FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Web3 Ventures Pty Ltd [2024] FCA 64

File number(s):	NSD 1007 of 2022
Judgment of:	**JACKMAN J**
Date of judgment:	9 February 2024
Catchwords:	**CORPORATIONS** – operation of unregistered management investment scheme in contravention of s 601ED(5) of the *Corporations Act 2001* (Cth) – carrying on financial services business without an Australian Financial Services Licence in contravention of s 911A of the *Corporations Act* – investment in cryptocurrency – where interest rate return was fixed – where representation on website that fixed interest return was generated by pooling customer funds and lending to third parties – where product connected borrowers and lenders in decentralised finance – whether products constituted a managed investment scheme – whether customers made a financial investment – whether products constituted a derivative
Legislation:	*Acts Interpretation Act 1901* (Cth) ss 13(1), 15AD *Corporations Act 2001* (Cth) ss 9, 601ED, 761B, 761D
Cases cited:	*AA v Persons Unknown* [2019] EWHC 3556 (Comm); [2020] 4 WLR 35 *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* [2021] FCAFC 121; (2021) 287 FCR 388 *Australian Securities & Investments Commission v Great Northern Developments Pty Ltd* [2010] NSWSC 1087; (2010) 79 ACSR 684 *Australian Securities & Investments Commission v MyWealth Manager Financial Services Pty Ltd (No 3)* [2020] FCA 1035; (2020) 146 ACSR 270 *Australian Securities & Investments Commission v Secure Investments Pty Ltd* [2020] FCA 1463; (2020) 148 ACSR 154 *Australian Securities & Investments Commission v Takaran Pty Ltd* [2002] NSWSC 834; (2002) 43 ACSR 46 *Australian Securities and Investments Commission v Marco (No 6)* [2020] FCA 1781 *Australian Securities and Investments Commission v*

	National Australia Bank Limited (No 2) [2023] FCA 118 *Joffe v The Queen* [2012] NSWCCA 277; (2012) 82 NSWLR 510 *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108; (2020) 279 FCR 1 *LCM Funding Pty Ltd v Stanwell Corporation Ltd* [2022] FCAFC 103; (2022) 292 FCR 169 *National Australia Bank Ltd v Norman* [2009] FCAFC 152; (2009) 180 FCR 243 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 *Spicer Thoroughbreds Pty Ltd v Stewart* [2023] NSWCA 82 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 *Tulip Trading Ltd v Bitcoin Association for BSV* [2023] EWCA Civ 83; [2023] 4 WLR 16
	Pearce, DC, *Statutory Interpretation in Australia* (10th ed, LexisNexis, 2024) Stevens, Robert, "Crypto is Not Property" (2023) 139 LQR 615
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	86
Date of hearing:	31 January 2024
Counsel for the Plaintiff:	Mr J Giles SC, Ms EL Beechey and Ms C Harris
Solicitor for the Plaintiff:	Australian Securities and Investment Commission
Counsel for the Defendant:	Mr J Entwisle and Mr B Smith
Solicitor for the Defendant:	Gilbert + Tobin

ORDERS

NSD 1007 of 2022

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**WEB3 VENTURES PTY LTD ACN 655 090 869** Defendant

ORDER MADE BY: **JACKMAN J**

DATE OF ORDER: **9 FEBRUARY 2024**

THE COURT DECLARES THAT:

1. The defendant has contravened s 911A(1) and (5B) of the *Corporations Act 2001* (Cth) by carrying on a financial services business without holding an Australian financial services licence covering the provision of financial services with respect to the "Earner" product.
2. The defendant has contravened s 601ED (5) and (8) of the *Corporations Act 2001* (Cth) by operating an unregistered managed investment scheme with respect to the "Earner" product.

THE COURT ORDERS THAT:

3. The proceedings be dismissed insofar as they relate to the "Access" product.
4. The costs of the proceedings to date be reserved.
5. The proceedings be listed for a case management hearing at 9.30 am on 1 March 2024 in relation to the preparation of, and fixing of a date for, the hearing as to any pecuniary penalty.

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

REASONS FOR JUDGMENT

JACKMAN J:

Introduction

1 The Australian Securities & Investments Commission (**ASIC**) seeks declarations and orders against Web3 Ventures Pty Ltd trading as Block Earner (**Block Earner**) in relation to contraventions of the *Corporations Act 2001* (Cth) (**Act**) in connection with two Block Earner products known as "Earner" and "Access". Block Earner operates an online platform through its website, offering various products to its customers. Those products have included:

(a) the Earner Product, from around 17 March 2022 until 16 November 2022; and

(b) the Access Product, from around March 2022 to the present.

2 Block Earner also operates a digital currency exchange (**Exchange Service**), which is registered with the Australian Transaction Reports and Analysis Centre, that allows users to exchange Australian dollars (**AUD**) into cryptocurrencies, including:

(a) USD Coin (**USDC**);

(b) Paxos Gold (**PAXG**);

(c) Bitcoin (**BTC**); and

(d) Ethereum (**ETH**).

The Exchange Service allows users to buy and sell over 100 different crypto currencies using the Block Earner platform.

3 The disputes between the parties concern whether the Earner and Access products are "financial products". ASIC contends that the Earner and Access products are financial products because each product is one or more of a managed investment scheme, a facility by which a person makes a financial investment, or a derivative. If Earner or Access are financial products, then it is common ground that Block Earner has contravened s 911A of the Act by carrying on a financial services business without holding an Australian Financial Services Licence (**AFSL**). Further, if either Earner or Access is a managed investment scheme, then it is common ground that Block Earner has contravened s 601ED(5) of the Act by operating an unregistered managed investment scheme.

