FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Web3 Ventures Pty Ltd [2025] FCAFC 58

Appeal from:	*Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2024] FCA 64
File number(s):	NSD 775 of 2024
Judgment of:	**O'CALLAGHAN, ABRAHAM AND BUTTON JJ**
Date of judgment:	22 April 2025
Catchwords:	**CORPORATIONS –** where primary judge held that a product that allowed customers to "loan" specified cryptocurrency in return for interest paid at a fixed rate was a "financial product" because it involved the respondent/cross-appellant: (i) operating a managed investment scheme as defined in s 9 of the *Corporations Act 2001* (Cth) (the **Act**); and (ii) offering a financial investment facility as defined in s 763B of the Act – where primary judge made declarations that the respondent/cross-appellant contravened ss 911A(5B) and s 601ED(8) of the Act (the **primary judgment**) – where primary judge ordered pursuant to s 1317S(2) of the Act that the respondent/cross-appellant be relieved from liability to pay a pecuniary penalty for the contraventions (the **penalty judgment**) – where ASIC appealed from the whole of the penalty judgment – where respondent/cross-appellant cross-appealed contending that the primary judge erred in the primary judgment in finding that the provision of the product constituted a "financial product" for the purposes of the Act, as it was neither a managed investment scheme nor a facility by which a person made a financial investment – where ASIC relied on a notice of contention, to the effect that if the primary judge was wrong to find that the provision of the product constituted a financial product on the basis that it involved the respondent/cross-appellant operating a managed investment scheme or offering a financial investment facility, then it was a "derivative" within the meaning of s 761D of the Act – whether the arrangements were to be treated as if they together constituted a single arrangement pursuant to s 761B of the Act – appeal dismissed – cross-appeal allowed
Legislation:	*Corporations Act 2001* (Cth) ss 9, 601EB, 601ED, 601FC, 761A, 761B, 761D, 762C, 763A(1)(a), 763B, 764A, 765A,

	766A–766E, 911A and 1317S(2) *Corporations Regulations 2001* (Cth) regs 7.1.04(2)(b) and 7.1.06
Cases cited:	*Australian Securities and Investments Commission v Great Northern Developments Pty Ltd* [2010] NSWSC 1087; (2010) 242 FLR 444 *Australian Securities and Investments Commission v Hutchings* [2001] NSWSC 522; (2001) 38 ACSR 387 *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310; (2002) 41 ACSR 561 *Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2)* [2020] FCA 1463; (2020) 148 ACSR 154 *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2024] FCA 64 *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (Penalty)* [2024] FCA 578 *Fox v Percy* (2003) 214 CLR 118 *Impiombato v BHP Group Limited* [2025] FCAFC 9 *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2012) 246 CLR 455 *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50; (2011) 248 FLR 149 *Keynes v Rural Directions Pty Ltd* (2010) 186 FCR 281 *LCM Funding Pty Ltd v Stanwell Corporation Ltd* (2022) 292 FCR 169 *National Australia Bank Ltd v Norman* (2009) 180 FCR 243 *Waldron v Auer* [1977] VR 236; (1977) 2 ACLR 514 *Warren v Coombes* (1979) 142 CLR 531
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	143
Date of hearing:	6 March 2025
Counsel for the	J Giles SC with E L Beechey

Appellant/Cross-respondent:	
Solicitor for the Appellant/Cross-respondent:	Australian Securities and Investments Commission
Counsel for the Respondent/Cross-appellant:	S Free SC with B Smith
Solicitor for the Respondent/Cross-appellant:	Gilbert + Tobin

ORDERS

NSD 775 of 2024

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant
AND:	**WEB3 VENTURES PTY LTD ACN 655 090 869** Respondent
AND	
BETWEEN:	**WEB3 VENTURES PTY LTD ACN 655 090 869** Cross-appellant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Cross-respondent

ORDER MADE BY: **O'CALLAGHAN, ABRAHAM AND BUTTON JJ**

DATE OF ORDER: **22 APRIL 2025**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The cross-appeal be allowed.
3. The declarations of contravention made by the primary judge be set aside.
4. The proceeding be dismissed.
5. The appellant pay the respondent's costs of the appeal and the cross-appeal, together with the respondent's costs of and incidental to the trial up to and including 9 February 2024.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011* (Cth).

REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

1 In the proceeding before the primary judge, the Australian Securities and Investments Commission (**ASIC**) sought orders against Web3 Ventures Pty Ltd t/a Block Earner (**Block Earner**) in relation to alleged contraventions of the *Corporations Act 2001* (Cth) (the **Act**) in connection with two Blocker Earner "products" or "services" known as "**Earner**" and "**Access**".

2 There was no factual controversy below or on appeal. The relevant facts were contained in a document entitled "Narrative of facts on liability" on which the parties agreed below (the **Agreed Facts** or **AF**) and in the unchallenged affidavit evidence of Block Earner's CEO and co-founder, Mr Karaboga.

3 The dispute between the parties below centred on whether the Earner and Access products were "financial products" within the meaning of the Act. ASIC contended that each product was a financial product because each was: (i) a managed investment scheme; (ii) a facility by which a person made a financial investment; or (iii) a derivative.

4 It was common ground that if either Earner or Access was a financial product, then Block Earner had contravened s 911A of the Act by carrying on a financial services business without holding an Australian financial services licence (**AFSL**).

5 It was also common ground that if either the Earner or Access products was a managed investment scheme, then Block Earner had contravened s 601ED(1) of the Act by operating a managed investment scheme that was not registered under s 601EB.

6 The Earner product was offered from 17 March 2022 until 16 November 2022 (the **Relevant Period**). It allowed customers to "loan" specified cryptocurrency in return for interest paid at a fixed rate. The primary judge accepted ASIC's case that the Earner product was a financial product — because it involved Block Earner: (i) operating a managed investment scheme as defined in s 9 of the Act; and (ii) offering a financial investment facility as defined in s 763B of the Act — and made declarations accordingly. See *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2024] FCA 64 (the **primary judgment** or **PJ**).

7 Because the primary judge found that the Earner product was a managed investment scheme (and was not registered and had more than 20 members), it followed that it was not a derivative within the meaning of s 761D of the Act. See PJ at [54]; ss 761D(3)(c), 764A(1)(ba) and 601ED(1)(a) of the Act. As such, his Honour did not have to deal with the third alternative aspect of ASIC's case.

8 The primary judge found that ASIC's case in relation to the Access product failed and he dismissed the Access claim. No issue arises on appeal about that order or about the Access product.

9 After a separate hearing, the primary judge ordered pursuant to s 1317S(2) of the Act that Block Earner be relieved from liability to pay a pecuniary penalty for contraventions of s 911A(5B) (the requirement to hold an AFSL) and s 601ED(8) (the requirement to register a managed investment scheme) of the Act, in summary because his Honour found that Block Earner had acted honestly, it had obtained legal advice about the Earner product, it made only a modest profit on the product, it had suffered adverse publicity (including in a misleading ASIC press release) and no Earner customer suffered any loss or damage. See *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (Penalty)* [2024] FCA 578 (the **penalty judgment**).

10 ASIC appealed from the whole of the penalty judgment, contending that the primary judge erred in the exercise of his discretion not to penalise Block Earner, and submitted that, on a re-exercise of that discretion, Block Earner should pay a penalty of as much as $350,000.

11 Block Earner cross-appealed, contending that the primary judge erred in finding that the provision of the Earner product constituted a "financial product" for the purposes of the Act, because it was neither a managed investment scheme nor a facility by which a person made a financial investment.

12 On the cross-appeal, ASIC relied on a notice of contention, to the effect that if the primary judge was wrong to find that the provision of Earner constituted a financial product because it involved Block Earner operating a managed investment scheme or offering a financial investment facility, then it was a "derivative". Block Earner disputed this contention.

13 For the reasons that follow, in our view the cross-appeal should be allowed, the declarations of contravention made by the primary judge should be set aside and ASIC's proceeding should be dismissed.

THE RELEVANT FACTS

14 Block Earner operates an online platform through its website which offers to its customers various products, including the Earner product during the Relevant Period.

15 Block Earner also operates a digital currency exchange service (**Exchange service**), registered with the Australian Transaction Reports and Analysis Centre, that allows users to exchange Australian dollars (or **AUD**) into cryptocurrencies and to buy and sell over 100 different cryptocurrencies.

The nature of cryptocurrencies

16 Cryptocurrency refers to digital tokens that are created from code, can be used to make payments and do not exist physically in the form of notes or coins. It is created using blockchain technology. A blockchain is a ledger method for recording transactions, where data is organised in blocks or groups across many computers that are linked and secured. Each block can only hold a certain amount of information, so new blocks are added to the ledger and this forms a chain. Each block has its own unique identifier, which is known as a cryptographic hash. The hash protects the information in the block from anyone without the required code and protects the block's place on the chain from being tampered with. See PJ at [7].

17 People interact with the blockchain by creating a wallet, which acts like a user account. See PJ at [8].

18 All users require a wallet to send and receive cryptocurrency. See PJ at [9].

19 The unique features of blockchain have changed how people can make transactions, relevantly in relation to "smart contracts", which are computer programs that automatically execute actions on the blockchain that have been pre-programmed (for example, in an agreement). The use of smart contracts permits the creation of applications on top of the blockchain to provide other services and removes the need for centralised intermediaries. See PJ at [12].

20 Block Earner maintained its own accounts with users. In order to use the Block Earner platform and invest in the Earner product during the period it was offered, a user first had to register an account with Block Earner. To set up an account, a user either went to the Block Earner website or accessed the mobile application, and clicked "Open Account". The platform then prompted the user to enter an email address and provide a password. The user was then shown Block Earner's "**Terms of Use**". To continue through to the platform and access the services, the user was required to click "I Agree" to confirm that they agreed to be bound by the Terms of

Use and that they had read the risks disclosure document provided by Block Earner. See PJ at [15].

Block Earner website

21 On the Block Earner website as it appeared from 17 March 2022 until sometime in May 2022, the following answer was given to the "frequently asked question" (or **FAQ**) "How is fixed yield generated?" (see PJ at [29]):

> Deposits into the Block Earner 7% fixed option, automatically convert your Australian dollars into the USD-backed stablecoin (USDC) via our exchange services and these stablecoins are then lent to us. Block Earner delivers risk-adjusted, high returns by working exclusively with partners whose investment strategies are proven, sustainable and measured.
>
> Block Earner is able to generate returns by pooling customer funds and lending it to our trusted partners, who are all vetted in accordance with our risk policy, thereby receiving a favourable yield rate.
>
> (The **first FAQ response**.)

