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Board of Taxation

By email only: TaxDigitalAssets@taxboard.gov.au

Dear Board,

Review of the tax treatment of digital assets and transactions

Thank you for the opportunity to provide a submission to assist the Board of Taxation's review of the tax treatment of digital assets and transactions. The consultation is a welcome initiative to clarify the application of existing tax laws and identify the areas for tax reform.

Responses to the questions posed in the Consultation Guide are set out Annexure A.

In summary:

1. The current tax treatment of token activities is neither clear nor understood by everyday taxpayers, nor is tax advice affordable. The areas of tax uncertainty cross-sect with other laws and show the need for a holistic policy approach to the token economy and increasingly tokenised economies around the world. Whilst significant and holistic reform is underway, a simplified basis of taxation could be introduced that enables better understanding of tax obligations and the ability to comply as well as a tax sandbox that supports the use of blockchain technology to programmatically assist with tax calculation and compliance.

2. The proposed simplified basis of taxation is not intended to apply only to retail investors but is instead intended to provide a clear, sustainable, and easily appended-to framework for taxation alongside the existing tax rules for taxpayers that seek to remain within the existing framework.

3. In large part, my view is that confusion stems from the lack of guidance regarding the characterisation of a DAO as an entity (or entities) for tax purposes. If a DAO does not fit within any of the existing entity types, there is a need to legislate recognition of 'personless protocols' and 'non-counterparty property' and/or move to an activities bases of taxation.

4. The requirement for tax transparency does not hold if the tax authority is able to verify the completeness of a taxpayer's token activities and/or if tax is programmatically collected on the token activities that are sought to be subject to tax by one or more national governments or more efficiently by international consensus. An activities basis of taxation would better support this approach than the current basis of income taxation. The principle of data minimisation alongside the development of digital identity and privacy enhancing tools provide a credible basis to move away from the collection and reporting of tax information. The Completeness of Token Storage Location Rule proposed in the simplified basis of taxation goes some steps towards a tax framework that supports data minimisation.

5. Learnings from tax authorities and other jurisdictions is that a simple and clear regulatory and tax framework, with risk-based approaches to application of the law by regulators, could greatly assist in attracting activity back or to Australia.

6. A specialist group should be convened to consider taxation issues related to token activities including data collection and record keeping standards and publish timely guidance. One of the first pieces of work should be a data schema for token exchanges to adopt.

Activities based taxation is novel in a similar way that consumption-based (or sales) taxes were novel at the time of their introduction. Latest data indicates that GST revenue is declining as a proportion of Australia's gross domestic product as more people spend less on discretionary items to repay home loans and/or spend more on critical needs that are GST-free items such as health care, childcare and fresh food and input taxed financial supplies which represent a significant portion of the Australian economy activity. With these such GST-free carve outs and input tax treatment the GST has not raised the revenue it was hoped to and is criticised as not achieving tax reform or being forward looking.[1] As the Henry Tax Review observed that "consumption is potentially one of the most efficient and sustainable tax bases available to government", I observe that token activities would be a future fit, efficient and sustainable tax base available to government and should be seriously considered.

The proposed simplified basis of taxation was set out in the submission to Australian Treasury's Exposure Draft legislation regarding the tax treatment of digital currencies. That submission is enclosed with this one for ease of reference.

I welcome the opportunity to discuss the recommendations and look forward to seeing the progress of sensible friendly tax policy to support Australian innovation and participation in this innovation.

This submission will be shared and discussed in the 'Taxation of token activities' working group of LawFi DAO with the view that the submission is ratified by the LawFi DAO committee and its members, and more broadly across the tax profession in Australia and interested parties around the world.

Yours sincerely,

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[1] Tony Kaye, CPA In the Black, 'GST in Australia 20 years on: looking back on taxing times' (1 March 2020), available at: https://intheblack.cpaaustralia.com.au/economy/gst-in-australia-20-years-on#:~:text=The%20GST%20was%20passed%20as,single%2010%20per%20cent%20tax.

Annexure A Responses to Consultation Guide

A. Current tax treatment of crypto assets

A1. Is the current tax treatment of crypto assets clear and understood under the Australian tax law? If not, what are the areas of uncertainty that may require clarification?

[1] No. Taxpayers and tax agents heavily rely on non-binding web guidance and in some cases still the 2014 suite of public rulings (**2014 Suite**) provided by the Commissioner of Taxation (**Commissioner**). The 2014 Suite is eight years old now, is based on the Bitcoin protocol (a UTXO system with Proof of Work consensus) and bitcoin token and has not been updated to reflect the Ethereum protocol (an account system now with Proof of Stake consensus) or other subsequent protocols that introduce functionality much greater and different than the Bitcoin protocol.[2] In addition, the binding parts of the 2014 Suite do not include the supporting analysis which calls into question the reliability of the binding parts.

[2] Rightly or wrongly, most tax agents and taxpayers rely on the web guidance. Furthermore, in the absence of up-to-date, and regularly updated, web guidance or binding guidance taxpayers look to tax judgments and statements from foreign jurisdictions for signals as to the appropriateness around one tax treatment or another.

A1.1 Areas of uncertainty that cross-sect with other laws and show the need for a holistic policy approach

[3] Before addressing the tax matters, it is important to highlight that the 2014 Suite provides tax guidance only. However, tax guidance that moves out of step with holistic policy or even just monetary policy is proving to be unsustainable and confusing for taxpayers. This confusion is playing out presently with respect to TD2014/25 that provided the Commissioner's view that bitcoin is not a foreign currency, and which has resulted in exposure draft legislation to attempt to provide taxpayers with clarity.

[4] Of key concern is TD 2014/28 which fuels a perception that it is legal to pay an employee's salary in tokens which is not the case based on my understanding of the applicable labour law. If certain types of Australian dollar pegged stablecoins are legislatively granted tax treatment on par with or as money, or if an Australian CBDC is introduced, then the payment of salary in such tokens would be legal. Payments of bonuses in tokens are legal based on my current understanding, however the PAYG-W component must still be paid in Australian dollars. As such, it is 'tax simpler' to engage labour as independent contractors rather than employees because there is no specific law that prevents paying a contractor in tokens, albeit any withholding component applicable (if the contractor hasn't quoted an ABN or is based offshore) must be withheld and remitted to the ATO in Australian dollars. This reality distances the token economy away from established employment taxation frameworks designed to best support the employee and which employers are familiar with.

[5] Thus, labour laws should be amended to allow employees the choice to be paid in tokens and benefit from the existing employee taxation framework that TD2014/28 supports, and the relevant laws defining currency for monetary and tax purposes should be amended to reflect currency or currency equivalent status of certain types of Australian dollar pegged stablecoins. An employee could currently contractually opt into payment of salary in tokens in their employment agreement but typically such agreements are qualified to be enforceable only to the extent permitted by law so the opt in provision could be useless.

A1.2 Areas of uncertainty that require clarification: 'Entity' characterisation of a DAO

[2] For the differences between a UTXO system and an account system see, for example, Horizen Academy, 'UTXO vs. Account Model', available at: https://www.horizen.io/blockchain-academy/technology/expert/utxo-vs-account-model/.

[6] The key criticism of the 2014 Suite and web guidance is that the analyses do not start from the beginning of characterising a decentralised autonomous organisation (**DAO**) in terms of whether it is a recognised 'entity' (or multiple entities) for tax purposes. Lacking a tax 'entity' characterisation then introduces difficulty in how the remainder of the tax law applies and how widely understood traditional tax principles apply because most if not all concepts rely on an entity as grounding to determine control, residency and then applicable tax provisions.

There is a need to recognise a 'personless' entity and 'non-counterparty property for tax purposes and develop fit for purpose tax principles

[7] Some web3 lawyers prefer the terms 'personless' to refer to a DAO or the protocol referable to a DAO model of governance, and the term 'non-counterparty property' to refer to tokens referable to a DAO and/or its protocol. Such concepts are novel and make existing tax provisions difficult to apply. These concepts also exist on a spectrum as not all DAOs would be sufficiently globally decentralised to meet a 'personless' classification. Recent approaches to regulatory reform (including tax proposals) in the US have attempted to define the level of centralisation and control that comes within the meaning of a person, rather than the level of decentralisation that tips a DAO or protocol into being 'personless'. It is the global problem at hand for solving.

[8] Two examples are provided below to illustrate this issue in the context of some of the areas of uncertainty at the blockchain protocol level (Example 1) and at the blockchain application level (Example 2). Providing examples for each level is intended to prompt the sort of guidance and potential legislative reform necessary to have a principled basis for considering the tax treatment of 'non-counterparty' tokens referable to 'personless' protocols and applications.

Example 1: Mining bitcoin (blockchain protocol level scenario)

[9] In Proof of Work mining, specific computer equipment is powered (increasingly by renewable energy) to produce 'hashes'. Only when the network of miners has produced enough hashes (i.e. which is a 'difficulty' requirement set by the Bitcoin protocol and which changes every ~2 weeks) will there be a 'winning hash'. The miner that produces the winning hash receives the BTC reward and the BTC fees (**BTC Reward Income**).

[10] From an income tax perspective, the tax analysis for a miner appears straightforward if the 2014 Suite is relied on which treats BTC as property and a CGT asset and without reference to where that property has come from. However, the UK Law Commission has recently provisionally proposed a third class of property to preserve the integrity of the existing two classes of property (a thing in possession and a thing in action) because key of the *Ainsworth* principles around recognition of objects of property rights are often met in relation to tokens but there are nuances of tokens that can neither be possessed in real world teams or have a clear counterparty to sue).