4 For the purposes of this proceeding, ASIC does not contend that USDC, PAXG, BTC and ETH are financial products within the meaning of the Act.

5 Block Earner does not hold or have the benefit of an AFSL, and has never done so.

6 This judgment deals with questions of liability only. Questions of penalty are to be decided later.

The Nature of Cryptocurrencies

7 The unchallenged evidence in the first affidavit of Mr Karaboga, the Chief Executive Officer and co-founder of Block Earner, is to the following effect at [21]–[25]. 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. Cryptocurrency is created using blockchain technology. A blockchain is a ledger method for recording transactions. This 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.

8 People interact with blockchain by creating a "wallet", which acts like a user account. However, a wallet is in fact made of two keys that provide access to the person's underlying cryptocurrency being:

(a) a public key that is an alphanumeric identifier, which functions as an address or location for the user. This can be publicly disclosed, for example for the purpose of providing a "destination" for someone to send cryptocurrency to; and

(b) a private key, which is an alphanumeric code that acts as a confidential password and is used to "sign" transactions and prove ownership of cryptocurrency. A private key should not be shared, as holding a private key means having access to the wallet and the underlying cryptocurrency.

9 All users require a wallet to undertake actions like sending and receiving cryptocurrency. There are many different types of wallets with varying features, including:

(a) "hot" or "cold" wallets, which refer to wallets that are connected or not connected to the internet;

(b) software wallets, which permit users to access their keys using software such as website browsers and mobile applications;

(c) hardware wallets, which are physical devices that store keys offline;

(d) custodial wallets, which are wallets where the private key is held by a third party in contrast to non-custodial wallets where a person has control over their keys;

(e) single signature wallets, which are where only one person "signs" transactions to authorise and execute them; and

(f) multi-signature wallets, which require two or more people to approve transactions. This can be tailored such that different combinations of signatures may be required to access cryptocurrency and execute transactions.

10 Pausing there, there is a legal controversy as to whether cryptocurrency is property, as that concept is understood by the common law. In *Tulip Trading Ltd v Bitcoin Association for BSV* [2023] EWCA Civ 83; [2023] 4 WLR 16 at [24], the English Court of Appeal held that cryptocurrency was property, following *AA v Persons Unknown* [2019] EWHC 3556 (Comm); [2020] 4 WLR 35 at [55]–[61], on the basis that the cryptoasset can be said to be capable of assumption by a third party by way of access to the private key. The requirement that the right or interest be capable in its nature of assumption by a third party was identified by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1248 as a necessary element of the concept of property rights or interests. The contrary view has been argued forcefully by Professor Robert Stevens, "Crypto is Not Property" (2023) 139 LQR 615. It is not necessary to form a view as to this controversy in order to resolve the present proceedings, and I express no opinion on it. I note, however, that certain terms used by the parties in their evidence and arguments before me, and by Block Earner in its Terms of Use and website, refer to ownership or lending of cryptocurrency, and those terms might be thought to assume the existence of rights of property in cryptocurrency. I have used language referring to ownership of cryptocurrencies in these reasons in a neutral sense to refer to the factual ability to control the relevant cryptocurrency. I have also used language referring to lending cryptocurrency in a similar neutral sense as meaning the act of conferring on another person the factual ability to control the relevant cryptocurrency on the basis of an obligation on the part of that other person to redeliver to the "lender" at a later time cryptocurrency of the same

number and type. Counsel for both parties accepted the appropriateness of that approach. A further source of potential confusion is that the Terms of Use (referred to below) also adopt the word "Lend" as the product name for the "Earner" product.

11 On either view of the legal controversy canvassed above, the concept of "lending" cryptocurrency is a misnomer. If one were to assume that cryptocurrency is a species of property, the word "lend" in connection with cryptocurrency would seem akin to its use in securities lending, whereby securities are actually transferred outright by way of sale and purchase from the "lender" to the "borrower", with the borrower being contractually obliged to redeliver to the lender at a later time securities which are equivalent in number and type: *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Limited* [2008] FCA 594; (2008) 246 ALR 361 at [3]–[7], [56]–[58] and [63]–[74] (Finkelstein J); *Re Opes Prime Stockbroking Limited (No 2)* [2009] FCA 813; (2009) 179 FCR 20 at [3] (Finkelstein J). In reality, however, the so-called "lending" of cryptocurrency merely involves the conferral of an ability to control.

12 Returning to Mr Karaboga's unchallenged evidence as to the nature of cryptocurrency in his first affidavit at [26]–[29], 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 blockchain that have been pre-programmed (for example, in an agreement). The use of smart contracts permits the creation of applications on top of blockchain to provide other services and removes the need for centralised intermediaries.

13 Decentralised finance (**DeFi**) refers to peer-to-peer finance enabled by smart contracts rather than a centralised intermediary, like a bank. Decentralised transactions of this kind occur on what is commonly referred to as DeFi "protocols". For example, Person A may access a DeFi protocol to lend their cryptocurrency directly to Person B who wants to borrow cryptocurrency in return for interest paid on the loan. Smart contracts can be programmed such that this transaction happens automatically and anonymously. Smart contracts facilitate the loan, payment of interest and any repayment without the need for a centralised intermediary, like a bank, or without the parties needing to know and trust one another, and it is anonymous because there is no direct interaction between Person A and Person B, in that transactions are recorded and verified on blockchain.