22 At some time in May 2022, the answer to the question "How is fixed yield generated?" was amended to read as follows (see PJ at [32]):

> Capital transfer into the USD Earner 7% fixed and Gold Earner 4% fixed options, automatically convert your Australian dollars into USD-backed stablecoin (USDC) and the physical gold back token (PAXG) via our exchange services and these assets are then lent to us.
>
> Block Earner delivers risk-adjusted competitive fixed annual yields by deploying capital to trusted partners, who are all vetted in accordance with the Block Earner risk policy, and whose investment strategies are proven, sustainable and measured.
>
> (The **second version of the FAQ response**.)

23 The primary judge did not rely on the second version of the FAQ response in the primary judgment.

The Terms of Use

24 The parties agreed that, at all relevant times, the Exchange service and the Earner service were provided in accordance with Block Earner's Terms of Use. See AF at [10]. The Terms of Use were amended from time to time, but the key features relevantly remained the same during the Relevant Period. See AF at [11].

25 Further, as noted above, for a consumer to use the Exchange or Earner services, the consumer was required to have an account with Block Earner. Opening an account with Block Earner required the consumer to agree to, among other things, the Terms of Use. See AF at [12].

26 The Terms of Use addressed the account registration process (cl 1), the Exchange service (cl 4.1), the Access service (cl 4.2) and the Earner service (or "**Lend**" as it was called in those terms) (cl 4.3).

27 The terms relating to the Exchange service were relevantly as follows:

> **4.1 Exchange service**
>
> a. Under the exchange service, users transfer Australian dollars to a fiat account with an Australian authorised deposit taking institution in Block Earner's name (Account) for the purpose of exchanging such dollars for:
>
> …
>
> ii. certain cryptocurrency as stated in the Block Earner Platform (Eligible Cryptocurrency) to participate in the loan service under which users can lend their Eligible Cryptocurrency to Block Earner in exchange for interest payments, known as 'Block Earner USD Coin Fixed Yield (Lending-based)' (Lend) (see section 4.3).
>
> …
>
> c. Once Block Earner receives a user's fiat deposit in the Account, the user is permitted to nominate whether the user wishes to participate in the access service or Lend. Participating in the access service requires the user to have certain cryptocurrency … Participating in the loan service requires the user to have Eligible Cryptocurrency.
>
> …
>
> e. You acknowledge and agree that:
>
> …
>
> iii. for Lend, Block Earner facilitates the exchange by exchanging the user's Australian dollars for the Eligible Cryptocurrency nominated by the user;
>
> …
>
> f. Block Earner charges the user a conversion fee to exchange Australian dollars to aUSDC, cUSDC and Eligible Cryptocurrency and vice versa. The conversion fee will be included in the exchange rate at the time of the transaction.
>
> …

28 The terms relating to Lend (the **Loan Terms**), which are central to the resolution of the issues that arise on appeal, were relevantly as follows:

> **4.3 Lend**
>
> a. Under Lend, in accordance with these Terms including the terms contained at this section 4.3 (Loan Terms), users can lend Eligible Cryptocurrency to Block Earner in return for daily interest payments paid in the same Eligible Cryptocurrency loaned to Block Earner.
>
> b. The Lend product suite includes USD Earner (Fixed yield product), Gold Earner (Gold Fixed product), Crypto Earner (Bitcoin, and Ethereum). Block Earner will from time to time add or remove existing products on the menu.
>
> c. The rate of interest paid to users under the loan arrangement in return for such users lending Eligible Cryptocurrency to Block Earner will be calculated by Block Earner and published on the Block Earner Platform. Block Earner reserves the right to change the rate of interest paid on a monthly basis, with the new interest rate effective on the first [calendar day] of each month. Block Earner will provide seven (7) calendar days' written notice of any such change, to be published on the Block Earner Platform and sent to the email address you used to sign up for your Block Earner account. By continuing to participate in Lend on the first calendar day of each month, you agree to the new rate of interest as published by Block Earner.
>
> …
>
> e. To activate Lend, you must log into your account on the Block Earner Platform and follow the prompts to:
>
> i. select Lend from the available services;
>
> ii. nominate the Eligible Cryptocurrency which you wish to lend to Block Earner and consequently receive interest payments in that Eligible Cryptocurrency; and
>
> iii. reconfirm your acceptance of these Terms including the Loan Terms.
>
> f. Once you have completed the actions at paragraph [(e)], your Australian dollars in the Account will be exchanged for the nominated Eligible Cryptocurrency under the exchange service. The Eligible Cryptocurrency will then be transferred to Block Earner under Lend. By lending Eligible Cryptocurrency to Block Earner, you agree to grant Block Earner all rights and title to such Eligible Cryptocurrency for Block Earner to use in its sole discretion during the term of the loan under Lend.
>
> …
>
> h. The balance of Eligible Cryptocurrency loaned by you to Block Earner, and any interest earned (as denominated in the Eligible Cryptocurrency) will be visible in your Block Earner account.
>
> i. The term of the loan of your Eligible Cryptocurrency will end:

i. at the expiry of the fixed term selected by you when you elected to use Lend, if we provide this option;

ii. upon termination of your account, subject to clause 17(b); or

iii. when you elect to terminate your use of Lend. You may terminate your loan at any time.

j. Upon the term of the loan of your Eligible Cryptocurrency ending Block Earner will return the borrowed Eligible Cryptocurrency and deliver any interest accrued under the Loan Terms (Final Amount), in each case by Block Earner converting the Final Amount to an equivalent value of Australian dollars under the exchange service and this value will be held in the Account. The user (i.e., you) may elect to use these funds to participate in the access services or Lend again or can request a withdrawal from the Account (see section 4.1(g)).

k. By agreeing to these terms (including the Loan Terms) and transferring Australian dollars to the Account for the purposes of conversion to Eligible Cryptocurrency that is then loaned to Block Earner (which, for the avoidance of doubt, shall be deemed as completed only upon the receipt of such Eligible Cryptocurrency by Block Earner), you agree to lend such Eligible Cryptocurrency to Block Earner in accordance with these Terms (including the Loan Terms).

l. You acknowledge and agree that:

i. all Eligible Cryptocurrency that is loaned to Block Earner by you under Lend is Block Earner's to use, without limitation and at Block Earner's sole absolute discretion;

ii. any interest paid to you under Lend is not referable to the activities Block Earner undertakes with respect to the loaned Eligible Cryptocurrency and the only amounts to which you have a right to [sic] are the amount of Eligible Cryptocurrency initially loaned to Block Earner and any interest earned on that amount as determined under these Loan Terms;

iii. by participating in Lend, you do not intend for Block Earner to use the loaned Eligible Cryptocurrency to generate a financial benefit or act as an investment for you; and

iv. any benefit gained or loss incurred by Block Earner's use of the loaned Eligible Cryptocurrency will not be passed onto you. …

The Earner product

29 The Earner product allowed customers to "lend" cryptocurrency to Block Earner and receive a fixed rate return over the term of the loan. (By cll 4.3(f) and (l) of the Terms of Use set out above, when a customer "loaned" cryptocurrency to Block Earner, it transferred all rights and title in that cryptocurrency and acknowledged that Block Earner could use the cryptocurrency without limitation and at its own discretion.)

30 In the usual case, Block Earner converted the customer's AUD into a cryptocurrency nominated by the customer at the commencement of the loan.

31 The fixed rates offered by Block Earner under the Earner product were as follows (see AF at [14]):

(a) 7% annualised percentage yield for loans denominated in a cryptocurrency called "USD Coin" (USDC); and

(b) 4% annualised percentage yield for loans denominated in other cryptocurrencies (including, for example, Bitcoin).

32 Block Earner used the loaned cryptocurrency (or "crypto-assets" as the parties also called the cryptocurrency) to generate income by lending the cryptocurrency to third parties. Under the Terms of Use, Block Earner was required to pay the fixed interest rate to users regardless of the amount of income it earned (if any) in relation to the cryptocurrency which was the subject of the loan. See AF at [15]; PJ at [20].

33 The primary judge set out the agreed or unchallenged evidence about the Earner product and the role of currency conversion in the primary judgment at [23]–[26].

34 In the period from 17 March 2022 to 7 August 2022, all users of the Earner product converted AUD into certain cryptocurrency as stated on the Block Earner platform (**Eligible Cryptocurrency**) to be lent to Block Earner. See AF at [16].

35 After 8 August 2022, six users used their own Eligible Cryptocurrency, which they transferred directly into digital crypto-asset addresses controlled by Block Earner. See AF at [16].

36 At the end of the loan, the customer was entitled to a return of AUD calculated by reference to the price of the relevant amount of cryptocurrency loaned to Block Earner, plus the fixed rate return.

37 Under the Terms of Use, ending a loan of Eligible Cryptocurrency was to result in Block Earner returning the borrowed amount of cryptocurrency plus interest (also in cryptocurrency) (the **Final Amount**) by converting that Final Amount into an equivalent value of Australian dollars through the Exchange service. This value was then to be held in the user's account, allowing the user to use the funds to participate in the Access service, participate in the Lend service again or request a withdrawal.

38 It was, however, an agreed fact that, prior to the withdrawal of the Earner product, users exiting did so in one of three ways: some users exiting the Earner service used the Exchange service to convert Eligible Cryptocurrency to Australian dollars; some users exiting the Earner service held their Eligible Cryptocurrency on the Block Earner platform (in a so-called "Crypto Wallet"); and some users exiting the Earner service moved their Eligible Cryptocurrency to the Access service. See AF at [19]. There was no temporal limit on the fact so agreed. There was also evidence, further referred to below, that from September 2022, the website functionality was changed so that users wishing to end a loan could access instructions on how to have their cryptocurrency transferred to them in kind.

39 ASIC submitted, and the primary judge accepted, that when users lent their own cryptocurrency directly to Block Earner on entering into the Earner product, or requested that their withdrawal entitlement be paid to them in cryptocurrency, there were "ad hoc variations" to cll 4.1(b), 4.2(c) and 4.3 (j) which otherwise required that those payments be in AUD. See PJ at [23].