[11] Prima facie, the miner is carrying on a business of mining BTC and should recognise assessable income at the time the BTC Reward Income at the Australian dollar value once derived. Expenses incurred in carrying on the mining business should be deductible, such as electricity costs to power the mining machines. However, if a comprehensive analysis is carried out with respect to the Bitcoin Network to characterise the type of 'entity' it is for tax purposes the case is not so straightforward. If each miner represents a taxable permanent establishment, on what basis is it appropriate to allocate the BTC Reward Income to each miner? Are BTC rewards as set by the Bitcoin protocol and BTC fees that vary based on demand/supply considered an appropriate arm's length amount and method to determine arm's length fees, respectively, since so many independent parties around the world undertake mining? The economic substance of mining activities may not correlate to BTC Income received such as where an Australian-based miner contributes the majority of hash power but does not receive

the same relative proportion of BTC Income. This latter point may seem semantic now, but the allocation of BTC Income, and alternate bases for allocation, could increasingly become political and manifest through adverse application of international tax concepts of attribution.

[12] Furthermore, if BTC fees for an income year represent annual global income of A$1 billion or more, it is unclear whether the Bitcoin Network (perhaps as a partnership) can be characterised as a significant global entity as defined in Subdivision 960-U of the ITAA 1997 and what the ensuring consequences and tax compliance obligations would be and upon whom.

[13] The application of the above concepts may seem extraordinary but is necessary to properly understand whether the Bitcoin Network is a recognised 'entity' for tax purposes, or not. Such analysis was never undertaken in the 2014 Suite but would provide a foundation for the application of established domestic and international tax principles to 'personless' protocols and 'non-counterparty property' referable to 'personless' protocols.

[14] From a GST perspective, it is unclear whether the supply of hashes is a taxable supply, an input taxed financial supply or a GST-free supply. In theory, the supply of hashes could be a taxable supply as it is a supply made for consideration (i.e. the BTC Reward Income). However, determining to whom the supply is made (and where) is difficult because the Bitcoin Network does not have a clear 'entity' characterisation (nor a basis for determining its residency).

[15] With respect to the BTC fees, it may make sense to 'look through' to the residency of the persons that had transactions verified in the particular block and apportion the supply to reflect what component is taxable (i.e. supplies to Australian residents) or GST-free (i.e. supplies to foreign residents). This would be an onerous compliance burden for a miner which could be automated but would not necessarily be accurate as publicly available methods to ascertain residency based on IP address are not reliable (e.g. because of VPN routers).[3] An administrative approach could involve the Commissioner treating a 'personless' protocol as a shop front in conjunction with an assumption of residency spread of the shop front based on annual geographic data from the likes of Chainalysis.[4]

[16] Since BTC meets the current GST definition of 'digital currency' and each of the persons with verified BTC transactions have used BTC as consideration to pay for BTC fees, then it is broadly accepted that Australian residents can treat the supply of BTC by them as a supply of money and ignored for GST purposes. A foreign resident would need to determine how the laws of their jurisdiction apply.

[17] With respect to the BTC rewards, it is clear that the BTC rewards are consideration for the supply of computational power but it is unclear *to whom* the power is provided and *from whom* the consideration is provided. In one sense, the BTC reward is provided by the winning miner but a person cannot make a supply to themselves. In another sense, the BTC reward is provided by the Bitcoin protocol on behalf of all the miners that produced hashes in pursuit of the particular block and the users sending BTC transactions. The BTC reward is mined because of the winning hash but is only possible to be mined because many miners contributed hash necessary to reach the difficulty rate and because of many users sending BTC transactions. Based on these facts, it is unclear what a reasonable interpretation of the GST law would be and at least an administrative determination from the Commission is necessary.

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[3] It is critical to note here that as countries and supranational bodes like the European Union seek to support decentralised identity and digital identity to support CBDCs, privacy preserving methods of sharing proofs of residency could become more commonplace. For example, a person that holds BTC in their CBDC wallet could also generate a proof at the time of sending a BTC transaction that verifiably proves their tax residency such that the information packet contains the BTC transaction data as well as the tax residency data.
[4] See, for example, the annual Chainalysis Geography of Cryptocurrency Report.

[18] For example, it could be reasonable for the Commissioner to administratively treat the supply of computational power to a 'personless' protocol as a GST-free supply. The GST revenue base would however be increased if the Commissioner instead stated that the supply must be apportioned between a taxable supply and GST-free supply based on available public data about the percentage of Australian miners relative to global miners, the percentage of Australian residents sending BTC transactions relative to foreign residents, or a percentage that reflects the combination of the earlier two metrics.

[19] Treating BTC as an object of property and thus a CGT asset in the 2014 Suite may have been appropriate from a superficial income tax perspective for a UTXO system where a public address represents the units of BTC that the person(s) with access to the private key can spend, and where the Bitcoin protocol only supports the spending, receiving and mining of units of BTC. However, from a GST perspective the lack of analysis of the Bitcoin Network creates significant difficulty for the reasonable application of GST law.

[20] Australian residents that are miners, validators or involved in other blockchain consensus mechanisms require income tax and GST clarity that begins with the 'entity' characterisation. This class of taxpayers represents substantial potential income tax and GST revenue for Australia, particularly if there is clear tax policy and certainty of regulatory conditions in Australia.

Example 2: Liquidity mining arrangements (application protocol level scenario)

[21] Only income tax comments are provided below as the GST considerations set out in Example 1 provide an equally applicable framework in the context of considering GST implications of an application protocol level scenario.

[22] Liquidity mining arrangements can be described broadly as follows:

a) The DAO white paper stating that a liquidity mining scheme will be used to distribute tokens and governance and/or a DAO proposal approved by vote of governance token holders to launch a liquidity mining scheme. Likelihood of approval of a DAO proposal may be ascertained by forum discussions (such as through a DAO's discord server) before a proposal is made available for formal vote of governance token holders.

b) The DAO Treasury Wallet (or a deployer wallet) deploys the staking contract to the blockchain.

c) Each person seeking to participate sends a defined number of specific tokens to the staking contract address and will sometimes receive a 'receipt token' and other times the contract will 'map' the number of tokens sent as referable to the sender's public wallet address. Sometimes, the scheme allows a Liquidity Provider (**LP**) token, a sort of receipt token for providing tokens as liquidity to a liquidity pool protocol like Uniswap, to be staked to receive higher token rewards. This is intended to incentivise support for one particular liquidity pool that is deep so that token holders have a reliable and deep market (which reduces exposure to slippage) from which to trade their tokens.

d) Token rewards accrue to the staker and are subject to lock periods before able to be claimed or token rewards are sent directly to the staker's wallet or staker is able to regularly choose to stake token rewards.

[23] In liquidity mining arrangements involving the staking of governance tokens for rewards 'paid' in pre-minted governance tokens it is unclear whether value is being created, by whom, when and where. The term mining is used because the pre-minted tokens are being 'found' through the

liquidity mining arrangement. It would not be liquidity mining if the staking scheme distributes already distributed tokens that have somehow been repurchased or earned by the DAO (which some DAO tokenomics models operate to).

[24] Arguably, in liquidity mining schemes any value is only really created when value is realised once the governance token rewards are sold for other tokens or exchanged for fiat currency.[5] Thus, based on value creation concepts a token received from a liquidity mining staking scheme should not be subject to tax until value is objectively created by a transaction with a third party.

[25] Unlike the BTC fees in Example 1, liquidity mining schemes do not in and of themselves generate or represent income or revenue distribution flows – revenue distribution staking schemes are often separate (but can still be related) to the liquidity mining scheme.

[26] The UK HMRC is currently consulting regarding the tax treatment of DeFi staking and lending and have proposed three options including separate rules (Option 2) and a ‘no gain no loss’ basis of taxation (Option 3). My submission to that consultation is enclosed for convenience which provisionally supports both options. In summary, Option 3, with respect to staking and reward arrangements, could be appropriate to align the tax treatment of DeFi staking activities with the concessional tax treatment afforded to early-stake investors to incentivise the allocation of capital to early stage and high-risk innovative ventures. This describes what is really happening with staking arrangements – that is, an incentive arrangement to ‘bootstrap’ users to an application or blockchain network.

[27] From the DAO’s perspective, it is unclear whether a CGT event occurs on receipt of tokens into the Treasury Wallet and how market value could be determined. Bringing tokens into existence is most closely analogous to the ‘natural increase’ provisions that relate to livestock where those provisions do not focus on bringing income to account but instead setting the appropriate trading stock cost base. However, the natural increase provisions cannot be read so broadly as to include a concept of ‘software increase’.

[28] Continuing the example, and if a ‘no gain no loss’ position is adopted for DeFi staking arrangements, it is unclear whether value creation should be recognised on use of tokens as collateral in a lending or investment protocol which have been earned from liquidity mining arrangements. On the one hand, the taxpayer can direct the tokens and generate value by way of loan proceeds; on the other hand, the putting up of collateral is not the realisation of value but instead the receipt of the loan proceeds potentially is. Within the current taxation framework, provision of collateral where the taxpayer remains absolutely entitled to the collateral should be disregarded under either or both of s 106-60 and TD2004/D25 but each assume that the collateral represents after-tax wealth and loans are repaid rather than perpetually outstanding. However, if the giving of collateral or receipt of loan proceeds are not subject to tax then lending protocols could support non-tax perpetual loans.