14 As Mr Karaboga explains in his first affidavit in relation to the Access product at [69]–[71], Block Earner's Access service provides users with streamlined access to two DeFi yield generating protocols, Aave and Compound, which operate in the manner explained in the previous paragraph without traditional intermediaries such as banks or financial institutions. Aave and Compound are DeFi protocols which operate on the Ethereum blockchain, and those protocols are accessible to anyone. Both Aave and Compound provide a platform for users to lend out their cryptocurrency holdings and earn interest on their loans, using algorithmic models to dynamically adjust interest rates based on the supply and demand for each cryptocurrency. When demand for borrowing a particular asset increases, the interest rate for borrowing that asset also increases; conversely, when demand decreases, the interest rate decreases as well. This dynamic interest rate model helps to balance the protocol's utilisation and maintain equilibrium between lenders and borrowers. In order to transact on Aave or Compound, it is necessary to exchange cryptocurrency to protocol-specific digital tokens that have certain entitlements to yield. For Aave these are known as "aTokens". For Compound, they are known as "cTokens". These tokens can only be used on the relevant protocol.

15 As Mr Karaboga explains in his first affidavit at [30]–[33], Block Earner maintains its own accounts with users, and in order to use the Block Earner platform, a user must first register an account with Block Earner. 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. The user is then shown Block Earner's "Terms of Use" (the **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 the Terms of Use and to confirm that the user has read the Risks Disclosure document provided by Block Earner.

Terms of Use

16 The parties have agreed on a document entitled "Narrative of facts on liability" (the **Agreed Facts**). Those Agreed Facts include that, at all times, the Exchange Service and the Earner and Access services were provided in accordance with Block Earner's Terms of Use. The Terms of Use were amended from time to time, but the key features relevantly remained the same during the relevant period (Agreed Facts at [11]). I set out below cl 4 of the Terms of Use taken from the version which appeared on Block Earner's website as at 8 November 2022, shortly before Block Earner ceased to offer the Earner product on 16 November 2022:

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:

   i. Aave USDC (**aUSDC**) or Compound USDC (**cUSDC**) to participate in the access services, known as 'Aave USD Coin Variable Yield (DeFi-based)' and 'Compound USD Coin Variable Yield (DeFi-based)' (see section 4.2); or

   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).

b. There are no restrictions on the amount of Australian dollars that users can transfer to the Account. Users do not earn any interest on their Australian dollars held in the Account and are not permitted to make payments or instruct Block Earner to make payments from the Account. Users can only exchange their Australian dollars for aUSDC, cUSDC or Eligible Cryptocurrency to access the Services or withdraw their Australian dollars to an Australian bank account in the name of the user.

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, being cUSDC for Compound and aUSDC for Aave. Participating in the loan service requires the user to have Eligible Cryptocurrency.

d. There are limits on how much users can exchange under the exchange service:

   i. Users can only exchange up to A$20,000 in Australian dollars for aUSDC, cUSDC or Eligible Cryptocurrency per 1 calendar day; and

   ii. there is an exchange limit of up to A$25,000 per 1 calendar day with respect to exchanging aUSDC, cUSDC or Eligible Cryptocurrency to Australian dollars. Where a user nominates to cease using the access service or Lend and wishes to exchange more than A$25,000 of aUSDC, cUSDC or Eligible Cryptocurrency to Australian dollars, Block Earner will split the transaction into parcels of A$25,000 per 1 calendar day until the nominated amount has been exchanged.

e. You acknowledge and agree that:

   i. Block Earner will facilitate the exchange process by exchanging your Australian dollars in the Account;

   ii. for the access service, Block Earner facilitates the exchange

by exchanging the user's Australian dollars for USDC and then exchanging that USDC for the corresponding amount of cUSDC or aUSDC;

iii. for Lend, Block Earner facilitates the exchange by exchanging the user's Australian dollars for the Eligible Cryptocurrency nominated by the user;

iv. each transaction constitutes a transaction between you and Block Earner as principal. Block Earner facilitates transactions with you through back to back transactions with third parties that may correlate to transactions entered into with you, however Block Earner is not acting on your behalf in relation to a transaction with such third parties. All monies owed by you under a transaction are owed to us as a principal counterparty and not to any other person. You do not have any relationship or engage in any transaction directly with any third parties through the exchange service; and

v. once you have nominated to proceed with exchanging your Australian dollars for aUSDC, cUSDC or Eligible Cryptocurrency, this nomination is irrevocable. We may (in our absolute discretion) but are not required or obliged to, stop, refund, suspend or reverse any change of Australian dollars into aUSDC, cUSDC or Eligible Cryptocurrency (or vice versa).

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.

g. Users can withdraw from the Account at any time. There is up to two business days processing time for withdrawals.