40 In the usual case, a customer transferred AUD from their bank account into a bank account in the name of Block Earner; AUD deposited by the customer then appeared in their "Block Earner Cash Account"; and once a customer had successfully transferred AUD to Block Earner, the customer then used the AUD to invest in the Earner or Access products. See PJ at [23]. The primary judge continued:

> 24 Mr Karaboga gave unchallenged evidence [that] … at all times since the platform was launched, Block Earner has been able to manually accommodate transfers of cryptocurrency to enable users to use the Earner and Access products where this was requested by users on a case by case basis. Where users did this, their cryptocurrency balance would be displayed on the platform. … From around September 2022, the platform displayed an additional message when a user wished to end the loan and selected the "Transfer Out" page on the website, explaining how users could require that their eligible cryptocurrency be transferred to them in kind, as cryptocurrency, rather than by way of conversion to AUD and payment in AUD. In that way, Block Earner had the ability to manually effect a transfer of cryptocurrency to a user at the end of the loan.
>
> 25 If a user viewed their Earner balance on Block Earner's platform, they would see the unit amount of lent eligible cryptocurrency and any interest accrued (being their token balance). The platform would also display the approximate AUD equivalent value of the lent eligible cryptocurrency and interest accrued …

41 The primary judge dealt with the evidence about what Mr Karaboga called Block Earner's "business model", summarising the unchallenged evidence about it as follows:

> 28 Mr Karaboga describes Block Earner's business model for the Earner product

(in his first affidavit at [66]–[67]) as being to lend the cryptocurrency borrowed from users, together with Block Earner's own cryptocurrency that it had purchased from other sources, to third parties at a higher interest rate than it was paying to Block Earner's users under the Terms of Use. Block Earner's profit was the difference between the amount of interest it had to pay to the user and the amount it received from the third party. This profit was not paid to the user, who only received the fixed interest in cryptocurrency as agreed with Block Earner. There were two relevant contracts between Block Earner and third parties: one being a "Yield Product Agreement" with Stablehouse, and the other a "USDC Revolving Credit Agreement" with XBTO Strategies Limited. Mr Karaboga gave evidence (at [68]) that he never intended the transactions to be for the benefit of users or to generate a financial return for users, in that users' only entitlement was to the agreed [annualised percentage yield] on the cryptocurrency they lent, payable by Block Earner under the Terms of Use, and users received the pre-agreed fixed interest rate regardless of Block Earner's lending activities with third parties. While I accept that there was not any direct correlation between the yield earned by Block Earner and the fixed interest which Block Earner owed to its users, the business model was based on the premise that the fixed interest payable by Block Earner to users was sourced from the higher yield which Block Earner would generate from aggregating the cryptocurrency which it borrowed from users and adding to that its own cryptocurrency.

MANAGED INVESTMENT SCHEME

Relevant legislation

42 Section 601ED of the Act relevantly provides:

> **When a managed investment scheme must be registered**
>
> (1) Subject to subsections (2) and (2A), a managed investment scheme must be registered under section 601EB if:
>
> (a) it has more than 20 members; or
>
> (b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or
>
> (c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.
>
> …
>
> (5) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.
>
> Note: Failure to comply with this subsection is an offence: see subsection 1311(1).
>
> …
>
> (8) A person contravenes this subsection if the person contravenes subsection (5).

Note: This subsection is a civil penalty provision (see section 1317E).

43 Section 9 of the Act relevantly provides that "managed investment scheme" means:

> (a) a scheme that has the following features;
>
> (i) people contribute money or money's worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
>
> (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interest in property, for the people (the *members*) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
>
> (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or give directions) …

The findings of the primary judge about the Earner product

44 The primary judge found that the Earner product constituted a "scheme", and that Earner satisfied part of s 9(a)(i) (i.e. people contributed money or money's worth when they participated in Earner) and s 9(a)(iii) (i.e. members did not have day-to-day control over the operation of the scheme).

45 On appeal, Block Earner accepted those findings.

46 At paragraphs [18], [19] and [21] of the outline of cross-appellant's submissions dated 6 February 2025 (the **cross-appellant's submissions**), Block Earner contended that the primary judge erred in finding that the Earner product had the following features:

(a) "the contribution of money or money's worth was in consideration for the acquisition of rights [to] benefits produced by the scheme (paragraph (a)(i))"; and

(b) "the contributions were to be pooled or used in a common enterprise to produce financial benefits for Block Earner's customers (paragraph (a)(ii))".

47 His Honour's reasons for concluding that the contribution was in consideration for the acquisition of rights to benefits produced by the scheme were as follows:

> 38 The next question is whether the element set out in subpara (a)(i) of the definition is satisfied. That element comprises three requirements, namely: (a) a "contribution" of money or money's worth; (b) that the "contribution" is "consideration" to acquire rights (whether actual, prospective or contingent and whether they are enforceable or not); and (c) that those rights are to "benefits produced by the scheme". Block Earner submits that none of these

three requirements is satisfied in the case of the Earner product.

39 First, Block Earner submits, and I accept, that the word "contribution" connotes pooling, in that as a matter of ordinary English, the requirement that an investor "contribute" suggests that the investor is not acting alone or intending to act alone and independently in the payment of money so as simply to recover a return on their own investment: *Australian Securities & Investments Commission v MyWealth Manager Financial Services Pty Ltd (No 3)* [2020] FCA 1035; (2020) 146 ACSR 270 at [64] (Derrington J). That construction is reinforced by the third element referred to above, that the contribution be consideration to acquire benefits produced by the scheme. ASIC then places emphasis on the Terms of Use, which convey that the Earner product involved a bilateral arrangement between Block Earner and the user, and that the loan of cryptocurrency was "in return for" a fixed interest rate: cl 4.3(a). The user, it was submitted, was entitled to payment of principal and interest irrespective of the success of Block Earner's business, and irrespective of how the cryptocurrency of other users of Earner was applied. The return did not fluctuate according to the fortunes of the business, nor did users have any right to require income earned by Block Earner from its lending of cryptocurrency to third parties to be applied in payment of principal or interest: cl 4.3(l)(i).

40 While I accept that the word "contribution" connotes that investors pay money or money's worth jointly with others or to furnish a common fund, I regard that element, and the other requirements of (i) of the definition of managed investment scheme, as satisfied by the Earner product. I have referred above to the statement on the Block Earner website from March to May 2022 to the effect that Block Earner was able to generate returns by pooling customer funds and lending it to third parties, thereby receiving a favourable yield rate. As I have stated above, I do not regard that statement as inconsistent with Mr Karaboga's evidence at [90] of his affidavit, in that Mr Karaboga's evidence was in effect that the result of pooling loans of cryptocurrency assets from users, together with Block Earner's own assets, enabled Block Earner to lend cryptocurrency to third parties and derive revenue for its own benefit from those loans in an amount which was designed to exceed the amount of fixed interest which Block Earner was obliged to pay to users, thus identifying the source of revenue from which the benefit of the promised fixed interest to users would be paid. The representation on the website did not refer to Block Earner contributing its own cryptocurrency, but the fact that it did so does not mean that users were not themselves making contributions jointly or to furnish a common fund. Users thus contributed money or money's worth jointly with all other users, as consideration to acquire the right to the promised fixed interest yield under the Earner product which Block Earner represented it would be able to pay because of the benefit produced by the scheme of enabling Block Earner to earn revenue in a greater amount by deploying the pooled contributions from users (as well as its own cryptocurrency) in lending the aggregated cryptocurrency to third parties at a higher rate. Block Earner submitted that it was conceivable that Block Earner may have been able to put itself in funds to pay the fixed interest in some other way, but that was not what was represented to users.

41 In my view, the above conclusion is consistent with the reasoning of White J in *Australian Securities & Investments Commission v Great Northern Developments Pty Ltd* [2010] NSWSC 1087; (2010) 79 ACSR 684. In that case, White J reviewed a number of cases in which it was held that loans with fixed interest returns can fall within the definition of "managed investment

> scheme" and that the right to interest and repayment of principal can be a right to "benefits produced by the scheme". As his Honour said at [69], in each of those cases, some representation was made to investors that by lending money to the promoter of the scheme the investor would derive a return, sometimes a very high return, out of the anticipated successful operation of the scheme, which was to be operated using the vaunted skills of the promoter. White J distinguished those cases, on the basis that there was no evidence before his Honour that representations were made to any of the persons to whom promissory notes were issued that the payment of principal or interest due under the notes would be derived from any particular source: at [70]. Accordingly, White J held that it was neither a term of a promissory note, nor was there any evidence of a representation being made to a holder of a promissory note, that the holder had a right, even an unenforceable right, to acquire benefits produced by the defendant's business of raising money from lenders and developing and selling properties: at [77]. In the present case, there is such a representation which was clearly made on Block Earner's website, which satisfies the element that was missing in *Great Northern Developments*.

48 His Honour's reasons for concluding that the contributions were to be pooled or used in a common enterprise to produce financial benefits for Block Earner's customers were as follows:

> 42 Turning to subpara (a)(ii) of the definition of "managed investment scheme", it is clear from the statement which appeared on the Block Earner website from March to May 2022 that the contributions made by users were to be "pooled", "pooling customer funds" being the very term used on the website. The purpose of that pooling was represented to enable Block Earner to generate returns by lending the funds to third parties in return for a favourable yield rate. Given that that was stated in answer to the question "How is fixed yield generated?", the purpose of that pooling was clearly represented to provide Block Earner with the wherewithal from which it would pay users the fixed yield promised to them under the Earner product. The payment of the fixed yield to users was obviously a financial benefit to them, as too was the capacity of Block Earner to earn revenue from which that fixed yield would be paid. Subpara (a)(ii) was therefore satisfied. As I have said above, I do not regard the evidence of Mr Karaboga at [90] of his first affidavit as contrary to those propositions. The representation on the website also satisfies the requirement, which has been held to be implicit in subpara (a)(ii), that contributors must objectively intend that pooling to produce financial benefits: see *National Australia Bank Ltd v Norman* [2009] FCAFC 152; (2009) 180 FCR 243 at [88] (Graham J); [148]–[150] (Gilmour J, with whom Spender J agreed).
>
> 43 I accept that the Terms of Use do not mention pooling for any common benefit. However, it is sufficient that Block Earner represented that contributions would be pooled in order to generate a financial benefit for users. Block Earner relies on the acknowledgment in cl 4.3(l)(iii) that "by participating in Lend [ie Earner], you do not intend for Block Earner to use the loaned Eligible Cryptocurrency to generate a financial benefit or act as an investment for you". Read literally, that is inconsistent with the representation on the website to which I have referred. However, in my view, those apparently contradictory statements can be reconciled. In my view, cl 4.3(l)(iii) should be read consistently with the effect of Mr Karaboga's evidence at [90] of his first affidavit, namely that Block Earner would not pass on to users the amount of the return which it earned by dealing in the cryptocurrency which users had lent to it, but would receive only the fixed yield promised to them, irrespective

> of the amount of revenue which Block Earner was able to earn from its dealings with third parties. In effect, the acknowledgment was that there would be no equivalence or no direct correlation between the revenue earned by Block Earner by using the loaned cryptocurrency, on the one hand, and the fixed yield payable to users, on the other hand.