[29] From the DAO’s perspective, if the DAO is a ‘tax law company’ that is an Australian resident, is a governance token an ‘equity interest’ and should liquidity mining schemes be treated on par with the issue of bonus shares.[6] The characterisation of the liquidity mining scheme in relation to the referable DAO when the token is multi characteristic (i.e. has payment, utility and governance features) complicates the exercise from an income tax and GST perspective.

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[5] Despite that the number of governance tokens can increase a person’s voting weight and influence in the protocol, a person is not typically remunerated for casting a vote on a DAO proposal.

[6] See, for example, ATO, ‘Bonus shares’ accessed on 3 October 2022 at: https://www.ato.gov.au/Forms/Guide-to-capital-gains-tax-2022/?=redirected_CGTbonusshares&anchor=Bonus_shares#Bonus_shares.

Issues with characterising a DAO as an entity (or entities)

[30] In attempting to characterise the entity (or entities) comprising a DAO for tax purposes, it is unclear whether a DAO could be characterised as the formation and operation of:

e) a general law partnership, subject to income tax as a partnership under Division 5 of the ITAA 1936, noting that a limited partnership or incorporated limited partnership can only be formed when the partnership is registered or incorporated, respectively, with the applicable body such as NSW Fair Trading;[7]

f) or if not a general law partnership, a ‘tax law partnership’ and subject to income tax as a partnership under Division 5 of the ITAA 1936;

g) or if neither of the above, a ‘tax law company’, being ‘any other unincorporated association or body of persons’[8] subject to income tax as a company under the ITAA 1997;

h) or if none of the above, a ‘non-entity joint venture’, being ‘an arrangement that the Commissioner is satisfied is a contractual arrangement under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties and that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than joint or collective profits for all the parties’, where each joint venture party is subject to tax based on their status as an Australian tax resident or foreign resident;

i) or if none of the above, a constructive trust (since there is no express declaration of trust) which requires recognition by a court but such recognition can be retrospective, subject to income tax as a trust under Division 6 of the ITAA 1936;

j) or if none of the above, a public trading trust subject to income tax under Division 6C (as a company) of the ITAA 1936;

k) or if none of the above, a charitable trust eligible for an income tax exemption under Division 50 of the ITAA 1997 (if an application is made to the Australian Charities and Not-for-profit Commission); or

l) a combination of any one or more of the above entity types, where the related schemes rules in section 974-155 of the ITAA 1997 apply to treat separate schemes as a single scheme; or

m) none of the above, which is what the 2014 Suite of guidance endorses without an ‘entity’ characterisation of the Bitcoin Network.

[31] In addition, it is unclear:

a) Whether activities after formation impact the entity characterisation for Australian tax purposes. If an entity characterisation can change multiple times in a tax year, even multiple times over a number of tax years, the compliance burden for all involved would disincentivise use of the DAO structure.

b) How tax residency of the entity (or entities) is determined, and if the entity (or entities) are not considered an Australian tax resident, could an Australian permanent

[7] See, for example, *Partnership Act 1892* (NSW).
[8] See definition of ‘company’ at s 995-1(1) of the ITAA 1997.

establishment exist through Australian resident persons involved with the DAO as a place or places in Australia at or through which the persons carry on the DAO 'business'.

[32] Given the above complexities, the adoption of a reasonable position for tax compliance purposes is extremely difficult both for those involved in DAO governance and the tokens and token activities referable to a DAO-governed protocol. Without a DAO being clear on its tax entity characterisation and compliance obligations, taxpayers involved with DAOs, and DAO tokens and token activities are equally confused.

[33] There are a patchwork of laws spanning State/Territory and Federal jurisdictions, as well as contract law, that must be considered when attempting to characterise what type of entity a DAO is for legal purposes at formation and whether the entity type changes through the life of the DAO. State/Territory law covers not-for-profit associations, partnerships, trusts and cooperatives. Federal law covers corporations and organisations that seek to incorporate or be regulated as corporations, as well as consumer law. Private law is contract based and includes non-entity joint ventures.

[34] The key difficulty in characterising a DAO for tax purposes relates to whether the DAO is a for-profit or not-for-profit entity, or whether there are multiple standalone separate entities within a DAO that are or are not treated as one broad scheme under the related schemes rules (if those rules can apply). The characterisation falls to be made by reference to a non-standardised white paper, governance proposals and social media representations rather than any single document resembling the rules of an association, a partnership deed, a trust deed or a constitution or established legal precedent concerning the nature of the exercise at hand. In addition, there is typically no explicit or fixed expression of membership, membership classes or the rights of a member of the association of persons that constitutes a DAO, or each separate part of it. Furthermore, the facts and prevailing model of DAO governance could alter what provisions are applicable, so an initial tax entity characterisation is not static.

[35] The identification of the type of entity a DAO is for legal and tax purposes is extremely difficult in the current domestic framework. Difficulty increases per additional jurisdiction involved and goes beyond the capability of the existing double tax treaty framework.

[36] As such, the following threshold considerations are unclear:

a) Whether the white paper is to be interpreted as a standalone document representing the rules, deed or constitution of an organisation, or if other materials can be included such as would be referred to when a plaintiff alleges a resulting or constructive trust was implied by conduct and materials. If the latter, the tax characterisation will not be static and could change at multiple points during an income year and retrospectively across multiple income years.

b) Holding governance tokens is not usually a requirement to interact with the DAO-governed protocol which is what that DAO builds with any capital contributions received through a token distribution event. However, acquiring and staking governance tokens to earn token rewards in 'liquidity mining' schemes is typical for a DAO project to attract attention which supports more token holders, more distribution of tokens across geographies and potentially more users of the protocol once deployed. This fact pattern makes it difficult to discern the class of members and whether there are multiple classes of membership or rather contractual arrangements that exist independently of the base level of membership which could be participation in the DAO discord server without holding any tokens. Holding governance tokens is not typically a requirement to express sentiment about the DAO and the spending of its capital resources in accordance with its

purpose, the sentiment of which is taken into account by governance token holders and any persons elected to councils or advisory boards of the DAO.

c) Whether the initial formation activities of the DAO constitute 'carrying on a business in common', considering the following factors:

   i. It is unclear whether a business as defined in the tax law[9] and case law is being carried on. A DAO is not a traditional for-profit or not-for-profit business because the activities are focussed on the use of capital to build a protocol (a technology 'public good' which some refer to the new internet standards or new digital infrastructure) which can function autonomously but also be subject to a model of 'on-chain' governance.

   ii. There are 'business-like' features about several aspects of a DAO's activities which likely weigh towards determining that a business is being carried on by some persons but not all persons. It is not true that all token holders are 'carrying on business in common' if a person is a member of the partnership or association of persons by virtue of their mere holding of governance tokens.

d) If a business is being carried on, whether there was a 'view of profit' at formation or after, considering that:

   i. It is common to use an ERC-20 fungible and transferable token as the DAO governance token and despite the ability for the token to increase in value.

   ii. An ERC-20 fungible and transferable token is the standard design used by DAOs for their governance token because the standardisation meant the token could be composable with other blockchain protocols built and being developed, which in turn can increase circulation and use of the governance token and thus demand for and price of the token.

   iii. Having a fixed governance token supply is common practice and designed to have a deflationary effect on the price of the governance token but other models include elastic token supply and uncapped token supplies.

   iv. If there was any 'view of profit' with regard to the performance of the governance token, that view is held by each person involved at formation in the capacity through which they were involved (e.g. as sole trader or company contractor to the DAO) and should not be construed in and of itself as the DAO 'carrying on a business' with 'a view of profit'.

   A person typically does not become a partner in a general partnership based on a view of profit from anticipated proceeds from sale of a partnership interest less the cost of acquiring the partnership interest – the enquiry around 'view of profit' is usually directed to the activities of the partnership. In limited partnerships, a limited partner may be passive and have a view of profit from anticipated proceeds of sale of a partnership interest less the cost of acquiring the partnership interest. However, a limited partnership must be registered – for example, in Victoria, Australia a limited partnership must be registered with Consumer Affairs Victoria.

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[9] See definition of 'business' at s 995-1(1) of the ITAA 1997 (***"business"*** includes any profession, trade, employment, vocation or calling, but does not include occupation as an employee).

v. A 'view of profit' is not construed from the mere act of writing in or signing a partnership deed that a partnership interest carries a right to vote on partnership matters and where the deed allows for a partnership interest to be sold.

vi. The intended use of governance tokens is typically to initially raise capital to fund the activities of the DAO to build a protocol and sustain a model of governance, treated as akin to a charity fundraising for a specific charitable purpose, or accepting subscription proceeds for units in a trust or the issue of equity by a company, rather than as a profit-making exercise. This is likely the factor where reasonable minds will differ and poses the most tax risk for the tax entity characterisation of a DAO.

vii. Use of a liquidity mining token distribution scheme for governance tokens is typically to attract more people to acquire and stake the governance token to 'mine' pre-minted but undistributed supply of governance tokens and thus facilitate a greater distribution of governance token holders around the world. The liquidity mining scheme is often designed such that token rewards cannot be claimed and withdrawn for a period (such as one year).

viii. Use of a revenue distribution feature for governance tokens to be staked to enable the receipt of distributions of revenue received through the protocol is a difficult and high-risk feature from a regulatory perspective. Most projects haven't switched this on, or switch it on so that the person receives revenue for their direct participation (e.g. providing collateral in Aave or Compound) but would like to once there is greater sense of regulatory clarity.