4.2 Access service

a. Under the access service, Block Earner:

i. streamlines user access to certain yield generating platforms, currently being Aave and Compound;

ii. aggregates the cUSDC and aUSDC exchanged under the exchange service from all users who have nominated Compound or Aave and holds such cUSDC and aUSDC in its Block Earner omnibus account on each platform (ie Compound or Aave). Access to Aave or Compound commences at the time the user's cUSDC and aUSDC is received by Block Earner and moved to Block Earner's omnibus account on each platform (as at the date and time stamped on the blockchain confirmation). Each user's cUSDC and/or aUSDC holding is reflected in the user's Block Earner Platform account. By using the access service, you acknowledge and agree that Block Earner will use an omnibus account on Compound and Aave; and

iii. is responsible for tracking and calculating returns on cUSDC and aUSDC for each user on its ledger. Block Earner will perform daily reconciliation procedures and update the displayed user holdings on Block Earner Platform accounts for any yield earned the previous day.

b. Block Earner displays performance data for Compound and Aave. Such data is updated daily and displays data for each platform for the last business day. You agree and acknowledge Block Earner produces such data as communicated to it by Compound and Aave and Block Earner is not responsible for any loss, damage or expense suffered or incurred arising from incorrect or erroneous data, excluding any mistake, fraud, negligence or wilful misconduct on the part of Block Earner.

c. Users can nominate to cease using the access service at any stage. Upon notifying Block Earner that a user wishes to cease using the access service, Block Earner will convert the nominated value of cUSDC or aUSDC to Australian dollars under the exchange service and transfer this to the Account. For cUSDC and aUSDC, Block Earner redeems the cryptocurrency with Compound and Aave respectively and receives USDC (including any yield earned), which Block Earner then exchanges to Australian dollars and transfers to the account for the relevant user. The user (ie, you) may elect to use these funds to participate in Lend or the access services again or can request a withdrawal from the Account (see section 4.1(g)).

d. All yield earned from cUSDC or aUSDC is passed through to the user. Block Earner does not pass along additional incentives or promotions offered by the underlying yield platforms (eg, deposit incentives on Aave where tokens are locked up for one year).

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.

d. There are no minimum or maximum amounts that can be loaned however Block Earner may put limits on amounts to be loaned from time to time at its own discretion in line with our risk management processes. Such limits will be notified to the user (ie, you) as needed.

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 (d), 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.

g. The loan commences at the time the Eligible Cryptocurrency is received by Block Earner. Any Eligible Cryptocurrency received under Lend will be treated by us as being received at the date and time stamped on the blockchain confirmation.

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 (ie, 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 referrable 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 loan arrangement under Lend, interest payments and the rate at which interest is calculated are subject to all applicable laws and regulation, and to the extent we are limited or restricted from providing Lend or paying interest for any reason by applicable law or regulation, we will do so and will notify you as soon as practicable.

4.4 Service discontinuation

a. Block Earner reserves the right to cease offering the access service or Lend, in its discretion (**Discontinued Service**).

b. Where Block Earner does cease offering the Discontinued Service, Block Earner:

i. will provide you with at least 7 calendar days' notice of any such cessation (**Notice Period**); and

ii. may, at its discretion, offer a new Service to which your aUSDC, cUSDC or Eligible Cryptocurrency under the Discontinued Service may be migrated (**New Service**). Block Earner will communicate the terms of this migration to you (including notice of any additional fees).

c. Upon receiving notice of the Discontinued Service, you may end your use of the Discontinued Service in accordance this section 4 or, where a new Service is available, elect to migrate to the New Service in accordance with the terms communicated to you by Block Earner.

d. At the end of the Notice Period, if you have not taken any action under paragraph (c), you acknowledge and agree that Block Earner will

> exchange your cryptocurrency under the Discontinued Service and credit the Account with the corresponding Australian dollar value (using the exchange service), the balance of which will be displayed on your Block Earner Platform account. You may elect to use these funds to participate in the available Services or can request a withdrawal from the Account (see section 4.1(g)).

17 In addition, cl 6(b) in that version of the Terms of Use provided as follows:

> b. You acknowledge and agree that we do not hold, or operate under:
>
> i. an Australian financial services licence (**AFSL**) and that the Services do not constitute the provision of a financial service in connection with financial products that would require [sic.] trigger the requirement for us to hold an AFSL under the Corporations Act 2001 (Cth) (**Corporations Act**). In particular, the access services and Lend are not financial products (as that term is defined in the Corporations Act), investment programs or speculative tools and the provision of the exchange service, access service and Lend does not constitute the provision of financial services (as defined under the Corporations Act). Under the access service, you are being provided with a streamlined look through service to Compound and Aave. Under Lend, you are paid interest on your loan of Eligible Cryptocurrency to Block Earner, in accordance with these Terms (including the Loan Terms); and
>
> ii. an Australian market licence and the Services do not constitute the provision of a facility through which offers to buy and sell financial products are regularly made and accepted, which would trigger the requirement for us to hold an Australian market licence.

The Earner Product

18 On about 17 March 2022, Block Earner first commenced offering the Earner product to consumers, and ceased offering Earner on 16 November 2022 (Agreed Facts at [13]).

19 The Earner product allowed customers to lend to Block Earner and receive a fixed rate return over the term of the loan. In the usual case, Block Earner converted the customer's Australian dollars (**AUD**) into a cryptocurrency nominated by the customer at the commencement of the loan, and then at the end of the loan, the customer was entitled to a return of AUD calculated by reference to the price of the relevant cryptocurrency, plus the fixed rate return. The fixed rates offered by Block Earner under the Earner product were (Agreed Facts at [14]):

(a) 7% annualised percentage yield (**APY**) for loans denominated in USDC; and

(b) 4% APY for loans denominated in PAXG, BTC and ETH.

20 Block Earner used the loaned cryptoassets to generate income for itself by lending the cryptoassets to third parties, and 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 cryptoassets which were the subject of the loan (Agreed Facts [15]).