The standard of appellate review

49 It was common ground that the Court's review of the primary judge's findings of fact and inferences drawn from those facts are subject to the principles stated in *Fox v Percy* (2003) 214 CLR 118 and *Warren v Coombes* (1979) 142 CLR 531. Here, no witness gave oral testimony and no witness was cross-examined. It was thus accepted by the parties that the Court is in as good a position as the primary judge to make findings of fact on the evidence that was adduced at the hearing. See, for example, *Impiombato v BHP Group Limited* [2025] FCAFC 9 at [193] (Beach and O'Bryan JJ) and [342]–[345] (Lee J).

Was the contribution of money or money's worth made by Block Earner's customers in consideration for the acquisition of rights to benefits produced by the scheme?

50 As Mr Free SC (who appeared with Mr B Smith for Block Earner) submitted, the terms that governed the relationship between Block Earner and its Earner product customers unequivocally provided that the cryptocurrency was being "loaned" in return for daily interest payments.

51 Clause 4.3(a) provided: "Under Lend, in accordance with these Terms including the terms contained at this section 4.3 (Loan Terms), users can lend Eligible Cryptocurrency to Block Earner in return for daily interest payments paid in the same Eligible Cryptocurrency loaned to Block Earner".

52 The only relevant right acquired by customers under the Loan Terms was the right to payment of the Final Amount upon termination of the loan, being the amount of the borrowed cryptocurrency plus the interest accrued, as provided in cl 4.3(j), viz:

> Upon the term of the loan of your Eligible Cryptocurrency ending Block Earner will return the borrowed Eligible Cryptocurrency and deliver any interest accrued under the Loan Terms (Final Amount), in each case by Block Earner converting the Final Amount to an equivalent value of Australian dollars under the exchange service and this value will be held in the Account. …

53 And the Loan Terms expressly provided that the loaned cryptocurrency was "Block Earner's to use, without limitation and at Block Earner's sole absolute discretion" (cl 4.3(l)(i)); that "any interest paid … [was] not referable to the activities Block Earner undert[ook] with respect to the loaned Eligible Cryptocurrency" (cl 4.3(l)(ii)); and that "the only amounts" to which a

customer had any "right" were "the amount of Eligible Cryptocurrency initially loaned … and any interest earned on that amount" (cl 4.3(l)(ii)).

54 The primary judge found that the first FAQ response constituted a representation that customers had a right, even an unenforceable right, to acquire benefits produced by Block Earner's business because that response indicated that customers were acquiring a right to interest that was funded by Block Earner's activities in on-lending the borrowed cryptocurrency to third parties. See PJ at [40]–[41].

55 The critical paragraph of his Honour's reasons is [40], which relevantly stated as follows:

> 40 … Users thus contributed money or money's worth jointly with all other users, as consideration to acquire the right to the promised fixed interest yield under the Earner product which Block Earner **represented it would be able to pay** because of the benefit produced by the scheme of enabling Block Earner to earn revenue in a greater amount by deploying the pooled contributions from users (as well as its own cryptocurrency) in lending the aggregated cryptocurrency to third parties at a higher rate. …
>
> (Emphasis added.)

56 In our view, the primary judge erred in making that finding because: (i) the Loan Terms (not the first FAQ response) defined the relevant legal relationship between Block Earner and its customers; and (ii) in any event, the first FAQ response did not, properly construed, represent that interest would be paid from, or that customers had a right to participate in, the benefits of Block Earner's own lending activities. The answer did not represent that there was a link between the return on customers' loans and the performance of Block Earner's lending activities, nor did it describe a right vested in customers to the benefits of Block Earner's own lending activities. And to say that Block Earner represented (in the first FAQ response) that "it would be able to pay" because of the benefit produced by the scheme is a very different thing from the statutory concept of a customer acquiring benefits produced by a scheme.

57 For a "borrower" to represent that it is able to pay a lender what it promises to pay because of the benefit produced by a scheme describes an ordinary loan. And as Derrington J said in *Australian Securities and Investments Commission v* ***Secure Investments*** *Pty Ltd (No 2)* [2020] FCA 1463; (2020) 148 ACSR 154 at 167 [52], a loan agreement "between a borrower and lender by which money is lent in return for its repayment together with interest is unlikely to satisfy the requirement that it was intended that the contribution would be used by the Borrower to generate a financial return for the lender" because, "[i]n the ordinary course, a borrower uses

borrowed funds for their own purposes to generate a benefit for themselves and the interest rate is the price paid for the use of the funds".

58 Mr Free summarised his case in oral submissions on this point as follows:

> So, again, these are overlapping statutory contexts but what one sees reflected in both [section 9(a)](i) and (ii) [of the Act] is that the customers or contributors who become members of this scheme must be offering their consideration to acquire benefits produced by the scheme. And the pooling which is described in (ii) has to be to produce financial benefits for the members. So two sides of the same concept. And we would say where you have a situation like this where, under the terms the participants in this scheme expressly disavow any intention to derive benefits from what Block Earner does with the cryptocurrency and acknowledge that what Block Earner does with the cryptocurrency is entirely at its discretion, they have no right to the benefits produced by what Block Earner does with the cryptocurrency.
>
> Conversely, they have no exposure to the risks of what Block Earner does with the cryptocurrency. …
>
> [W]hat customers of the Lend service get is a contractual entitlement to be paid the benefits of returning the cryptocurrency that they've lent plus interest. They're entitled to that regardless of how well or how poorly Block Earner might be doing in its own investment activities. They've got no right to insist that that payment comes from any particular pool. They do have a right to insist that it come from Block Earner come what may. And that, we would say, is elementary from the terms, and nothing in the representation on the FAQs could point to the contrary.

59 With respect, we entirely agree.

60 In any event, ASIC agreed before the primary judge that, in this respect, the Earner product was provided in accordance with the Loan Terms. Accordingly, as Mr Free submitted, it was not, and is not, open to it to contend that it was provided otherwise (that is, in accordance with the terms of a response to a single FAQ that appeared on Block Earner's website for a period of a few months).

61 Contrary to his Honour's finding in the primary judgment at [41], we do not consider that the first FAQ response constituted a "clearly made" representation that "satisfie[d] the element that was missing" in *Australian Securities and Investments Commission v* ***Great Northern*** *Developments Pty Ltd* [2010] NSWSC 1087; (2010) 242 FLR 444.

62 As White J said in *Great Northern* at 465 [76]:

> 76 In my view, it is a mistake to conflate an expectation that a return will be generated from a scheme with a right to receive a benefit from the scheme which is consideration for the member's contribution. The question is what was the consideration for the contribution of money or money's worth? Unless the consideration was the right (even if unenforceable) to acquire benefits produced by the scheme, then para (a)(i) of the definition of "managed

investment scheme" is not satisfied. …

63 The representations in the cases that White J distinguished — namely, *Waldron v Auer* [1977] VR 236; (1977) 2 ACLR 514; *Australian Securities and Investments Commission v Hutchings* [2001] NSWSC 522; (2001) 38 ACSR 387 and *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310; (2002) 41 ACSR 561 — are far removed from what users were told in the first FAQ response. Those cases all had as a central element of the scheme in fact being offered to investors an interest in or exposure to the underlying business activities of the promoter. As his Honour noted in *Great Northern* at [69]: "[i]n each of these cases some representation was made to investors that by lending money to the promoter of the scheme the investor would derive a return, sometimes a very high return, out of the anticipated successful operation of the scheme". Here, as in *Great Northern*, and contrary to the finding of the primary judge, such an element is wholly missing.

64 For those reasons, the contribution of money or money's worth made by Block Earner's customers was not in consideration for the acquisition of rights to benefits produced by the scheme within the meaning of a "managed investment scheme" under s 9(a)(i) of the Act.

Was an intention to pool funds to produce financial benefits for customers a feature of the scheme?

65 As Gilmour J (with whom Spender J agreed) explained in *National Australia Bank Ltd v Norman* (2009) 180 FCR 243 at 279 [148] and [150]:

> 148 [T]he words "contributions are to be pooled" in para (a)(ii) require an intention, objectively discerned, forming part of the "scheme" and formed prior to the making of contributions, that the contributions are to be pooled. That intention may be discerned objectively and variously from documents, discussions or conduct …
>
> 150 Furthermore what is required is an intention objectively discerned that contributions are to be pooled, relevantly, "to produce financial benefits … for the people (the members) who hold interests in the scheme". Accordingly, contributions are not merely to be pooled. Rather they are to be pooled for a purpose, namely, the production of financial benefits for the members as a whole proportional to the interest they acquired by making contributions. The primary judge in this case at [13] acknowledged this when he said:
>
> > The scheme must therefore contemplate the generation of benefits under a common enterprise … from the funds contributed.

66 As Derrington J said in *Secure Investments*, although a loan agreement is unlikely to satisfy the requirement that it was intended that the contribution would be used by the borrower to generate a financial return for the lender (see above at [57]), as his Honour explained, there

may be some cases (like the one before him) where "the circumstances of [the] case show that the answer to the question of what was the intended use of the funds is not to be limited to a consideration of the terms of the loan agreements" but "is to be answered in the context of all of the relevant circumstances, including what the investors were told about the transaction". See *Secure Investments* at 167–168 [52]–[53].

67 Here, the words of cll 4.3(l)(iii) and (iv) were unambiguous. The putative customer was told that "by participating in Lend, you do not intend for Block Earner to use the loaned Eligible Cryptocurrency to generate a financial benefit or act as an investment for you" and that "any benefit gained or loss incurred by Block Earner's use of the loaned Eligible Cryptocurrency will not be passed onto you".