Often in such schemes there is no intention at formation for the DAO to make a profit from its activities.

ix. It is unclear whether all or some of the above factors would be weighted towards characterising the DAO, as a whole, having a for-profit purpose or formed with a 'view of profit', or whether the for-profit purpose attaches to a separate contractual non-entity joint venture that would form between:

1. the persons that stake the governance tokens; and either
2. the relevant persons involved in governance of the DAO at formation; or
3. the relevant persons involved in governance of the DAO at the time any applicable proposal is approved or ratified by the prevailing model of DAO governance.

e) Which entity characterisation takes priority. For example, whether based on the facts and circumstances of the DAO a resulting or constructive trust characterisation is more persuasive and appropriate than a general law or tax law partnership on a 'whole of DAO' basis and court action to recognise as such is probable.

f) Whether a tax law partnership or constructive trust arises over the DAO treasury assets because of white paper and other representations that the DAO treasury assets will be used for development and sustainability of the protocol.

[37] Without an understanding of whether a DAO is an 'entity' for tax purposes, tax agents and taxpayers are forced to delve into the realm of policy making because the tax law was not developed with the concept of a DAO in mind. How far does one stretch the law to determine the most appropriate way in which a DAO and token activities should be subject to the tax law?

[38] In other words, it is unclear whether a taxpayer is required to understand the workings of a protocol (i.e. one or more smart contracts) to determine the full facts of the scheme to apply the tax law or if the protocol should be viewed as a 'shop front' as set out above. Not knowing the entity characterisation, or having a clear framework to determine entity characterisation, has been a recipe for confused application of traditional tax principles to the tokens referable to a DAO and token activities possible in the ecosystem.

[39] Both everyday and sophisticated taxpayers and the majority of tax agents do not have the competency or clarity of application of existing tax rules to review the materials available in relation to a token or activities that can be undertaken with that token to feel confident in applying Australian tax law.

Difficulties in applying tax law and concepts of recognised 'entities' to DAOs

[40] A high-level analysis is provided below to exemplify the difficulties in applying tax law and concepts of recognised 'entities' to DAOs.

General law partnership

[41] Based on the nature of each DAO, it is unclear whether the general law partnership tests of 'a relation which exists between persons' and 'carrying on business' and 'with a view to a profit' are satisfied by looking at the DAO as a whole or at its separate parts.

[42] The Partnership Act NSW has been selected as an example partnership law to consider at the point of formation of a DAO on the basis that the core founding team (or a majority) resides in NSW. However, due to the global representation of token holders possible within the first income year of a DAO's existence it is unlikely to be the only applicable act that requires consideration and is unlikely to be the only jurisdiction in the world that a partnership may be considered to be formed. The foreign hybrid provisions and controlled foreign entity provisions are considered briefly below but consideration of further acts in other States and Territories of Australia or foreign countries and non-Federal jurisdictions of those foreign countries is beyond the scope of this submission.

[43] If a general law partnership was formed in New South Wales in the FY22 year, it is unclear whether, but unlikely, due to the global representation of token holders, a DAO could satisfy the definition of a 'foreign hybrid company' for any income year.

[44] The Partnership Act NSW provides rules for determining the existence of a partnership, which expressly state that 'the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which returns are derived.'[10] Perhaps if the activities intended to produce revenue for distribution to stakers are treated as part of a single arrangement with the revenue distribution scheme, then some elements may be satisfied for a general law partnership to exist. However, to the extent the revenue distribution arrangement is the sharing of gross returns then a general law partnership does not exist for the purposes of the Partnership Act NSW.

[45] To the extent that a revenue distribution arrangement is considered by the Commissioner of Taxation not to be an arrangement for the sharing of gross returns, analysis of the 'view to a profit' limb is provided below.

[46] In general law partnerships, the enquiry as to whether there is a 'view to a profit' is focussed on profit of the partnership business activities and not on whether a person has a 'view to a profit' on sale of a partnership interest. If a person has a 'view to a profit' when acquiring a

[10] s 2 *Partnership Act 1892* (NSW) (**Partnership Act NSW**).

partnership interest, that may be appropriately characterised as an asset acquired by that person on revenue account (rather than on capital account) but that characterisation does not extend to or taint the characterisation of the activities of the partnership because the partner is a separate entity to the partnership.[11] As such, to the extent that governance tokens represent a partnership interest in a DAO as a general law partnership, the economic substance of the issue of those partnership interests for value received in tokens (e.g. ETH or USDC) into the DAO Treasury Wallet is more akin to an initial contribution of capital from the incoming partner(s) rather than a receipt of income or profits or that the value was received based on a 'view to a profit'.

[47] Subject to the following qualifications, there is arguably no intention or conduct that clearly demonstrates a general law partnership exists, based on the NSW Partnership Act and relevant provisions of the tax law.

(a) Qualification 1: In determining whether there is a 'view of profit' of any business being carried on by a DAO it is unclear whether the funds raised from distribution of governance tokens is properly treated as one of the following:

i. A contribution to a common purpose fund covered by the mutuality principle (a reasonably arguable and more likely better view), where:

1. The case law establishes, reflected in ATO guidance,[12] 'that an organisation cannot derive income from itself' and 'where a number of persons contribute to a common fund created and controlled by them for a common purpose, any surplus arising from the use of that fund for the common purpose is not income.' In addition, 'the [mutuality] principle does not extend to include income that is derived from sources outside that group.'

2. ATO guidance sets out the characteristics of organisations that can access mutuality, which include where 'the organisation is carried on for the benefit of its members collectively, not individually' and 'the members of the organisation share a common purpose in which they all participate or are entitled to do so.' To the extent that the funds raised from distribution of governance tokens were not or are not used for the common purpose of building a protocol (or whatever the purpose of the DAO may be) and decentralised model of governance, the persons responsible for any such alleged misuse of funds may suffer allegations grounded in constructive trust arguments (considered further below).

ii. A capital receipt treated as the issue of an 'equity interest' (a reasonably arguable view but not likely the better view).

1. If a DAO is treated as a company as 'any other unincorporated association of persons', then the question arises whether governance tokens can meet the basic test for an equity interest in s 974-75 of the ITAA 1997. Arguably, governance tokens can meet Item 1 of the table in s 974-75 since, if the text is read broadly, each token represents an interest in the 'company' as a member or stockholder of the company. However, this may be too broad a reading as typically the rights of a member of a company includes rights to vote, dividends and the return of capital.

[11] s 960-100(3) ITAA 1997.

[12] See ATO, 'Mutuality principle', available at: https://www.ato.gov.au/Non-profit/Your-organisation/In-detail/Income-tax/Mutuality-and-taxable-income-for-not-for-profits/?page=8.

2. To the extent a revenue distribution scheme is treated as a separate non-entity joint venture but a 'connected entity' to the DAO, then arguably Items 2, 3 and 4 of the table could also be satisfied. In addition, there may be constituent schemes which may be considered related and when taken together give rise to an 'equity interest' in a company where it is reasonable to conclude that the company intended, or knew that a party to the scheme or one of the schemes intended, the combined economic effects of the constituent schemes to be the same as, or similar to, the economic effects of an equity interest. As stated above, gross revenue distributions as intended with the staking scheme are not the same as a distribution of profits or dividends.

3. Governance tokens may be a 'non-equity share', being a 'share' that is not an 'equity interest' in the company, noting that CGT event H2 does not happen if a company issues or allots 'equity interest' or 'non-equity shares' in the company, the trustee of a unit trust issues units in the trust, or a company grants an option to acquire equity interests, non-equity shares or debentures in the company.[13]

4. Governance tokens are transferable and exchangeable so a person that had contributed capital can recoup their capital (to an extent) from an on-market sale of the governance tokens for other tokens rather than requesting or requiring the return of capital from the DAO Treasury Wallet.

iii. A receipt of income treated as assessable ordinary income or statutory income (a reasonably arguable but not likely the better view).

1. The Australian dollar value of tokens received in consideration for the distribution of governance tokens may be assessable income from the sale of 'trading stock', being tokens produced for the purpose of sale or exchange in the ordinary course of a 'business', or if the token distribution events are not considered activities in the ordinary course of any 'business' then statutory income from one or more applicable CGT events (e.g. CGT event D2 if the governance tokens represent an option to participate in a revenue distribution scheme).

(b) Qualification 2: In determining whether there is a 'view of profit' of any business being carried on by the DAO, it is unclear whether the revenue distribution scheme is a separate and standalone scheme or part of a single scheme under the related schemes rules because:

i. The related schemes rules exist within the debt-equity rules where:

1. An object of Division 974 '…is to establish a test for determining for particular tax purposes whether a *scheme, or the combined operation of a number of schemes: (a) gives rise to a *debt interest; or (b) gives rise to an *equity interest.'[14] Note 1 to the applicable provision states 'that the test is used, for example, for:

a. identifying distributions that may be frankable and which may be subject to dividend withholding tax; and

[13] s 104-155(5)(c) – (e) ITAA 1997.
[14] s 974-10(1) ITAA 1997.

b. identifying returns that may be deductible to the company making the return; and
c. resolving uncertainty as to the proper tax treatment for debt/equity hybrid interests (interests that have some debt qualities and some equity qualities); and
d. identifying debt capital for the purposes of Division 820 (thin capitalisation rules).'