21 The parties are in dispute as to the nature of the services. Block Earner contends that:

(a) the Exchange Service operated separately to the Earner and Access products, to convert AUD into eligible cryptocurrency (and vice versa); and

(b) it was not a requirement that users convert AUD to eligible cryptocurrency or vice versa in order to use or cease using the Earner or Access products.

ASIC contends that the conversion process formed part of the Earner and Access products, and was not separate to those products.

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.

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 (Agreed Facts at [18]).

26 The Agreed Facts at [19] establish that, prior to the withdrawal of the Earner product:

(a) some users exiting the Earner product used Block Earner's exchange service to convert eligible cryptocurrency to AUD. The amount of AUD received back by the user (whether it used the Earner product or not) varied by reference to the exchange rate between AUD and the relevant cryptoasset;

(b) some users exiting the Earner product held their eligible cryptocurrency on the Block Earner platform (in Block Earner's Crypto Wallet); and

(c) some users exiting the Earner product moved their eligible cryptocurrency to the Access product.

27 When Earner was discontinued in November 2022, Mr Karaboga proves in his second affidavit at [10] that there were some 53 users who elected to move their cryptocurrency to the Access service without having it converted to AUD.

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 APY 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.

29 On the Block Earner website as it appeared from 17 March 2022 until some time in May 2022 (as reflected in the screenshots taken as at 19 April 2022), the following answer is given to the question "How is fixed yield generated?":

> 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.

In its Concise Statement in Response, Block Earner admitted that it published that statement between 17 March 2022 and 9 July 2022 (at [10]). However, at the hearing before me, ASIC very properly did not oppose Block Earner being granted leave to withdraw its admission as to the end date of 9 July 2022, as having been an inadvertent error, and I grant that leave. The end date was some time in May 2022.

30 Mr Karaboga refers to that statement given on the Block Earner website, as to Block Earner being able to generate money in order to pay the fixed yield by "pooling customer funds and lending it to our trusted partners … thereby receiving a favourable yield rate," at [89] of his first affidavit, and says the following at [90]:

> This answer was drafted by a junior employee, employed by Block Earner and was not reviewed carefully enough by me before being posted on the website. It was not my intention to suggest, and it is not the case, that the "*return*" payable to users from the earner service was generated by pooling customer funds and lending those funds to third parties. The "*pooling*" referred to in this statement is the holding of loaned cryptocurrency assets, together with any of Block Earner's owned assets that it wished to loan, in one wallet for the purpose of Block Earner making loans to third parties such as Stablehouse and XBTO, for its own benefit. Block Earner's obligation to pay interest to users did not depend on those transactions and this was set out in the "Terms of use".

31 In my view, that evidence by Mr Karaboga does not establish that the statement on the Block Earner website did not reflect reality. I have referred above to Mr Karaboga's evidence as to Block Earner's business model for the Earner product, being 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. The difference between the amount of interest Block Earner had to pay to the user and the amount it received from the third parties was Block Earner's profit, which was not paid to the user, who only received the fixed interest rate in cryptocurrency as agreed with Block Earner. In my view, that is consistent with the statement on the website that Block Earner was able to generate returns by pooling customer funds and lending them to third parties thereby receiving a favourable yield rate, in that the favourable yield obtained from those parties allowed for the payment of fixed interest to users as well as a profit margin for Block Earner itself. What Mr Karaboga appears to be saying at [90] of his affidavit is 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 did not match (but was designed to exceed) the amount of fixed interest which Block Earner was obliged to pay to users.

32 At some time in May 2022, the answer to the question "How is fixed yield generated?" was amended to read as follows:

> 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.

33 On 21 October 2022, ASIC wrote to Block Earner outlining ASIC's concerns that Earner was a managed investment scheme, an investment facility and a derivative, noting various statements on Block Earner's website, and stated ASIC's view that Block Earner should immediately cease offering the Earner product. It appears that that led to Block Earner removing from the website the statement drawing a link between the funds provided by users and the favourable fixed interest rates. As at 8 November 2022, about a week before Earner ceased to be offered, the answer to the question "How is fixed yield generated?" was shortened to include only the first paragraph quoted in the preceding paragraph of these reasons.

34 As at 16 November 2022, approximately 491 users were using the Earner service (Agreed Facts at [20]).

Was the Earner product a managed investment scheme?

35 Section 9 of the Act defines "managed investment scheme" relevantly as follows:

> (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, perspective 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) …

36 The first issue which arises in applying that definition is whether the Earner product constituted a "scheme". A "scheme" must be capable of being identified within certain boundaries, the essence of a "scheme" being a coherent and defined purpose, in the form of a "program" or "plan of action", coupled with a series of steps or course of conduct to effectuate the purpose and pursue the program or plan: *Australian Securities & Investments Commission v Takaran Pty Ltd* [2002] NSWSC 834; (2002) 43 ACSR 46 at [12] and [15] (Barrett J); *Australian Securities and Investments Commission v Marco (No 6)* [2020] FCA 1781 at [65] (McKerracher J). In oral submissions, ASIC identified the relevant "scheme" by reference to its Amended Concise Statement at [2]–[12] and [14], which relevantly referred to:

(a) the effect of the Terms of Use from 17 March 2022 until around 16 November 2022 being that the consumer, in acquiring, investing in or using the Earner product, deposited money with or "lent" money to Block Earner, and Block Earner undertook to repay that money;

(b) the Earner product was marketed as making use of the cryptoassets known as USDC, PAXG and BTC;

(c) the representation on the Block Earner website that "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" and subsequent changes on the website to the answer to the relevant question as well as other material on the website;