68 The primary judge was of the view that it was "clear" from the first FAQ response "that the contributions made by users were to be 'pooled', 'pooling customer funds' being the very term used on the website". See PJ at [42]. His Honour reasoned that "[t]he purpose of that pooling was represented to enable Block Earner to generate returns by lending the funds to third parties in return for a favourable yield rate" and that "[g]iven that that was stated in answer to the question 'How is fixed yield generated?', the purpose of that pooling was clearly represented to provide Block Earner with the wherewithal from which it would pay users the fixed yield promised to them under the Earner product". His Honour said that "[t]he payment of the fixed yield to users was obviously a financial benefit to them, as too was the capacity of Block Earner to earn revenue from which that fixed yield would be paid". On this basis, his Honour found that subparagraph (a)(ii) was satisfied.

69 At [43] of the primary judgment, his Honour accepted that the Loan Terms "[did] not mention pooling for any common benefit", but in his view it was "sufficient that Block Earner represented that contributions would be pooled in order to generate a financial benefit for users". His Honour accepted that, "[r]ead literally", the acknowledgment by the user in cl 4.3(l)(iii) that "by participating in Lend, you do not intend for Block Earner to use the loaned Eligible Cryptocurrency to generate a financial benefit or act as an investment for you" was "inconsistent" with the representation in the first FAQ response. Nevertheless, the primary judge said that "those apparently contradictory statements [could] be reconciled" as follows:

> 43 … In my view, cl 4.3(l)(iii) should be read consistently with the effect of Mr Karaboga's evidence at [90] of his first affidavit, namely that Block Earner would not pass on to users the amount of the return which it earned by dealing in the cryptocurrency which users had lent to it, but would receive only the

> fixed yield promised to them, irrespective of the amount of revenue which Block Earner was able to earn from its dealings with third parties. In effect, the acknowledgment was that there would be no equivalence or no direct correlation between the revenue earned by Block Earner by using the loaned cryptocurrency, on the one hand, and the fixed yield payable to users, on the other hand.

70 With respect, cl 4.3(l)(iii) cannot be read that way. That clause stated that "by participating in Lend, you do not intend for Block Earner to use the loaned Eligible Cryptocurrency to generate a financial benefit or act as an investment for you".

71 First, the clause is unambiguous: by agreeing to the Loan Terms and that clause in particular, customers must be taken *objectively* not to have intended for Block Earner to use the borrowed cryptocurrency to generate a financial benefit for them.

72 Secondly, to read cl 4.3(l)(iii) as a mere "acknowledgment … that there would be no equivalence or no direct correlation between the revenue earned by Block Earner by using the loaned cryptocurrency … and the fixed yield payable to users" would, as Block Earner submitted, render otiose cl 4.3(l)(ii) ("any interest paid to you under Lend is not referable to the activities Block Earner undertakes …").

73 Thirdly, to the extent that the answer to the question of the intended use of the funds is not to be limited to a consideration of those Loan Terms, and might include consideration of the first FAQ response on the Block Earner website, in our view, for reasons we have already given, and as Block Earner submitted, the message, read fairly and as a whole, conveyed by the website (which it must be emphasised included the Loan Terms) was that customers could "loan" cryptocurrency in return for fixed interest. The first FAQ response did not suggest that customers were offered an investment that pooled their funds with the contributions of other customers in order to generate greater customer returns.

74 It is true that the first FAQ response used the word "pooling", which was perhaps unfortunate, but the answer did not represent that pooling was ***for the purpose of*** producing financial benefits for the members in circumstances where they have acquired rights to those benefits. Compare *LCM Funding Pty Ltd v Stanwell Corporation Ltd* (2022) 292 FCR 169 at 174 [18] (Lee J) (the expression "to be pooled" has a purposive element, such that contributions are to be pooled to produce benefit for the investors and used for the purposes they contemplate).

75 Fourthly, the cases in which courts have gone beyond the terms of a loan agreement to consider what investors were otherwise told about proposed offerings and what they relied on (including

the cases which White J discussed in *Great Northern*) are far removed from the facts here, including because those cases involved specific representations outside of and contrary to the terms of the loan agreement that involved a commitment to use the invested funds in particular ways for the benefit of the investors. In *Secure Investments* at 168 [55], by way of example, Derrington J pointed to the defendant's website and the brochures that it disseminated in the course of its business which:

> identified that it provided clients with investment options and profitable returns in respect of property development. The options which it promoted concerned what it identified as, "investing directly" in the property market. That indicated that the proposed investment involved the use of the investor's funds in a particular way and, most likely, in the **acquisition of interests for them in property or in property development**. It also conveyed the notion that the **investor would secure the benefits of positive fluctuations**, if any, arising from a successful development, even if it omitted any mention that a **direct investor will also be subject to the consequences of an unsuccessful project**. Similarly, the indication in the various public statements that Secure Investments supports the investments by ongoing management and resale is suggestive of the individual investors having interests in the developments.
>
> (Emphasis added.)

As may be seen, the potential for the investors' return to fluctuate, depending on the success (or failure) of the project, was a key feature of the arrangements in *Secure Investments*. By contrast, users of the Lend service had no exposure to the benefits (or pitfalls) of whatever activities Block Earner undertook once it had borrowed cryptocurrency from those users.

76 Fifthly, with respect to the primary judge's finding at [43], it is unclear how Mr Karaboga's evidence "that Block Earner would not pass on to users the amount of the return which it earned by dealing in the cryptocurrency which users had lent to it, but would receive only the fixed yield promised to them, irrespective of the amount of revenue which Block Earner was able to earn from its dealings with third parties" reconciles the contradiction identified between cl 4.3(l)(iii) and the first FAQ response. Further, and in any event, given that Mr Karaboga's evidence about the way he apparently construed cl 4.3(l)(iii) was not communicated to customers, it is difficult to see, with respect, what bearing it could have on the proper construction of it.

77 For those reasons, an intention to pool funds to produce financial benefits for customers, within the meaning of a "managed investment scheme" under s 9(a)(ii) of the Act, was not a feature of the scheme.

Inconsistency with the statutory scheme

78 At [45] of the primary judgment, the primary judge accepted in principle that the difficulty in mapping a statutory scheme (such as Chapter 5C of the Act) onto an impugned arrangement (such as Block Earner's provision of the Earner product) is a matter that may properly inform whether the definition of "managed investment scheme" in s 9 of the Act has been satisfied in a particular case.

79 At paragraphs [35]–[36] of the cross-appellant's submissions, Block Earner submitted that this should have fortified the conclusion that Earner was not a managed investment scheme because a finding to the contrary would:

(a) "mean that the Block Earner (as the putative responsible entity of the scheme) would be required to hold all of the scheme property (relevantly, the cryptocurrency and returns from its own lending activity with third parties) on trust for scheme members, act in the interests of members at all times, and ensure that the scheme property is held separately from the Block Earner's own property: s 601FC(1)(c), (i); s 601FC(2)"; and

(b) "radically transform the arrangement between Block Earner and its customers".

80 Block Earner thus submitted that his Honour erred in not accepting or fully appreciating the abovementioned consequences of a finding that Earner was a managed investment scheme.

81 There is considerable merit in that submission, but in circumstances where we have formed the view that the scheme is not a managed investment scheme, it is not necessary to consider such difficulties in mapping.

Period of contravention

82 Block Earner submitted that the first FAQ response was only on the website for three months (from March 2022 to May 2022) and that the primary judge erred in finding that the relevant elements of the definition of managed investment scheme (for example, the requirement that contributions be "pooled") were satisfied at all times until the Earner service was withdrawn in November 2022. At the hearing, it was accepted that this point would only result in the period of any contravention dependent on the website representation being narrower, which would go to the quantum of any penalty. As we have found that there was no contravention by Block Earner, it is not necessary to say any more about the different versions of the FAQ on the website. (The second version of the FAQ response was not relied on by the primary judge, in our view correctly.)

FINANCIAL INVESTMENT

Relevant legislation

83 Section 911A(1) of the Act provides that "a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services". During the Relevant Period, the expression "financial services business" was defined in s 761A to mean "a business of providing financial services". The term "financial service" had (and continues to have) the meaning given by ss 766A–766H of the Act. This relevantly includes dealing in a "financial product" (s 766A(1)(b)).

84 A financial product is in turn relevantly defined to include a "facility" (which includes a contract, agreement, understanding or scheme: ss 761A and 762C) through which a person "makes a financial investment" (s 763A(1)(a)).

85 Section 763B of the Act is headed "When a person makes a financial investment" and provides as follows:

> For the purposes of this Chapter, a person (the *investor*) *makes a financial investment* if:
>
> (a) the investor gives money or money's worth (the *contribution*) to another person and any of the following apply:
>
> (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
>
> (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
>
> (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
>
> (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

86 As his Honour correctly observed in the primary judgment at [49], in relation to the three alternatives in s 763B(a), it is sufficient if only one of them is satisfied.

Did users of the Earner product make a financial investment?