2. Another object of Division 974 is that the test referred to immediately above '…is to operate on the basis of the economic substance of the rights and obligations arising under the *scheme or schemes rather than merely on the basis of the legal form of the scheme or schemes.'[15]

3. The meaning of a 'debt interest' and an 'equity interest' are provided in relation to an 'entity', where the definition of entity expressly excludes a *non-entity joint venture from the class of entity of 'any other unincorporated association or body of persons'.[16] Since a non-entity joint venture is not an entity in its own right and describes a contractual arrangement where the parties share the output of an economic activity which does not constitute a company, the parties are responsible for determining their Australian tax position with respect to their respective joint venture inputs and outputs.

4. Despite the meaning of a 'debt interest' and an 'equity interest', a 'debt interest' can arise under the related schemes rules or by the exercise of the Commissioner's discretion.

[48] Based on the nature of a DAO, it is unclear whether the general law partnership tests of 'carrying on business' and 'with a view to a profit' are satisfied.

Tax law partnership

[49] Based on the nature of a DAO, it is unclear whether the tax law partnership tests of 'an association of persons' that are either 'carrying on business as partners' or 'in receipt of *ordinary income or *statutory income jointly' are satisfied by looking at the DAO as a whole or at any separate parts.

[50] To the extent that the funds raised from distribution of governance tokens is properly treated as a receipt of ordinary income or statutory income, which depending on the facts is arguable in each case, it then falls to be considered whether such income is received jointly. In our view, if ordinary or statutory income is received it is not received jointly by the association of persons comprised of persons that hold governance tokens for the reasons that follow.

[51] Income is not received jointly and there is no joint ownership of tokens held in the DAO Treasury Wallet because the tokens represent value raised to spend on the purpose of the DAO. In this regard, any person appointed as a signer on the DAO Treasury Wallet is appointed as either an officer of a not-for-profit association or as a bare trustee to spend treasury tokens in accordance with the DAO's purpose and mandate.

[52] To the extent that revenue is received by the DAO Treasury wallet or other DAO-controlled contract, that revenue does not constitute ordinary or statutory income received jointly by

[15] s 974-10(2) ITAA 1997.
[16] s 960-100(1A) ITAA 1997.

signers to upgrade the contract parameters or any other subgroup of the DAO. Rather, it represents the outputs payable to each staker in proportion to the amount of input (i.e. number of governance tokens staked) by each staker.

Foreign hybrids treated as partnerships

[53] A 'foreign hybrid' may be treated as a partnership by Division 830 of the ITAA 1997 and can be a 'foreign hybrid limited partnership' or 'foreign hybrid company'. Where a foreign hybrid company exists, the shareholders and their shares are treated as partners with partnership interests.[17] A DAO would likely not satisfy the definitions of a 'foreign hybrid limited partnership' or 'foreign hybrid company'.

[54] Since a DAO is typically not registered anywhere in the world as a limited partnership, it is reasonable to n assume that it will not meet the definition of 'limited partnership' to enable further consideration of whether the DAO could be a 'foreign hybrid limited partnership'.

[55] It is difficult to apply the definition of 'foreign hybrid company' to a DAO as the partnership treatment requirements in sub-sections (2) and (3) of s 830-15 assume a state that if a company is not formed in Australia that it is formed in a foreign country. That is, the provision refers to a singular foreign country where the company is formed, rather than allowing for a plurality of foreign countries where a company may form or be deemed to be formed and where that foreign country or those foreign countries treat the company as a partnership.

[56] Furthermore, it is difficult to determine whether an 'attributable taxpayer' exists which relies on a determination of whether the DAO is a 'controlled foreign entity' in each income year. Assuming that there is no 'controlled foreign entity' and thus no 'attributable taxpayer' with respect to that entity, sub-s 830-15(5) states that a company is a foreign hybrid company in relation to an income year for the shareholder if and only if the shareholder has made an election under former sub-s 485AA(2) of the ITAA 1936 or under sub-para (b). An election under sub-para (b) can only be made if the company is a FIF (within the meaning of former Part XI of the ITAA 1936) and at no time during an income year the company is a resident of that other foreign country (or multiple foreign countries) or an Australian resident. Without advice from multiple foreign countries, a clear determination cannot be made as to whether a foreign resident person's holding of governance tokens, and/or their involvement with the DAO would mean the DAO (or a part of it) is treated as a resident of one or more foreign countries.

Controlled foreign entity provisions

[57] 'Attributable taxpayers' of a 'controlled foreign entity' are subject to Australian tax on an accruals basis as if the foreign entity was an Australian resident taxpayer subject to some modifications.

[58] It is difficult to determine whether a 'controlled foreign entity' exists because like the foreign hybrid company rules the text for controlled foreign companies, partnerships and trusts assumes the entity is a resident of one other foreign country and not multiple foreign countries.

[59] Assuming the hurdle mentioned immediately above can be surpassed, the requirements then look to whether any of the following apply:

(a) There is a group of 5 or fewer Australian 1% entities the aggregate of whose associate-inclusive control interests in the company is not less than 50%.[18]

[17] s 830-25 ITAA 1997.
[18] s 340(a) ITAA 1936.

(b) There is a single Australian entity, an assumed controller, whose associate-inclusive control interest in the company is not less than 40%, and the company is not controlled by a group of entities not being or including the assumed controller or any of its associates.[19]

(c) The company is controlled by a group of 5 or fewer Australian entities, either alone or together with associates (whether or not any associate is also an Australian entity).[20]

[60] Based on the percentage of governance tokens held by the core team (which may be founders and core contributors and multi sig signers), who would not be grouped together under the associate-inclusive control interest test but where they could be associates, paragraphs (a) and (b) would not be satisfied.

[61] Furthermore, paragraph (c) would not be satisfied based on the decentralised model of governance where key management and strategic decisions are to be approved by vote of governance token holders or elected councils and where at least 5 of those persons are not Australian entities.

[62] It would be an extremely high compliance burden to require everyday taxpayers, wholesale investors, token funds and tax agents to undertake a comprehensive enquiry and mapping of all associates of possible Australian entities that may be considered to control a DAO.

Tax law company

[63] If a DAO is neither a general law partnership, a tax law partnership, or a foreign hybrid company treated as a partnership, the DAO could be a 'company' for income tax law purposes, which is defined as follows:

> *"company" means:*
>
> *(a) a body corporate; or*
>
> *(b) any other unincorporated association or body of persons;*
>
> *but does not include a partnership or a *non-entity joint venture.*
>
> *Note 1: Division 830 treats foreign hybrid companies as partnerships.*
>
> *Note 2: A reference to a company includes a reference to a corporate limited partnership: see section 94J of the Income Tax Assessment Act 1936.*

[64] Paragraph (b) of the definition of company can be deconstructed into two alternative limbs: 'any other unincorporated association… of persons' and 'any other … body of persons'. No part of paragraph (b) is defined in the income tax law and therefore the phrase or each limb to the phrase takes their ordinary meaning.

[65] The reference to 'body of persons' connotes a more formal and business-like organisation than 'any other unincorporated association of persons'. Accordingly, the tax law can deem a very informal association of persons as a company and despite the strict liability offence of a person participating in the formation of a partnership or association that has an object of gain for itself or for any of its members and has more than 20 members unless the partnership or association is incorporated or formed under an Australian law.[21]

[19] s 340(b) ITAA 1936.
[20] s 340(c) ITAA 1936.
[21] s 115 Corporations Act 2001 (Cth).

[66] However, it is noted that registration of a DAO as an incorporated association with NSW Consumer Affairs under the *Associations Incorporation Act 2009* (NSW) would not be appropriate given the objects of the Act pursuant to s 3 are:

> *(a) to establish a scheme for the registration of associations that are constituted for the purpose of engaging in* ***small-scale, non-profit and non-commercial activities [emphasis added],*** *including—*
> *(i) associations that are currently unincorporated (which become bodies corporate when they are registered); and*
> *(ii) associations that are currently incorporated under other legislation (which retain their corporate status following registration), and*
> *(b) To make provision with respect to the corporate governance and financial accountability of associations registered under that scheme.*

Non-entity joint venture

[67] A non-entity joint venture is 'an arrangement that the Commissioner is satisfied is a contractual arrangement under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties and that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than join or collective profits for all the parties'.

[68] Each joint venture party is subject to tax based on their status as an Australian tax resident or foreign resident. If the joint venture outputs are considered Australian source income, then foreign residents will be subject to Australian tax on that income.

[69] For the reasons set out above, and particularly because all persons that hold governance tokens may not all participate in staking, it is reasonably arguable and more likely the better view that a revenue distribution staking arrangement is a non-entity joint venture. The arrangement is contractual in nature in the sense that each person wishing to have a say in the revenue distribution staking scheme or any changes to it can propose a vote for approval by governance token holders and the DAO is bound to comply with that 'meeting of minds'.