(d) for a consumer to acquire, invest in or use the Earner product offered by Block Earner, they must have had an account with Block Earner into which they deposited AUD, which process included agreeing to the Terms of Use, and by using the Earner product, the consumer then provided that AUD to Block Earner;

(e) from the consumer's perspective, the following process took place when they participated in the Earner product via the Block Earner platform:

    (i) any AUD deposited by the user appeared in their "Block Earner Cash Account", at which point the user could select the relevant Earner Product and nominate the amount of AUD in their account to be deposited into the product;

    (ii) at the same time the user was shown the equivalent amount of relevant cryptoassets (corresponding to the Earner product selected) and the exchange

rate and any fees applied by Block Earner for the conversion, and the user was also shown the fixed yield they would receive for the deposit;

(iii) users were required to tick a box agreeing to the Terms of Use and click "Transfer In";

(iv) Block Earner's platform then displayed the user's cash balance, holdings in the Earner product, any yield earned to date (in AUD) and the APY, and users' Block Earner accounts were credited with their yield on a daily basis;

(v) to withdraw from the Earner product, the user followed the prompts on Block Earner's platform to transfer an amount from the Earner product to their "Block Earner Cash Account", and as part of that process, the user was shown the equivalent amount of AUD and the exchange rate and any fees applied by Block Earner for the conversion of the relevant cryptoasset into AUD; and

(vi) the consumer could then withdraw the AUD from the Block Earner platform by requesting a bank transfer to a third party bank account, or nominate for the funds to be placed into the same or a different Block Earner product;

(f) the following processes occurred concurrently with the processes set out in the previous subparagraph, but were not necessarily apparent to consumers using the platform:

(i) once the user clicked "Transfer In", Block Earner converted the nominated amount of AUD to the relevant cryptoasset through an overseas crypto exchange platform, being referred to in the Terms of Use as the Exchange Service;

(ii) the newly converted cryptoassets were automatically "loaned" to Block Earner on an unsecured basis, being referred to in the Terms of Use as the "Lend" service;

(iii) Block Earner then lent those cryptoassets on an unsecured basis to a third party under a pre-existing commercial arrangement, for which it received a fixed yield; and

(iv) a similar conversion or exchange process to the one described above occurred when Block Earner received a request to withdraw funds from the Earner product, albeit in reverse, whereby Block Earner converted the cryptoassets back into AUD at the prevailing exchange rate and charged the customer a fee for the conversion;

(g) the Terms of Use provided that by using the Earner product, consumers "lend" the cryptoassets (into which the AUD had been converted) to Block Earner, in return for daily interest which was paid in the same cryptoasset "loaned" to Block Earner, and users also agreed to grant Block Earner all rights and title to those cryptoassets for Block Earner to use at its sole discretion during the term of the "loan"; and

(h) the amount of AUD received back by the consumer varied by reference to the exchange rate between AUD and the relevant cryptoasset.

37 I accept that there existed at the relevant time a "scheme" to the effect alleged in those paragraphs of the Amended Concise Statement, which satisfied the requirements of a "scheme" as expressed by Barrett J in *ASIC v Takaran*.

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*.

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.

44 As to subpara (a)(iii), the users of the Earner product did not have day-to-day control over the operation of the scheme, which was operated and controlled by Block Earner. Block Earner submits, and I accept, that users did have the ability to control when they entered into the scheme and when they withdrew from the scheme, but I do not regard that as a matter of day-to-day control of the scheme itself.

45 Block Earner also submitted that it is legitimate and appropriate to consider the potential difficulties in the application of the regulatory regime concerning managed investment schemes in deciding whether the definition of "managed investment scheme" is satisfied. It is now well established that it is relevant and appropriate to consider such issues in deciding whether a scheme is a "managed investment scheme" as defined: *LCM Funding Pty Ltd v Stanwell Corporation Ltd* [2022] FCAFC 103; (2022) 292 FCR 169 at [163]–[165] (Anderson J, with whom Middleton and Lee JJ agreed); *Spicer Thoroughbreds Pty Ltd v Stewart* [2023] NSWCA 82 at [66] (Leeming JA, with whom Mitchelmore JA and Griffiths AJA agreed). In the present case, there is a potential difficulty in the application of that regulatory regime to the Earner product, but only if it were to be found that cryptocurrency is a kind of property. The definition of "scheme property" in s 9 of the Act includes not only contributions of money or money's worth to the scheme, but also "property acquired, directly or indirectly, with, or with the proceeds of, contributions or money …", and s 601FC(2) requires that the responsible entity of the scheme holds scheme property on trust for scheme members. In the case of Earner, the contributions of money were almost immediately converted to cryptocurrency which was then dealt with by Block Earner "in its sole discretion" on the basis that Block Earner has been granted "all rights and title" to that cryptocurrency: cl 4.3(f). That would appear to be antithetical to the notion that Block Earner held the cryptocurrency on trust for scheme

members. However, this issue does not arise if cryptocurrency is not property at all. Neither party advanced an argument to the effect that cryptocurrency is property, and both parties accepted that it was not necessary for me to decide that question in order to resolve these proceedings. Given the way in which the case has thus been conducted, it would not be appropriate to pursue further the question whether there are insuperable difficulties in the application of Pt 5C of the Act which would compel a conclusion that the Earner product does not satisfy the definition of "managed investment scheme".