87 The primary judge held that the Earner product met the first limb of that definition because Block Earner used the money or money's worth it received to "generat[e] revenue from which it would be able to pay the fixed yield which it was legally obliged to pay". See PJ at [50]. His Honour also held that the second and third limbs were satisfied because Mr Karaboga's

evidence and the first FAQ response established that it was both the intention of Block Earner and the "likely" intention of its customers that their contributions be used in this way. See PJ at [50]–[53]. His Honour's reasons for so concluding were as follows:

> 50 As to subpara (a)(i), Mr Karaboga's evidence as to Block Earner's business model at [66] of his first affidavit establishes that the business model was for Block Earner to lend the cryptocurrency borrowed from users, together with its own cryptocurrency that it had purchased from other sources, to third parties at a higher interest rate than it was paying to Block Earner's users under the Terms of Use, thereby providing Block Earner with the funds from which it would pay the fixed yield to users and also derive a profit for itself. The representation on the website as to pooling customer funds and lending them to third parties thereby receiving a favourable yield rate was consistent with that business model. In that way, Block Earner used the money or money's worth given to it by the investors to generate a financial return or other benefit for the investors, by generating revenue from which it would be able to pay the fixed yield which it was legally obliged to pay. That involved a financial return or other benefit for the investors even if the revenue generated by the use of the contribution was in a higher amount, thereby enabling Block Earner to make a profit. Further, it does not matter that Block Earner also used its own financial resources, in combination with the investors' contributions, in generating that financial return or other benefit.
>
> 51 The same evidence satisfies subpara (a)(iii) of s 763B in that Mr Karaboga's description of Block Earner's "business model" is plainly a reference to the intended operation of the Earner product from Block Earner's point of view.
>
> 52 The application of subpara (a)(ii) of s 763B is more contestable, in that there is no evidence from any investor as to that investor's intention, and the acknowledgment in cl 4.3(l)(iii) (that the investor does not intend for Block Earner to use the loaned cryptocurrency to generate a financial benefit or act as an investment for the user) appears on its face to negative any such intention. In *Australian Securities & Investments Commission v Secure Investments Pty Ltd* [2020] FCA 1463; (2020) 148 ACSR 154 at [53], Derrington J said that the answer to the question of what was the investors' intended use of the funds for the purpose of s 763B was not limited to a consideration of the terms of the agreements, but was to be answered in the context of all of the relevant circumstances, including what the investors were told about the transaction. His Honour pointed out in that case that there was little, if any, evidence from the investors of the circumstances in which they entered into the relevant transactions insofar as those circumstances may elucidate what they were told of the nature of the investment, and thus approached the matter by way of inference from the surrounding circumstances. His Honour found that despite the absence of direct evidence, it was possible to conclude that the investors did intend that their funds would be used to generate a financial return for them.
>
> 53 In the present case, there is no direct evidence from any investors. However, the representation on the website from March to May 2022 as to the way in which fixed yield was generated does provide a basis for inferring that investors did intend that Block Earner would use their monetary contributions to generate a financial return or other benefit for them, by Block Earner generating revenue from which it would be able to pay the fixed yield. In my view, it is more likely than not that at least a substantial proportion of investors

> would have read and understood that representation and adopted it as part of their own intentions. Given the relative prominence of that representation, and the relative lack of prominence of the apparently contrary acknowledgment in cl 4.3(l)(iii) of the Terms of Use, it is likely that many of those investors in the period March to May 2022 would not have been aware of the acknowledgment in cl 4.3(l)(iii), and it seems to me unlikely that any investors who were aware of the acknowledgment in the period March to May 2022 would have failed to read and understand the representation on the website as to how fixed yield was generated. Although the investors were bound by the Terms of Use irrespective of whether they read and understood those Terms (see *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165), that does not mean that the intention thereby imputed to them for the purpose of the law of contract was their actual intention as a matter of fact. The question as to what actual intention was formed by investors remains one of fact. Accordingly, in my view it is more likely than not that a substantial proportion of the users of the Earner product would have formed the intention required by subpara (a)(ii), based on having read and understood the representation on the website, and not having read or understood the apparently contrary acknowledgment in cl 4.3(l)(iii). Even those who read both the representation and the acknowledgment may well have treated the representation as paramount in forming their intentions, either because they were able to reconcile the two propositions in a similar way to my own analysis, or because they treated the acknowledgment as merely boilerplate drafting which was contrary to the actual fact of the matter in their own particular case.

88 We are, with respect, unable to agree with the conclusions his Honour reached in those passages.

89 In paragraph [66] of his first affidavit dated 25 August 2023, Mr Karaboga gave the following unchallenged evidence about Block Earner's business model:

> 66 Block Earner's business model was to loan the cryptocurrency borrowed from users, together with its own cryptocurrency that it had purchased from other sources, to third parties at a higher interest rate than it was paying to Block Earner's users under the "Terms of use". Block Earner's profit was then the difference between the amount of interest it had to pay to the user and the amount it received from the third party. This profit was not paid to the user, who only received the fixed interest rate in cryptocurrency as agreed with Block Earner.

90 In light of that unchallenged evidence (alongside the clear language of the Terms of Use), the primary judge, with respect, erred in finding that "Block Earner used the money or money's worth given to it by the investors to generate a financial return or other benefit for the investors, by generating revenue from which it would be able to pay the fixed yield which it was legally obliged to pay". See PJ at [50]. Block Earner used the money or money's worth given by investors to generate a financial return "for" itself, and to benefit itself. It did not use those contributions to generate a financial return or other benefit "for" the investors. The contrary

conclusion conflates the generation of a return that would enable Block Earner to meet its obligations to its users with the generation of a return or other benefit "for" those users.

91 Section 763B(a)(i) is therefore not satisfied.

92 With respect to ss 763B(a)(ii) and (iii), the case was run below on the basis that the respective intentions of the investor and the "other person" are subjective. (Senior Counsel for ASIC, Mr J Giles SC, who appeared with Ms WL Beechey of counsel, submitted for the first time in his oral submissions on appeal that the intention of the investor referred to in s 763B(a)(ii) is an objective one. That is an improbable submission. But more importantly, it is contrary to the finding of the primary judge, so absent a notice of contention we need say no more about it.)

93 For the reasons identified above in respect of s 763B(a)(i), the primary judge erred in finding that the "same evidence [relating to subpara (a)(i)] satisfies subpara (a)(iii) of s 763B in that Mr Karaboga's description of Block Earner's 'business model' is plainly a reference to the intended operation of the Earner product from Block Earner's point of view". See PJ at [51]. The Terms of Use and Mr Karaboga's unchallenged evidence were, with respect, flatly inconsistent with the subjective intention attributed to Block Earner by his Honour. As such, the better view is that s 763B(a)(iii) is not satisfied in the present case. (We note that the parties agreed that the above reference to "Mr Karaboga's description of Block Earner's 'business model'" was a reference to that which was summarised in [28] of the primary judgment.)

94 With respect to s 763B(a)(ii) of the Act, ASIC did not adduce evidence from any customer about what they understood the first FAQ response to mean (including in light of the unambiguous language in cl 4.3(l)(iii)) or whether, and if so how, they relied on it.

95 As the primary judge recognised, the issue at hand is one of fact and the investors were bound by the Loan Terms irrespective of whether they read and understood them. See PJ at [53]. In our respectful view, the primary judge was wrong to conclude as a matter of fact something that is wholly at odds with those terms based on his Honour's view, absent any evidence about the matter, about the likelihood ("more likely than not") of what a "substantial proportion" of customers would have understood. We see no reason to assume (as the primary judge did) that users would not have read the Terms of Use. The Terms of Use were not long or overly complex. They also included terms concerning how an investment of a certain kind would be made and the users' entitlements (including as to interest) under the arrangements. As such,

the Terms of Use did not concern something like a minor consumer purchase, where common sense would tell that a consumer may be less inclined to read terms and conditions.

96 But in any event, as Mr Free submitted in the course of his oral address, if the question of what a putative customer would have perceived and intended is addressed in the absence of direct evidence from them, and even assuming (for the sake of the argument) that such a consumer would have read the first FAQ response as signifying that they were going to reap the benefit of Block Earner's activities, then it must also be assumed that the same person would have read the Terms of Use on the same website — which included express terms that negate such a reading and a term that the customer agrees to be bound by such terms. As we have noted, there is no reason to assume that customers would *not* have read the Terms of Use in the relevant circumstances.

97 Mr Karaboga gave uncontested evidence about what a user had to do to set up an Earner account. At [32]–[33] of his first affidavit, he explained:

> 32 To set up an account, a user must go to the Block Earner website, or access the mobile application, and click "Open Account". The platform then prompts the user to enter an email address and provide a password.
>
> 33 The user is then shown Block Earner's "Terms of use". To continue through to the platform and access the services, the user must click "I Agree" to confirm that they agree to be bound by those terms and to confirm that the user has read the Risks Disclosure document provided by Block Earner.

98 As Mr Free put it, "by the time they're getting to the point of opening an account to use the service, even if they are aware of what's said in that FAQ, they've also had two opportunities to see the terms which negate the supposed proposition from the terms".

99 In those circumstances, the appropriate inference to be drawn is that the users would understand what they were told (and agreed to) in the Loan Terms, including most relevantly:

(1) all cryptocurrency loaned to Block Earner by them was Block Earner's to use, without limitation and at Block Earner's sole absolute discretion (cl 4.3(l)(i));

(2) any interest paid to them was not referable to the activities Block Earner undertook with respect to the loaned cryptocurrency (cl 4.3(l)(ii));

(3) the only amounts to which they had a right were the amounts of cryptocurrency initially loaned to Block Earner and any interest earned on those amounts (cl 4.3(l)(ii));

(4) they did not intend for Block Earner to use the loaned cryptocurrency to generate a financial benefit or act as an investment for them (cl 4.3(l)(iii)); and

(5) any benefit gained or loss incurred by Block Earner's use of the loaned cryptocurrency would not be passed onto them (cl 4.3(l)(iv)).

100 Having read those terms, a user could not possibly be taken to have believed that they intended that Block Earner would use their contribution to generate a financial return or other benefit for them, because that is precisely what the terms said it will not do.

101 For those reasons, users of the Earner product did not make a financial investment under s 763B of the Act.

DERIVATIVES

102 As we have concluded that the Earner product was not a managed investment scheme, it is necessary to determine ASIC's notice of contention, by which it contended that if the Earner product was not a managed investment scheme, it was a derivative as defined in s 761D of the Act.

Relevant legislation and associated regulations

103 During the Relevant Period, s 761D of the Act defined "derivative" as follows:

> **Meaning of *derivative***
>
> (1) For the purposes of this Chapter, subject to subsections (2), (3) and (4), a *derivative* is an arrangement in relation to which the following conditions are satisfied:
>
> (a) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time consideration of a particular kind or kinds to someone; and
>
> (b) that future time is not less than the number of days, prescribed by regulations made for the purposes of this paragraph, after the day on which the arrangement is entered into; and
>
> (c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following:
>
> (i) an asset;
>
> (ii) a rate (including an interest rate or exchange rate);
>
> (iii) an index;
>
> (iv) a commodity.
>
> (2) Without limiting subsection (1), anything declared by the regulations to be a derivative for the purposes of this section is a derivative for the purposes of

this Chapter. A thing so declared is a derivative despite anything in subsections (3) and (4).

