakes a consultation into the legal and regulatory classification of the same assets is pre-emptive, likely to cause a duplication of efforts and risks developing a tax framework that does not operate coherently and consistently with other areas of the law.

We believe it is likely that the findings from the token mapping exercise, particularly in relation to the legal and regulatory classifications of specific digital assets, will be fundamental to informing the appropriate taxation treatment of digital assets.

It is a trite observation that there is no one type of "digital asset" or "cryptocurrency". They come in many different forms, and have many different uses. For example, a digital cryptocurrency, like Bitcoin, is fundamentally different to a "non-fungible token", that represents a unique digital asset, and fundamentally different again to a "governance token" that gives rights to participate in the governance of an online body like a Decentralised Autonomous Organisation (or DAO). It is obvious that these different types of digital assets should not necessarily be taxed in the same way. There is a fundamental difficulty in applying tax concepts to "digital assets" without a clear definition of what the different types of digital assets are and how they should be classified from a legal and regulatory perspective. The tax landscape simply cannot be properly formulated until this is done.

As such, our view is that any determinations made by the Board of Taxation regarding the appropriate tax treatment of those assets prior to the completion of the token mapping exercise is premature, and the Board's review should therefore be deferred until after that exercise is completed. Further, we consider that it is critical that the tax framework is developed in conjunction with the more general legal and regulatory framework, so that there is a coherent and consistent approach to the treatment of digital assets across the law.

For example, if the token mapping exercise concludes that certain types of digital assets are appropriately classified as 'securities' (eg, stable coins might be a type of asset that is appropriately treated in this way), then it may well be appropriate to treat these in a similar way for tax purposes, eg, as falling within the scope of "eligible investment business" (section 102M of the *Income Tax Assessment Act 1936*) and as "financial arrangements" (Division 230 of the *Income Tax Assessment Act 1997*). But this will not necessarily be the case for other digital assets that are not characterised as securities for regulatory purposes. Accordingly, we do not believe that the Board of Taxation can properly make recommendations on the tax treatment of digital assets without undertaking some form of token mapping exercise, nor should the Board of Taxation formulate any recommendations in isolation from other areas of the law.

To illustrate the point, one of the Board of Taxation's Terms of Reference provided by the previous Government is to "Consider the characteristics and features of digital assets and transactions in the market, including the rapid evolution of technology supporting the broader digital asset ecosystem". Not only is this not taxation related, it will be likely covered by the token mapping exercise – leading to a clear duplication of efforts.

Separately, as the Board of Taxation's final Term of Reference alludes to, the question remains open as to whether the primary issue is the insufficiency of existing taxation laws in regulating digital transactions and assets or whether the primary issue is one of enforcement.

In relation to the sufficiency of existing taxation laws, at this point, it is not clear that there is a case for a separate tax regime for all forms of digital assets. Once the token mapping exercise is complete, we would suggest that the first step is to identify the extent to which digital assets can be taxed under existing tax laws, or by amending the existing laws in minor ways (where necessary) to ensure that the appropriate digital assets are taxed under the appropriate taxation laws, with the appropriate tax policy outcomes. Only if the existing laws prove inadequate or inappropriate for particular categories of digital assets should new laws be introduced.

In relation to enforcement, it is clear that traditional enforcement mechanisms are challenged by the ecosystem of digital assets. Current taxation enforcement mechanisms and information gathering is reliant on intermediaries such as centralised exchanges and financial institutions that are within the reach of the ATO and are typically highly regulated under the general law. Where digital assets and transactions are wholly decentralised, it is difficult for the ATO to be aware of transactions given jurisdictional and technical limitations, notwithstanding the immutable record of transactions recorded in a blockchain. However, this is also a challenge for other legal regulators, and there are clear synergies between taxation and regulatory enforcement which, in our view, should proceed in tandem rather than as disparate exercises.

In summary, we believe that the appropriate tax treatment of digital assets can only be determined after their legal and regulatory classification is determined through Treasury's token mapping exercise. Until such time, any recommendations made by the Board of Taxation's review are likely to be premature and made without the benefit of a fully informed understanding of digital assets and the proposed legal and regulatory framework. We believe that there would be benefits to the Board of Taxation's review being deferred until after the token mapping exercise has completed.

Further, we believe that the taxation and regulatory framework, including enforcement mechanisms, should be developed together, rather than separately, so that the tax and legal regimes work together with similar policy driven outcomes for the different types of digital assets, rather than being out of step with each other in what is a fast developing and potentially significant future market for the Australian and global economy. Consideration should therefore be given to folding the Board of Taxation's review into the broader process of establishing a legal and regulatory framework for digital assets.

If you have any queries on any of our comments above, please contact Sanjay Wavde on 02 9258 6135.

Yours faithfully,



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