46 Block Earner submitted that, even without deciding that cryptocurrency is property, there remains a difficulty in applying Pt 5C of the Act to the Earner product, in that if the product was a managed investment scheme users would be "reaping the benefit or the loss that arises from those third party lending arrangements" (T88.06–7). The submission appears to be based on the definition of "scheme property", which includes "income … derived, directly or indirectly from contributions", and it may be thought that if all that income were held on trust for members under s 601FC(2) this would change the nature of their investment because members were entitled to the fixed yield and only the fixed yield. However, the terms of any such trust would have to conform to the contractual entitlement of members to be paid the fixed yield irrespective of the income that Block Earner derived from contributions, and as to any income in excess of the fixed yield, the duty of the responsible entity of a registered scheme under s 601FC(1)(k) is to ensure that all payments out of the scheme property are made in accordance with the scheme's constitution.

47 I note that the section of Block Earner's website headed "Risk Disclosure" stated that Block Earner does not hold AUD on trust. As that disclosure does not have contractual force, it represents a conclusion of law which, in my view, would have been wrong if the Earner product had been a registered scheme, in light of s 601FC(2). In any event, counsel for Block Earner submitted that Block Earner was a trustee of the AUD which users of Earner and Access had paid to it (T55.40–56.09), despite what was stated in the "Risk Disclosure".

Did users of the Earner product make a financial investment?

48 Section 763B of the Act 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.

49 In relation to the three alternatives in para (a), it is sufficient if only one of those is satisfied. However, in my opinion, all three are satisfied in relation to the Earner product.

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.

Was the Earner product a derivative?

54 The meaning of "derivative" is provided by s 761D of the Act. I have set out this provision in analysing the Access product below. In relation to the Earner product, it is sufficient to note that an interest in a managed investment scheme that is not a registered scheme and has more than 20 members is excluded from the definition of "derivative": ss 761D(3)(c), 764A(1)(ba) and 601ED(1). As I have found that the Earner product is a managed investment scheme (and was not registered and had more than 20 members), it follows that the Earner product is not a derivative.

The Access Product

55 The Access product is marketed as providing users with access to the Aave and Compound protocols, being third party DeFi lending protocols operating on the Ethereum blockchain (Agreed Facts [24]). The product was described as follows on Block Earner's website as at 19 April 2022 in an answer to the question "How does Block Earner generate Variable yield?":

> Block Earner facilitates access to the leading yield platforms — Aave and Compound, which connect borrowers and lenders in decentralised finance. Your deposits are lent to borrowers, who pay an annualised yield on the funds borrowed.
>
> Aave and Compound are routinely audited, open source, decentralised and non-custodial peer-to-smart contract lending systems. Borrowers in this system are required to provide digital assets much greater than the borrowed amount as collateral.

56 DeFi protocols such as Aave and Compound use distributed ledger technologies to allow lending, staking (ie locking up in return for rewards) or exchanging crypto assets outside of centralised cryptocurrency exchanges (Agreed Facts at [25]). The services are implemented through executable software programs called smart contracts whose execution is automated (Agreed Facts at [25]). Both Aave and Compound provide a platform for users to lend out their cryptocurrency holdings and earn interest on their loans. Both protocols use algorithmic models to dynamically adjust interest rates based on the supply and demand for each cryptocurrency (Mr Keraboga's first affidavit at [70]). Each of Aave and Compound represent a market or

"pool" to which users of the DeFi protocols supply cryptoassets (eg ETH, BTC and USDC), which must be converted to protocol-specific digital tokens known as aTokens (aWETH, aWBTC and aUSDC in the case of Aave) or cTokens (cUSDC in the case of Compound) before the DeFi protocol user can supply to, or borrow from, the relevant market or "pool" (Agreed Facts [25]).

57 At all times, Aave and Compound could be accessed directly by individuals without using the Access Service (Agreed Facts [26]). In order for a user to access Aave or Compound without using Block Earner's platform, a user needs to:

(a) exchange their AUD for cryptocurrency via a cryptocurrency exchange;

(b) create their own digital cryptocurrency wallet that can connect to the DeFi protocol;

(c) send their cryptocurrency assets to the wallet;

(d) connect the wallet to the chosen DeFi protocol; and

(e) deposit their cryptocurrency directly with the protocol, so as to receive the necessary protocol-specific digital tokens in exchange for that cryptocurrency (Mr Karaboga's first affidavit at [72]).

However, by using the Access service, Block Earner's users could access Aave and Compound without entering into a series of separate and distinct transactions to exchange cryptocurrency to DeFi-specific digital tokens (ie cUSDC, aWETH, aWBTC or aUSDC) before interacting with the relevant DeFi protocol (Agreed Facts [26]).

58 As already mentioned, there is no central counterparty to the transactions that occur on the DeFi protocols. All transactions occur against the market or pool (Agreed Facts [27]). The way in which Block Earner provides the Access service is as follows:

(a) Unless the user is transferring in their own eligible cryptocurrency, the first step that Block Earner takes is to provide the Exchange Service to convert the users' AUD to eligible cryptocurrency. Up to November 2022, this conversion took place through the Stablehouse exchange (and then by other third-party cryptocurrency exchange providers after that date) in the same way as applied to the Earner service. However, as the cryptocurrency is not loaned to Block Earner, it is treated by Block Earner as remaining the user's property at all times (Mr Keraboga's first affidavit at [84]);