(3) Subject to subsection (2), the following are not derivatives for the purposes of this Chapter even if they are covered by the definition in subsection (1):

(a) an arrangement in relation to which subparagraphs (i), (ii) and (iii) are satisfied:

(i) a party has, or may have, an obligation to buy, and another party has, or may have, an obligation to sell, tangible property (other than Australian or foreign currency) at a price and on a date in the future; and

(ii) the arrangement does not permit the seller's obligations to be wholly settled by cash, or by set-off between the parties, rather than by delivery of the property; and

(iii) neither usual market practice, nor the rules of a licensed market or a licensed CS facility, permits the seller's obligations to be closed out by the matching up of the arrangement with another arrangement of the same kind under which the seller has offsetting obligations to buy;

but only to the extent that the arrangement deals with that purchase and sale;

(b) a contract for the future provision of services;

(c) anything that is covered by a paragraph of subsection 764A(1), other than paragraph (c) of that subsection;

(d) anything declared by the regulations not to be a derivative for the purposes of this Chapter.

(4) Subject to subsection (2), an arrangement under which one party has an obligation to buy, and the other has an obligation to sell, property is not a derivative for the purposes of this Chapter merely because the arrangement provides for the consideration to be varied by reference to a general inflation index such as the Consumer Price Index.

104 During the Relevant Period, s 761B of the Act provided as follows:

If:

(a) an arrangement, when considered by itself, does not constitute a derivative, or some other kind of financial product; and

(b) that arrangement, and one or more other arrangements, if they had instead been a single arrangement, would have constituted a derivative or other financial product; and

(c) it is reasonable to assume that the parties to the arrangements regard them as constituting a single scheme;

the arrangements are, for the purposes of this Part, to be treated as if they together constituted a single arrangement.

105 As we explained above at [83], the Act imposes a licensing requirement upon a person who carries on a financial services business in this jurisdiction. During the Relevant Period, the expression "financial services business" was defined to mean a business of providing "financial services" (s 761A), a term which was in turn defined to include dealing in a "financial product" (s 766A(1)(b)).

106 Section 764A of the Act lists a large number of "[s]pecific things that are financial products (subject to Subdivision D)" and includes "a derivative" at subparagraph (1)(c). It follows that the licensing requirement under the Act prima facie applies to a person who carries on a business of dealing in derivatives.

107 Section 765A, which is contained in Subdivision D and therefore takes priority over s 764A, is headed "[s]pecific things that are not financial products". Among the things in that long list of exclusions from the definition is a "credit facility" as defined in reg 7.1.06 of the *Corporations Regulations 2001* (Cth) (the **Regulations**) (s 765A(1)(h)(i)). Since a credit facility is not a financial product under the Act, it follows that the licensing requirement mentioned above does not apply to a person who carries on a business of dealing in credit facilities. Moreover, a product that can be classified as both a "derivative" under s 764A and a "credit facility" under s 765A will ultimately not be a "financial product" for the purposes of the relevant licensing regime under the Act.

108 Regulation 7.1.06(1)(a) relevantly provides that a "credit facility" for the purposes of s 765A(1)(h)(i) of the Act includes the provision of "credit" (under certain conditions).

109 Regulation 7.1.06(3)(a) relevantly defines "credit" as follows:

> *credit* means a contract, arrangement or understanding:
>
> (a) under which:
>
> (i) payment of a debt owed by one person (a *debtor*) to another person (a *credit provider*) is deferred; or
>
> (ii) one person (a *debtor*) incurs a deferred debt to another person (a *credit provider*) …

110 This definition of credit includes "any form of financial accommodation" and "a financial benefit arising from or as a result of a loan" (regs 7.1.06(3)(b)(i) and (ix)).

111 Separately to the above, s 761D(3) of the Act also provides for exclusions from the definition of "derivative". Relevantly, s 761D(3)(b) excludes "a contract for the future provision of

services" from the definition of a derivative even if such a contract were to satisfy the requirements in s 761D(1).

Case law and commentary on derivatives

112 In ***International Litigation Partners*** *Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50; (2011) 248 FLR 149 at 161 [66]–[69], Giles JA set out the legislative history of s 761D. His Honour's decision was overruled by the High Court in *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2012) 246 CLR 455, but not for reasons that touch on what his Honour said about the relevant legislative history, as follows:

> 66 The definition of "derivative" is extraordinarily wide, one which could catch many arrangements not ordinarily thought of as derivatives. Returning to ILP's submissions as to the legislative intention, there is no satisfactory basis for reading the words down.
>
> 67 Section 761D was part of the amendments to the Act made by the *Financial Services Reform Act 2001* (Cth). The amendments included introduction of Ch 7, s 760A and following, amongst which are the provisions concerned with provision of a financial service. By s 760A:
>
> > *Object of Chapter*
> >
> > The main object of this Chapter is to promote:
> >
> > (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
> >
> > (b) fairness, honesty and professionalism by those who provide financial services; and
> >
> > (c) fair, orderly and transparent markets for financial products; and
> >
> > (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.
>
> 68 More specifically as to derivatives, there was dissatisfaction with the regulation of financial market instruments so far as through the definition of a futures contract in the *Corporations Law*, particularly following the decision of the Full Federal Court in *Sydney Futures Exchange Ltd v Australian Stock Exchange Ltd* (1995) 56 FCR 236. The Company and Securities Advisory Committee (CASAC) recommended "core provisions" for regulation of financial markets and financial market instruments, including a definition of derivatives, and that the definition should employ commercial criteria and be by the "deductive" method of "devising a broad general definition to cover all possible derivatives, with a power (by regulation or administrative discretion) to exempt certain agreements, to avoid over-regulation" (CASAC Final Report, "Regulation of On-Exchange and OTC Derivatives Markets", June 1997, paras 3.31, 3.33-3.35).

> 69 This was taken up by the legislature. The Explanatory Memorandum to the Financial Services Reform Bill stated (in para 6.72):
>
> > The definition of "derivative" in proposed section 761D has been formulated to replace the existing definition of "futures contract" in section 72 of the proposed *Corporations Act*. As recommended by CASAC in its report entitled "Regulation of On-exchange and OTC Derivatives Markets" the definition focuses on the functions or commercial nature of derivatives rather than trying to identify each product that will be regarded as a derivative. The definition proposed by CASAC in its report has been used in developing the definition in proposed section 761D.

113 Writers in the field have referred to the difficulties involved in adequately defining derivatives, including because "not all derivatives share all characteristics, and the characteristics of certain types of derivatives sometimes require a little analytical thinking to spot. Conversely, and this is very important, the fact that something is a derivative does not mean that it cannot also be something else". See S K Henderson, *Henderson on Derivatives* (LexisNexis, 2nd ed, 2010) at page 7. As Mr Henderson went on to say at page 8:

> Every true derivative will have an underlying rate, price, currency, index, security, commodity or other economic variable on which it is principally based. There is no limitation on what that variable might be, and this potential is one of the great advantages of [over-the-counter] derivatives. This is, however, one of the least significant *distinguishing* elements of a derivative, because it is in principle shared with almost all financial products and many commercial transactions.
>
> (Emphasis in original.)

114 Section 761D similarly recognises that the fact that something is a derivative does not mean that it cannot also be something else.

115 As Giles JA said in *International Litigation Partners* (at 162 [70]–[71]), the structure of the definition in s 761D — which provides that an arrangement satisfying certain conditions is a derivative unless it: (i) satisfies certain other conditions; (ii) is some kind of other thing (such as a contract for the future provision of services); or (iii) is declared by regulation not to be a derivative — "is in accord with the CASAC method of a wide general definition with exceptions".

116 His Honour was of the view (at 162 [72]) that "[g]iven this deliberate drafting, there is little warrant for reading down the definition in the inclusory s 761D(1)".

117 Along similar lines, as Dowsett, Stone and Bennett JJ said in *Keynes v Rural Directions Pty Ltd* (2010) 186 FCR 281 at 292 [28]:

> 28 The term "financial product" is critical to the operation of the Chapter. The

> express exclusions contained in s 765A are designed to ameliorate the effect of the very broad language used in the other definition sections which seek to capture many kinds of financial transactions. Section 765A narrows the operation of Ch 7 so as to keep it within the intended bounds. Section 761D(3) is important because it leads to the exclusion of a very large number of everyday transactions, namely sales of tangible property for future delivery. Such transactions are not generally thought to be financial transactions. However it is well-known that there are markets in which contracts for the sale and purchase of "tangible property" are traded. Such markets are more readily seen as being "financial" and therefore appropriately regulated. Where the price of tangible property fluctuates significantly over time, there is always the likelihood that people will seek to profit from such fluctuations. For that reason s 761D(1) catches "arrangements" for the supply of tangible property where the prices are not fixed or the "values" of the arrangements may fluctuate. However s 761D(3) narrows that effect. Broadly speaking, it does so by excluding from the definition of "derivative" arrangements for the supply of tangible property where one of the parties is actually expected to deliver the relevant property, and where rights and obligations under such arrangements are not usually traded, or not traded in a recognisable market.

118 Accordingly, the following issues arise:

(1) Was the Earner product a derivative within the meaning of s 761D of the Act?

(2) If yes, was there nonetheless no requirement for Block Earner to hold an AFSL on the basis that the Earner product was:

  (a) a contract for the future provision of services (and so not a derivative pursuant to s 761D(3)(b)); or

  (b) a credit facility, so that, even if a derivative, the Earner product was not a financial product pursuant to s 765A(1)(h)(i)?

Was the Earner product a derivative within the meaning of s 761D of the Act?

119 It was common ground that:

(a) s 761D(1)(a) was satisfied by the Earner product, both by the return of capital to the customers and the fixed rate return paid to them; and

(b) s 761D(1)(b) was satisfied because, by reason of reg 7.1.04(2)(b) of the Regulations, there was no minimum duration for the period between entry into the arrangement and the future time after which a party must provide consideration to someone.

120 The parties disagreed about the meaning and effect of s 761D(1)(c).

121 ASIC accepted that the mere accrual of interest on the cryptocurrency was not a derivative, because it was not pegging something to the value of something else. But it contended that the product acquired the character of a derivative because the amount of consideration that users

received in AUD varied depending on the exchange rate between AUD and the particular cryptocurrency on the day of exchange, and in that sense "the amount of the consideration … [was] ultimately determined, derived from or varie[d] by reference to … the value or amount of something else" within the meaning of s 761D(1)(c) of the Act.

122 In that regard, ASIC relied on clause 4.3(j) of the Loan Terms (set out at [28] above), which provided that when the Earner loan came to an end, Block Earner would return the borrowed cryptocurrency "in each case by Block Earner converting the Final Amount to an equivalent value of Australian dollars under the exchange service and this value will be held in the Account".