[70] For completeness, there should be no tax event on a person's staking of governance tokens, from both the perspective of the staker and the DAO. This is because the act of staking involves transferring governance tokens to a contract that merely stores the state of each person's governance token balance. The staked tokens are not used by any person or by any algorithm within a contract or contracts in any business activity. As such, upon staking it is reasonably arguable and more likely the better view that a bare trust arises where the staker remains absolutely entitled to the same number of staked tokens.[22] To the extent any rewards or revenue are paid in governance tokens then the below would appear appropriate but for the value creation issues set out above at Example 2:

(a) If the staker is an Australian resident they should treat the Australian dollar amount of staking rewards or revenue distributions as assessable income at the time it is derived, which is when it is claimed or able to be dealt with in a way the taxpayer directs (so not as rewards accrue).

(b) If the staker is a foreign resident and all or a portion of the staking rewards or revenue distributions are Australian source income, then the Australian dollar amount of those rewards or revenue distributions should be treated as assessable income at the time derived.

[22] Refer to the Commissioner's draft ruling TD 2014/D

[71] The double tax treaties that Australia has entered, and which other countries have entered into, can alter the base principle that Australian residents are subject to Australian tax on their worldwide income and foreign residents are subject to Australian tax on their Australian source income.

Constructive trust

[72] Per Jacob's Law of Trusts,[23] constructive trusts are:

- *imposed regardless of actual or presumed intention*
- *recognised by courts where they interpret (construe) the circumstances as creating equitable or fiduciary obligations*
- *recognised where it would be a fraud, or unconscionable, for a party to deny a trust*

[73] An extract from a private ruling published by the Commissioner on 1 March 2021 summarises that a court order is required for recognition of a constructive trust:[24]

> *A constructive trust is a trust imposed by operation of law, regardless of the intentions of the parties concerned, whenever equity considers it unconscionable for the party holding title to the property in question to deny the interest claimed by another.*
>
> *The existence of a constructive trust is, however, dependent upon the order of the court, even though that order may operate retrospectively by dating the origin of the trust from some earlier wrongful act. Therefore, for a finding that a constructive trust exists, there must be an existing court order to that effect.*

[74] Such arguments may commence in the ordinary course or even as a result of a tax liability being assessed to a DAO. It is yet to be seen whether an argument made on grounds of a constructive trust arising would rank higher in priority than the operation of any Australian tax law provision.

[75] Persons that hold governance tokens would likely be entitled, in equity, to recoupment or refund of any surplus from their contributions, such as interest or interest-like returns from investing the contributions in the event the funds held in the DAO Treasury Wallet were not applied to advance the purpose of the DAO. In such circumstances, a person may also have grounds under Australian consumer law (or other equivalent foreign law) to allege misleading and deceptive conduct which could result in the person recouping an amount on account of loss or damage that arises from that conduct.

[76] If a constructive trust exists and is ordered by a court to exist retrospectively from the date that funds were first raised by the distribution of governance tokens, then a question arises as to whom the constructive trustees are. This could be any or a combination of:

(c) The founders that wrote the white paper;
(d) The persons that are signers on the multi signature DAO Treasury Wallet;
(e) The persons that are signers on the multi signature contracts that make up the DAO protocol;
(f) The persons that submit a proposal that is approved by vote of governance token holders or an elected council, where a person considers the proposal goes outside of the purpose initially expressed in the white paper, or more broadly all governance token holders that vote to approve such a proposal.

[77] To the extent that the DAO Treasury Wallet is subject to a court order that it represents a constructive trust retrospectively, the property held in the Treasury Wallet and any income

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[23] Heydon, JD and Leeming, MJ (2016) Jacob's Law of Trusts in Australia, 8th edn, LexisNexis Butterworths Australia [3.08, 13.01].
[24] See, private ruling 1051809389145, available at: https://www.ato.gov.au/law/view/view.htm?docid=EV/1051809389145&PiT=99991231235958.

earned from that property falls within the purview of Division 6 of the ITAA 1936 if it is a 'resident trust estate'.

[78] Whether the trust is a 'resident trust estate' will depend on who the trustee or trustees are which could be one or more of the categories set out above at paragraph [76][75]. For the purposes of Division 6 of the ITAA 1936, a trust estate is taken to be a resident trust estate in relation to a year of income if:[25]

(a) a trustee of the trust estate was a resident at any time during the year of income; or

(b) the central management and control of the trust estate was in Australia at any time during the year of income.

[79] Where a trust estate is not a resident trust estate in relation to a year of income it is referred to as a non-resident trust estate in relation to that year of income.[26]

[80] Subparagraph (a) of s 95(2) is very easily satisfied, whereby only a single trustee need be a resident at any time during the income year.

[81] With respect to subparagraph (b) of s 95(2), whilst it may be arguable that the central management of the trust estate is in Australia at any time during an income year, it is not true that control exists given the decentralised and global representation of governance token holders or typical geographic spread of elected council members across a number of countries.

[82] It then falls to be determined what the net income of the trust estate is, and the Australian tax implications of distributions or deemed distributions made to Australian residents and foreign residents.

[83] A threshold question is whether the staking rewards and revenue distribution schemes are considered part of the trust estate or separate and standalone non-entity joint ventures. I consider it reasonably arguable and more likely the better view that the staking rewards and revenue distribution schemes are separate and standalone non-entity joint ventures. However, the Commissioner could adopt a different view.

[84] I acknowledge that the Commissioner has expressed early views that lending and staking arrangements in decentralised finance constitute a tax event (either a disposal or cancellation), but no view has been expressed regarding the tax implications for the DAO referable to the lending or staking arrangement. For example, the DAO may receive or be deemed to receive assessable income or statutory income as the counterparty to a staking arrangement.

[85] For completeness, if the persons that provided tokens to the DAO Treasury Wallet in consideration for governance tokens claim that a constructive trust arose, then the Australian dollar value of those tokens cannot also be assessable income of the trust estate. Accordingly, there should be no assessable income nor any net income of the trust estate.

Division 6C public trading trust

[86] A public trading trust that does not carry on an 'eligible investment business' is subject to tax as a company under Division 6C of the ITAA 1936 and not the general trust taxation rules in Division 6 of Part III of the ITAA 1936.

[25] s 95(2) ITAA 1936.
[26] s 95(3) ITAA 1936.

[87] A public trading trust is a unit trust that is a 'resident unit trust', a 'public unit trust' and a 'trading trust' in relation to a year of income.[27]

[88] Broadly, a unit trust is public if it has more than 50 members or where the units are offered to the public.[28] In a DAO, the number of governance token holders is typically more than 50 and the 'units' of governance tokens were offered to the public at least via Sushiswap or Balancer protocols or directly via a website front end or airdrop. Accordingly, the public nature of any trust that exists is non-controversial. However, 'unit' is defined, in relation to a prescribed trust estate, to include a beneficial interest, however described, in any of the income or property of the trust estate.[29] To the extent that the staking rewards scheme and the revenue distribution schemes (if any) are separate and standalone schemes, they should not form part of the trust estate where corpus of the trust is applied for the purpose of the DAO.

[89] A unit trust is a 'trading trust' if the trustee carries on a 'trading business' or controls, or is capable of controlling, another person in respect of the carrying on by that person of a trading business.[30] A 'trading business' is a business that does not consist wholly of an 'eligible investment business'. If the trading trust test is failed at any time during the income year, the trust is deemed to be a trading trust for the entire year.

[90] An 'eligible investment business' means one or more of:[31]

> *(a) investing in land for the purpose, or primarily for the purpose, of deriving rent; or*
> *(b) investing or trading in any or all of the following:*
> *(i) secured or unsecured loans (including deposits with a bank or other financial institution);*
> *(ii) bonds, debentures, stock or other securities;*
> *(iii) shares in a company, including shares in a foreign hybrid company (as defined in the Income Tax Assessment Act 1997);*
> *(iv) units in a unit trust;*
> *(v) futures contracts;*
> *(vi) forward contracts;*
> *(vii) interest rate swap contracts;*
> *(viii) currency swap contracts;*
> *(ix) forward exchange rate contracts;*
> *(x) forward interest rate contracts;*
> *(xi) life assurance policies;*
> *(xii) a right or option in respect of such a loan, security, share, unit, contract or policy;*
> *(xiii) any similar financial instruments; or*
> *(c) investing or trading in financial instruments (not covered by paragraph (b)) that arise under financial arrangements, other than arrangements excepted by section 102MA.*

[91] In my view, the application of funds in a DAO Treasury Wallet to building an open-source protocol with a decentralised model of governance would not satisfy any of the eligible investment business categories. As such, any net income of the trust estate would be subject to the applicable corporate tax rate. As stated above, my view is that there should be no assessable income or net income of the trust estate from a token distribution events that raises capital for the pursuit of a purpose.

[92] For completeness, the related schemes rules in Division 974 do not operate in relation to treating 2 or more constituent schemes as a single scheme that is a trust estate.

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[27] s 102R ITAA 1936.
[28] s 102P(1) ITAA 1936.
[29] s 102M ITAA 1936.
[30] s 102N ITAA 1936.
[31] s 102M ITAA 1936.

Charitable trust

[93] An entity can apply to the Australian Charities and Not for profit Commission (**ACNC**) to be registered as a charity.

[94] Entities such as registered charities[32] are listed as entities whose ordinary income and statutory income is exempt from income tax in Division 50 of the ITAA 1997. However, the Commissioner can still require an exempt entity to lodge an income tax return or information under s 161 of the ITAA 1936.[33]

[95] It is beyond the scope of this submission to consider whether a DAO should apply to the ACNC to register as a charity. The purposes of the majority of DAOs do not fit neatly into any of the 14 charity subtypes set out in the ACNC Act, which include the 12 charitable purposes set out in the *Charities Act 2013* (Cth).