123 Accordingly, it was a premise of ASIC's argument that the payments users would receive at the end of their loan would be in AUD and that this was a feature of the Earner product, not an optional step.

124 Block Earner submitted that the requirement in s 761D(1)(c) was not met. It contended that the conversion from cryptocurrency to AUD was not part of the same "arrangement" as the arrangement comprising the loan of cryptocurrency by the user to Block Earner. As it was the conversion from cryptocurrency to AUD that provided the only hook by which it might be said that the amount of the consideration, or the value of the arrangement, was ultimately determined by reference to "the value or amount of something else", Block Earner submitted that the Earner product would not satisfy s 761D(1)(c) unless, pursuant to s 761B(c), "it is reasonable to assume that the parties to the arrangements regard[ed] them as constituting a single scheme" such that the arrangements are to be treated as if they, together, constituted a "single arrangement".

125 Block Earner advanced two related bases for its submissions that there were distinct arrangements and that it would not be reasonable to assume that the parties to the arrangements regarded them as constituting a "single scheme".

126 First, Block Earner submitted that the Terms of Use offered three distinct services: the Exchange service, the Access service, and the Earner service. As Mr Free put it:

> … The exchange service is a discrete service for which a fee is charged. It's the gateway on the terms; you have to go through that in order to qualify [for the loan] service but it's effectively a discrete service at each end, the entry point and the exit point. And so, if one is characterising the arrangement, we would say there are two distinct arrangements, they are related but they are two arrangements, one of which has this exchange service, one of which doesn't.

127 On this argument, the Exchange service was an arrangement that was distinct from the arrangement constituted by the loan of cryptocurrency.

128 Secondly, and relatedly, Block Earner submitted that it was not an inherent feature of the Earner product that the user's cryptocurrency would be converted into AUD; rather, it was an optional and distinct service. It submitted (at [13] of the cross-appellant's reply submissions dated 20 February 2025) that while the Loan Terms contemplated that there would be an exchange from cryptocurrency to AUD at the end of the loan, this was not "an essential feature of the service". Block Earner continued: "As the primary judge found, customers could and did transfer their own cryptocurrency directly onto the Block Earner platform to use the Earner service and, equally, **could and did receive their return from the Earner service in kind**: PJ [22]–[24]" (emphasis added).

129 In paragraphs [22]–[24] of the primary judgment, his Honour said as follows:

> 22 As a corollary, the parties are also in dispute over what was lent to Block Earner. Block Earner contends that the Earner product allowed users to lend eligible cryptocurrency to Block Earner in return for daily interest payments in the same eligible cryptocurrency at a fixed rate, whereas ASIC contends that AUD was converted to cryptocurrency as part of the process.
>
> 23 In the period from 17 March 2022 to 7 August 2022, all users of the Earner product converted AUD into eligible cryptocurrency to be lent to Block Earner (Agreed Facts at [16]). In addition, from 8 August 2022, six users used their own eligible cryptocurrency which they transferred directly into digital cryptoasset addresses controlled by Block Earner (Block Earner Crypto Wallet) (Agreed Facts at [16]). **ASIC submits, and I accept, that on the occasions when users** used their own cryptocurrency on entering into the Earner or Access products, or **requested that their withdrawal entitlement be paid to them in cryptocurrency, there were ad hoc variations** to the relevant provisions in the Terms of Use (such as cll 4.1(b), 4.2(c) and 4.3 (j)) which otherwise required that those payments be in AUD. **In the usual case**, a customer transferred AUD from their bank account into a bank account in the name of Block Earner; AUD deposited by the customer appeared in their "Block Earner Cash Account"; and **once a customer had successfully transferred AUD to Block Earner, the customer then used the AUD to invest in the Earner or Access products**.
>
> 24 Mr Karaboga gave unchallenged evidence in his first affidavit at [38]–[41] that, at the time Block Earner was launched in March 2022, he intended to provide users with an additional functionality to send their own eligible cryptocurrency to the Block Earner Crypto Wallet, so that they could use the Earner and Access products without first needing to use the Exchange Service to convert AUD to eligible cryptocurrency. That feature was unable to be built as an automated function of the Block Earner platform in time for the launch. However, at all times since the platform was launched, Block Earner has been able to manually accommodate transfers of cryptocurrency to enable users to use the Earner and Access products where this was requested by users on a

> case by case basis. Where users did this, their cryptocurrency balance would be displayed on the platform. Between August 2022 and March 2023, eight users transferred their own cryptocurrency onto the Block Earner platform in order to use the Earner or Access products, six of them being in relation to Earner (as referred to in the previous paragraph) and the other two being in relation to Access. **From around September 2022, the platform displayed an additional message when a user wished to end the loan and selected the "Transfer Out" page on the website, explaining how users could require that their eligible cryptocurrency be transferred to them in kind**, as cryptocurrency, rather than by way of conversion to AUD and payment in AUD. In that way, Block Earner had the ability to manually effect a transfer of cryptocurrency to a user at the end of the loan.

(Emphasis added.)

130 While the primary judge referred (at [24]) to the additional message that appeared on the platform from September 2022, providing information about how to obtain a transfer of cryptocurrency in kind, it should not be understood that it was only from that date that users could obtain cryptocurrency in kind. The primary judge's finding (at [23]) regarding ad hoc variations when users obtained cryptocurrency in kind was not limited to only part of the period in question. That is consistent with the agreed facts, to which we have referred above, which stated, without any temporal limits, that some users obtained cryptocurrency in kind, some converted it into AUD and some moved their cryptocurrency into the Access service.

131 ASIC accepted that if the "arrangement" within the meaning of the section did not include the Exchange service, then the Earner product was not a derivative. But it contended — even accepting that it was a separate or ancillary element of the product — that the exchange element was part of the arrangement by operation of s 761B which, during the Relevant Period, provided that if: an arrangement, when considered by itself, did not constitute a derivative; and that arrangement, and one or more other arrangements, if they had instead been a single arrangement, would have constituted a derivative; and "it is reasonable to assume that the parties to the arrangements regard[ed] them as constituting a single scheme", then the arrangements are be treated as if they together constituted a single arrangement. See paragraph [104] above.

132 As already explained, Block Earner, on the other hand, submitted that s 761B has no application because it is not reasonable to assume that Block Earner and its customers regarded the Earner product and the Exchange service as constituting a single arrangement, because the customer could elect not to use the Exchange service, either when signing up to Earner or upon termination or expiry.

133 In our view, Block Earner's contentions are correct.

134 As Block Earner submitted, the Terms of Use provided for three types of services that those who registered as users could access: the Exchange service, the Access service and the Earner service. In the language of s 761B(a), the Earner service, when considered by itself, did not constitute a derivative. The Exchange service was a distinct arrangement.

135 Even if the Exchange service would, in the ordinary course, be used at the end of a loan of cryptocurrency, we do not consider that it is reasonable to assume that the parties to the arrangements regarded the loan and the Exchange service as constituting a "single scheme" (s 761B(c)). Rather, the conversion of cryptocurrency to AUD via the Exchange service was a distinct process that would take the user out of the cryptocurrency environment and allow the user to exit the platform by transferring their AUD out of the platform, or to re-enter the cryptocurrency environment, either by entering into the Access service or by making another loan after entering into the Earner service again. On this analysis, even if all users of the Earner service had to use the Exchange service at the end of the loan of their cryptocurrency, the compulsion to use that service does not make it part of "a single scheme" (s 761B(c)).

136 In any event, according to the agreed facts, users were not required to use the Exchange service at the end of a loan of cryptocurrency. Rather, conversion to AUD was only one of three options that users had when exiting the Earner service; they could take cryptocurrency in kind, move the cryptocurrency into the Access service or have it converted into AUD.

137 Whether approached as a discrete reason why the exchange into AUD was not part and parcel of the Earner service, or as supporting the characterisation of the Terms of Use as offering three distinct services, this aspect of the agreed facts exposes that the proposition underpinning ASIC's position — namely, that conversion into AUD was an inherent and inevitable component of the Earner product — must be rejected.

138 For those reasons, the Earner product was not a derivative within the meaning of s 761D of the Act. In light of that conclusion, and also because the parties' submissions did not address the credit facility point in any depth, it is not necessary or desirable to address the two subsidiary arguments that were advanced concerning: (i) whether the Earner product was relevantly a contract for the future provision of services (and so not a derivative pursuant to s 761D(3)(b)); and (ii) if not, whether the Earner product was nonetheless not a financial product on the basis

that it was a "credit facility" for the purposes of s 765A(1)(h)(i) of the Act and reg 7.1.06 of the Regulations.

ASIC'S APPEAL

139 In the view we take of the cross-appeal, it follows that ASIC's appeal is to be dismissed. There is no need to say anything more about it, save for one matter.

140 In the penalty judgment, the primary judge ordered that Block Earner be relieved from liability to pay a pecuniary penalty for contraventions of s 911A(5B) (the requirement to hold an AFSL) and s 601ED(8) (the requirement to register a managed investment scheme) because, among many other reasons, his Honour found that Block Earner had obtained legal advice about the Earner product. For reasons his Honour explained (including at [32]–[35] of the penalty judgment), and for reasons that had to do with how the question arose in the particular context of the case, Block Earner did not produce a copy of the advice and was silent about the substance of it.

141 A defendant who seeks to contend either that they should be relieved from liability to pay a pecuniary penalty for contraventions of the Act, or that a penalty should be fixed in an amount lower that it otherwise would be, because they had received relevant legal advice would ordinarily need to give evidence about what advice they had in fact received. Nothing his Honour said in the penalty judgment should be read as suggesting otherwise.

DISPOSITION

142 For the foregoing reasons, we will make the following orders:

(1) The appeal be dismissed.

(2) The cross-appeal be allowed.

(3) The declarations of contravention made by the primary judge be set aside.

(4) The proceeding be dismissed.

143 As to costs, the primary judge ordered that ASIC pay Block Earner's costs after 9 February 2024 and that order remains extant. The appropriate costs order is that ASIC pay Block Earner's costs of the appeal and the cross-appeal, together with its costs of and incidental to the trial up to and including 9 February 2024.

I certify that the preceding one hundred and forty-three (143) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices O'Callaghan, Abraham and Button.

Associate: 

Dated: 22 April 2025