A2. Do crypto assets and associated transactions feature particular characteristics that are 'incompatible' with the current tax laws? If yes, what are these and why are they incompatible?

[96] Refer to analyse above. In summary, there is a lack of policy thinking and principled based tax approaches to the tax characterisation and tax treatment of a DAO, tokens referable to a DAO and token activities referable to a DAO-governed protocol.

[97] For example, the market value substitution rule arguably does not apply to deem a market value of tokens received as an airdrop or as a result of a hard fork or hard spoon because no 'entity' provided the property. The Commissioner's web guidance initially required the market value of airdropped tokens to be treated as assessable income but tokens from a hard fork such as the ETH-ETC hard fork as not giving rise to assessable income and that a zero cost base of the 'new token' should be recorded. Without providing the technical basis to support these views, industry and taxpayers are rightly confused. Furthermore, the Commissioner has recently changed web guidance again to state that only airdropped tokens with an established market value should be treated as assessable income but still without citing the technical basis for this view.

[98] The Commissioner's views and administrative treatments should be grounded in the application of tax principles, where such application and the policy judgment calls made by the Commissioner are clearly articulated.

B. Awareness of the tax treatment of crypto assets

B1. Do entities which carry on a business in relation to crypto assets or accept crypto assets as a form of payment, have a comprehensive awareness of the current tax treatment of crypto assets and their tax obligations?

[99] No.

[100] Entities accept tokens as a form of payment in either or a combination of the ways set out below. Tax comments are provided for each, as well as the broader regulatory impacts:

a) Entities may use a payment service provider such as VISA or Mastercard, whereby the provider's business facilitates the exchange of the customer's tokens for fiat currency so that the merchant receives fiat currency and not tokens. In this case, there is no tax

[32] s 50-5 Item 1.1 ITAA 1997.
[33] s 50-1 ITAA 1997.

complexity for the merchant but significant tax complexity for the customer. Customers are finding it difficult to determine whether use of tokens for discretionary spending:

i. falls within the personal use asset exemption, such that any gains or losses are disregarded for tax purposes;

ii. constitutes the carrying on of a business in tokens, or venturing tokens into a profit-making scheme, if the customer only spends tokens when their mobile or desktop app shows they are in a gain position, such that the tokens used are treated as trading stock or revenue asset (which would be an aggressive application of the *Favaro* case); or

iii. constitutes a capital gain or loss on disposal of the tokens when they are exchanged for fiat currency, which may be reduced by the CGT discount if the customer is an eligible taxpayer and has held the token for at least 12 months.

b) Entities may sell the tokens immediately, which reduces the merchant's exposure to a gain or loss on revenue account where the tokens are treated as trading stock or revenue assets such that the Australian dollar value of tokens received is treated as assessable income and that Australian dollar value is treated as the trading stock cost or revenue asset cost. The trading stock cost is then treated as deductible expenditure once the token is sold and the proceeds from sale treated as assessable income.

c) Entities may speculate on the tokens, such that the Australian dollar value of tokens received is treated as their assessable income and that Australian dollar value is treated as the CGT cost base.

[101] The types of crypto asset businesses carried on include:

a) Token investment and/or token trading funds, typically through a unit trust structure, discretionary trust structure, series of bare trusts structure, fixed trust structure or company structure. The application of Division 6C (public trading trust rules) and the Attribution Managed Investment Trust (AMIT) rules causes difficulty in such businesses.

b) Token distribution to raise capital, typically through a non-profit foundation or offshore special purpose vehicle but sometimes through an entity that also conducts operational activities for development of the protocol.

c) Token distribution for utility, typically through a known company structure and is prolific with non-fungible tokens with membership and access rights. Such activities may be combined with raising capital, staking arrangements and revenue distribution arrangements (albeit through the company and marketing as loyalty reward schemes).

d) Contract-controlled token activities, where a smart contract deployed on a blockchain controls the activities possible with one or more tokens and may be controlled by a person (including an individual, company or legally recognised collective) or a decentralised model of governance (i.e. many persons). DAOs, or the persons involved in founding and deploying and governing the protocol do not have a clear understanding of the tax treatment of token activities performed by the protocol.

[102] From a policy perspective, the tax law does not limit the forms of payment that a merchant may choose to accept. The fact that a merchant chooses to accept payment in tokens, or shells, or in-kind services does not elevate those accepted forms of payment to a form of legal tender. However, if a significant number of merchants accept tokens as payment and/or a significant

number of transactions are paid using tokens, the discretionary spending and financial services data available to authorities charged with setting monetary policy and maintaining financial stability will reduce. Whilst this factor is not of interest to the everyday taxpayer or merchant, the protection of everyday taxpayers and merchants through a relatively stable Australian dollar is. The stability of a fiat currency is largely impacted by the use of that fiat currency to pay taxes.

[103] Appropriate and clear tax policy and administrative practices, such as perhaps support for a personal use wallet election, would improve taxpayer understanding and compliance. At the same time, monetary policy and financial stability regulators can develop processes to adapt supervision and monitoring of economic health and spending from on-chain data and analytics.

[104] If the tax treatment of token activities is unclear, the tax rules and tax administration framework do not support understanding and payment of taxes. If taxpayers increasingly engage with the token economy, or an increasingly tokenised economy, the need for clear tax rules will intensify. Enabling a taxation framework that supports the auto payment of taxes, which requires support for an Australian dollar pegged stablecoin and/or CBDC, during a token transaction could assist the sustainability of both the domestic tax system and the fiat currency.

B2. Are retail investors aware of the current tax treatment of crypto assets? To what extent are they receiving professional advice

[105] Retail investors may be aware of the ATO guidance and that there are issues with the tax treatment of tokens. However, retail investors typically cannot afford risk-priced tax advice or the preparation of a reasonably arguable position paper for their interaction with one decentralised protocol or centralised entity let alone multiple. Anecdotally, it is rare for taxpayers to pay for tax advice priced at or above A$2,000 despite the Australian dollar value of tax potentially owing.

[106] If a rate of A$500/hr is used for a tax lawyer (noting that market rates are at or above A$700/hr), this allows 4 hours to review and understand relevant materials and the taxpayer's facts, prepare written advice or a RAPP with reference to tax law, case law and ATO guidance, and discussions with the client. This will likely be a loss-making exercise which tax advisors cannot recover easily because each token activity with a decentralised protocol or centralised entity may have slight or substantial differences.

[107] Even when a tax event is likely, the lack of ATO action leaves taxpayers questioning why they should adopt a tax position the results in greater tax when "nobody else is". The lack of clear ATO guidance and communication of the ATO's targeted areas for enforcement compounds this attitude.

[108] For example, the terms and conditions published by a number of centralised token exchanges arguably give rise to a tax disposal event. The ATO community forum referred to this issue, but it was never properly clarified in formal binding guidance. Similarly, centralised 'crypto savings account' providers onshore and offshore published terms and conditions with the same effect but no web guidance was forthcoming from the ATO to warn taxpayers of the unintended tax consequences of sending tokens to a 'crypto savings account'.

B3. Do wholesale investors understand the current tax treatment of crypto assets? To what extent are they receiving professional tax advice?

[109] Wholesale investors perhaps have a surface level understanding of the current tax treatment of tokens but are still heavily reliant on tax advisors to document tax advice and tax risk governance procedures. The tax risk being taken intentionally or unintentionally could expose advisors to professional negligence claims given the dollars involved. This is where related legal advice is crucial.

[110] There is a broad need for education of both wholesale investors and their legal and tax advisors. It is common for lawyers to leverage from a unit trust deed to assist with formation of a DAO but where the trust deed makes no reference to the tokens which are fungible and transferable. If a trust deed does not link to the realities of activities possible with a token, it discredits the integrity of what a unit in that unit trust is intended to represent. In such cases, would a separate or related scheme come into existence for tax purposes?

B4. How can taxpayer awareness of the tax treatment of crypto assets be improved?

[111] At least in the interim, an opt in simplified basis of taxation with a body convened to produce timely and principles-based guidance. In principle, retail access to financial and other tokenised products should be democratised but the burden of sophisticated tax advice in relation to financial and other tokenised products should not carry over to retail. However, a focus on retail is a sort of misdirection because clear principles that result in standardised approaches are a basis for attracting economic activity from both retail and wholesale investors.

[112] Reliance on awareness of tax treatment isn't necessarily the key problem to solve if an alternate or concurrent focus is on using the capabilities of blockchain technology to alleviate taxpayers of the burden to seek to understand complex tax concepts. If a tax sandbox were introduced (an adaption on the existing rulings system), particularly for DAOs, DAOs would be welcomed to program the tax rules for tax collection per token activity so that taxpayers didn't have to manage their token tax compliance.

C. Characteristics and features of crypto assets

C1. How should the tax transparency of crypto assets be improved, including what information tax administrations need to know about transactions for purposes of compliance and enforcement?

[113] The proposed simplified basis of taxation includes a Completeness of Token Storage Location Rule, which clearly supports taxpayers to record the places of 'storage' of their tokens for all self-hosted wallets, centralised token exchange accounts and contracts in which the taxpayer treats as the place of storage of tokens owned or earned by that taxpayer. If a tax authority has this information, then the tax authority has full tax transparency of a taxpayer's activities and token wealth and should treat such information as highly sensitive. This approach should be carefully considered instead of multiple centralised entities and intermediaries and even protocols or DAOs being required to collect and report tax information with respect to taxpayers.

[114] As referred to in footnote 3 of this submission, it is critical to note here that as countries and supranational bodes like the European Union seek to support decentralised identity and digital identity to support CBDCs, privacy preserving methods of sharing proofs of tax residency could become more commonplace. For example, a person that holds BTC in their CBDC wallet could also generate a proof at the time of sending a BTC transaction that verifiably proves their tax residency such that the information packet contains the BTC transaction data as well as the tax residency data. In addition, as set out above at paragraph [112], tax can be programmatically collected and remitted with the use of smart contracts. In light of recent events such as the Optus hack, it is becoming ever more appreciated that principles of data minimisation and the privacy enhancing practices such as digital identity and zero knowledge proofs are critical in a digital and tokenised economies.

[115] The requirement for transparency does not hold if tax is programmatically collected on the token activities that are sought to be subject to tax by one or more national governments or more efficiently by international consensus. It is worth noting there that if protocols are to remain 'pure' in the sense of providing an economic function rather than regulatory and tax

functions, the technology could still be used to see on-chain data and determine the tax implications of token activities. However, an activities basis of taxation would better support this approach than the current basis of income taxation.

[116] The OECD has released its Crypto-Asset Reporting Framework (**CARF**) for public consultation. I did not have the ability to prepare a written submission to that consultation, but my verbal comments made are summarised as follows.

[117] The CARF incorrectly assumes that:

(a) the travel rule will be adopted as recommended by the Financial Action Task Force, when more than half of FATF member countries have not adopted the travel rule and the information collection requirements and cyber security arrangements around the provision of token services by centralised entities is the subject of consultation by many governments seeking to introducing token licensing regimes;

(b) data relevant for tax purposes can only be collected by intermediaries and centralised entities and should continue to be collected in the same way as the paradigm of centralised financial entities;

(c) the existing ways in which people access and initiate transactions with tokens – typically via a centralised token exchange or a self-hosted digital wallet such as MetaMask – will continue, which does not account for institutional or enterprise use of public blockchains with privacy processes to preserve commercially sensitive information; and

(d) tax administration, compliance and enforcement will continue to be after-the-fact rather than real-time at the time of the transaction, which necessitates the need for the collection and sharing of tax information against which tax authorities can check against what the taxpayer has filed.

[118] The CARF does not deal with:

(a) the role of token activities data collection standards that could be reflected in mandatory requirements for block explorers;

(b) existing methods of obfuscation of source of transactions such as through mixers and tumblers, and how this sort of transaction or attempted transaction should be categorised for tax transparency reporting purposes, particularly if not sanctioned;

(c) the influx of development into identity, privacy and shield layers intended to be largely available through digital wallet technology which at a base level aim to enable a person to choose whether their on-chain publicly available activity is linked back to a public address with a public address known to be associated with that person.

[119] A more sustainable CARF would incorporate the elements dealt with in paragraph [117], which each reflect the emerging nature of this still nascent technology.

D. International tax treatment of crypto assets and experience

D1. What lessons can Australia draw from the taxation of crypto assets in other comparable jurisdictions, including novel ways of taxing these transactions?

[120] Tax authorities and governments in each jurisdiction are grappling with the fast-paced evolution of blockchain technology and its applications.

[121] The work by the UK HMRC has been referred to above in this submission, and the considered approach being taken by the HMRC is sensible and welcome by the industry. Such an approach is much preferred to non-binding web-based guidance that is not principles based or that refers to the issues of the tax authority adopting a particular interpretation of tax law. In addition, such web guidance is apt to expose tax authorities to amended assessments when a technically correct application of tax law goes against a position that has been adopted by the Commissioner in web guidance. Tax revenue 'banked' may effectively have to have a provision booked against it to fund tax refunds in such circumstances, further making the case for clarity of tax law to token activities sooner rather than later.

[122] Vermont and Wyoming in the US moved quickly to introduce law that allowed registration of a DAO, but without buy in at US federal level the regulatory and tax treatment risks and uncertainty have meant that the largest DAOs have not registered there.

[123] China has introduced its Blockchain Services Network to encourage businesses to build applications on that network. This will be the digital infrastructure that support a digital first government and real time calculation and collection of tax. Australia, like other democratic countries, will unlikely achieve this level of adoption by a 'government mandated' blockchain network. However, Australia and other countries should be mindful of the competitive advantage to be gained by China of having such an efficient tax administration system that tax rates can be reduced and tax revenue more efficiently allocated.

[124] A number of token businesses opt to incorporate entities in 'tax haven' countries, which are also actually or perceived to be 'regulatory havens'. In other words, launching a token business from such a jurisdiction is perceived to be a method to buy time while more developed jurisdictions clarify regulatory laws and tax laws or introduce simpler or clear regulatory and taxing frameworks for token activities. The learning is that a simple and clear regulatory and tax framework could greatly assist in attracting activity back or to Australia.

E. Changes to Australia's taxation laws for crypto assets

E1. What changes, if any, should be made to Australia's taxation laws in relation to crypto assets, whilst maintaining the integrity of the tax system? If changes are required, please specify the reasons.

[125] An opt in simplified basis of taxation would assist in preserving existing tax laws if taxpayers seek to engage with tax rules that are familiar even if complex to apply whilst also providing a clear and activities-based taxation framework that can transition tax advisors and taxpayers into an increasingly tokenised economy.

E2. How could tax laws be designed to ensure that they keep pace with the rapidly evolving nature of crypto assets?

[126] As set out above, a shift to an activities basis of taxation would assist in programmatically determining tax implications and alleviating taxpayers of the burden and complexity of tax laws. Activities based taxation could both broaden the tax base and ensure the tax base is sustainable and fit for purpose in an increasingly tokenised economy.

F. Administration of Australia's taxation laws for crypto assets

F1. How can the existing treatment of crypto assets be improved to ensure better compliance and administration?

Convene and resource a specialist group to publish regular guidance including data collection standards for tax record keeping

[127] A dedicated group should be resourced to meet regularly regarding topical issues concerning the token economy and to provide NTLG style minutes and guidance about the tax treatment of tokens under existing law, and potentially under new law as it is proposed and introduced to parliament.

[128] When novel law or guidance is introduced, there is usually a sunset date or review body charged with consultation and review one- or three-years following implementation. This has not been the case with the 2014 Suite.

[129] Since the token economy moves so quickly, more dynamic engagement and rapid delivery of principles-based guidance will assist in lifting level of awareness and engagement with the tax system and ability to understand and meet tax compliance obligations.

F2. What data sources are available to assist taxpayers in completing their tax obligations and/or the ATO in implementing its compliance activities?

[130] There is no credible industry data source available to assist taxpayers in complying with their tax obligations.

[131] A number of crypto tax software providers are now a feature of the space, however, still require the taxpayer to choose or toggle the tax treatment so the taxpayer bears full risk but may not necessarily realise it. Nor are taxpayers equipped to review the software to ensure it is producing correct tax outcomes.

[132] I attempted to obtain a class ruling on behalf of a centralised token exchange in 2019 regarding its tax report. However, after months the ATO confirmed it was not willing to provide a class ruling or product ruling in relation to the tax outcomes sought to be given by the tax software and tax report. If there is no ability or willingness within the ATO to provide such rulings, a new process is required. As such, a tax sandbox has been recommended and described in more detail earlier in this submission.

F3. Are there intermediaries (such as exchanges) that are involved in particular crypto asset transactions that could play a role in the administration of the tax laws? If so, what would their involvement look like?

[133] Token exchanges registered with AUSTRAC should be required to record customers' data according to a standardised format. This format could be designed for the following typical categories of token activities undertaken through centralised token exchanges:

a) Purchase of tokens with fiat currency
b) Purchase of tokens with tokens
c) Withdrawal of tokens to self-hosted wallet or other centralised token exchange or custodian
d) Deposit of tokens from self-hosted wallet or other centralised token exchange or custodian
e) Staking of tokens to earn token rewards
f) Educational activity to earn token rewards
g) Other activity to earn token rewards
h) Staking of tokens to participate (or delegate participation) in blockchain consensus mechanism

F4. How can taxpayers be further supported to understand their tax obligations in relation to crypto assets?

[134] If DAOs are required to produce something similar to a disclosure document with a statement of general tax implications of interacting with the DAO or its protocol, and/or its intent to provide

programmatic support to assist its members and/or users with their tax obligations, then more taxpayers have a basis of being informed about tax and assisted with their tax compliance. Currently, the lack of standards around white papers and where most if not, all do not include a tax section contributes to the confusion around taxation of token activities.

F5. What additional support can be provided to the tax adviser community to assist them in advising their clients in relation to the tax treatment of crypto assets?

[135] Options for consideration by the Board of Tax include:

a) Introduction of a 'best efforts' declaration made by both tax agent and taxpayer which could assist in encouraging taxpayers to keep records to the best of their ability based on whatever guidance is available from the ATO at the time of lodging their tax returns. Evidence that 'best efforts' were not made would attract a penalty.

b) Introduction of a specific lodgment deferral program where taxpayers with token activities that are too complex for a tax agent can receive the benefit of lodgment deferral until either clear guidance is available from the ATO or a simplified basis of taxation is legislated. The deferral program would rely on the issues of complexity being logged with the ATO and addressed through an NTLG style body as suggested earlier in this submission.

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