(b) The next step is to send the users' eligible cryptocurrency to a Block Earner wallet that is connected to the DeFi protocol. It is not possible to use the Block Earner Crypto Wallet for this purpose (ie the wallet controlled by Block Earner for the purpose of exchanging AUD to cryptocurrency for the purposes of the Earner Product) as that wallet does not have the necessary application interface to interact with the DeFi protocols. Instead, Block Earner maintains separate wallet technology using Fireblocks, a third-party provider which provides white label wallet infrastructure technology (similar to a third-party custodian operating a custodial wallet, as described above) (the **DeFi Access Wallet**). The DeFi Access Wallet is a multi-signature wallet as described above, being a wallet in relation to which any transaction in or out of the wallet needs to be verified by two or more people (and in the case of Block Earner four people were required to approve any transactions). This provides an added layer of security for transactions in and out of the wallet and eliminates "key person" risk. The DeFi Access Wallet technology also allows Block Earner to interact with the smart contracts which are part of the DeFi protocols (Mr Karaboga's first affidavit at [85]); and

(c) The DeFi Access Wallet on each protocol is an "omnibus" wallet that holds tokens for all users currently using the Access service. When Block Earner first launched the Access service, Mr Karaboga looked into setting up individual accounts for each user, but this was not feasible as additional fees would be incurred for each account when it connected to the DeFi protocols. Instead of maintaining individual accounts, Block Earner sends user cryptocurrency to the DeFi Access Wallet in daily batches and keeps the database ledger at all times recording how much cryptocurrency has been sent on behalf of each user. Those ledgers are then used to calculate the proportionate yield earned by each user. A user's entitlement is reflected at all times in the amounts displayed on the platform (Mr Karaboga's first affidavit at [86]). Under the Terms of Use, Block Earner is responsible for tracking and calculating returns for each user on its ledger, through daily reconciliation procedures: see cl 4.2(a)(iii) in the version extracted above (Agreed Facts at [30]); and

(d) While Block Earner's technology provides a stream-lined solution to users for accessing each of Aave and Compound, Block Earner is not involved with and has no way to influence the peer-to-peer transactions that automatically occur on the DeFi protocols as a result of the smart contracts which underpin each protocol (Mr Karaboga's first affidavit at [87]).

59 In summary, "Block Earner aggregates the DeFi-specific digital tokens of all users who have nominated Aave or Compound (ie cUSDC, aWETH, aWBTC and aUSDC) and holds those tokens in its Block Earner omnibus account on each protocol on behalf of users. At all times, users retain ownership of their cUSDC, aWETH, aWBTC or aUSDC tokens" (Agreed Facts at [29].

60 Block Earner does not receive any yield from the DeFi protocol on its own behalf. Block Earner does not operate, and has no influence over, the DeFi protocols. The relevant DeFi protocol determines the amount of yield earned, and Block Earner does not retain any yield earned (Agreed Facts at [28]). Under the Terms of Use, Block Earner is required to pass on all earnings from an Access service user's cUSDC, aWETH, aWBTC or aUSDC tokens through to that user: see cl 4.2(d) of the version of the Terms of Use extracted above (Agreed Facts at [35]).

61 By providing access to Aave and Compound, Block Earner automatically qualifies for incentive payments from Aave and Compound. Those incentives have an approximate value of USD11 (from Aave) and USD60 (from Compound) since access was first offered (Agreed Facts at [31]). Block Earner has not claimed the incentives from Aave or Compound and Block Earner says that it has no intention of doing so (Agreed Facts at [32]). The relevant evidence shows that the tokens offered by way of incentives from Aave or Compound have not been claimed by Block Earner and that no funds have ever been claimed by Block Earner from DeFi platforms (Agreed Facts at [32]).

62 In the period from March 2022 (when Block Earner commenced offering the Access service) to 14 March 2023, all users of the Access service converted AUD to eligible cryptocurrency in order to use the Access service (Agreed Facts at [33]). In addition, since 15 March 2023, two users have transferred eligible cryptocurrency directly into the Block Earner Crypto Wallet in order to use the Access service (Agreed Facts at [33]).

63 The amount of eligible cryptocurrency received by a user when they exchange their DeFi tokens back to eligible cryptocurrency depends on the yield received from the relevant DeFi protocol. To date, all users exiting the Access service have used Block Earner to convert eligible cryptocurrency to AUD. From 20 September 2022, at the latest, users had the option to contact Block Earner's customer service team to make cryptoasset withdrawals if they did not wish to convert the eligible cryptocurrency to AUD. The amount of AUD received by the user when they exchanged their eligible cryptocurrency to AUD (whether they used the Access

service or not) varies by reference to the exchange rate between AUD and the relevant cryptoasset (Agreed Facts at [34]).

64 Under the Terms of Use, users can cease using the Access service at any time, at which time Block Earner will either process a cryptoasset withdrawal for the user or convert the nominated value of cUSDC, aWETH, aWBTC or aUSDC tokens to AUD and transfer this amount to the Fiat Account (as defined in the Terms of Use), together with any earnings generated by the users from their use of the DeFi protocols (Agreed Facts at [36]).

65 As at 30 April 2023, approximately 165 users were using the Access services (Agreed Facts at [37]). As at 4 May 2023, Block Earner held less than AUD117,560 worth of cryptoassets which belonged to users of the Access service, those assets being held on behalf of users by Block Earner in its omnibus accounts (Agreed Facts at [38]). The Access service is not, and has never been, registered as a managed investment scheme (Agreed Facts at [39]).

Is the Access product a managed investment scheme?

66 As with the Earner product, the first issue which arises is whether there is a "scheme". In relation to the Access product, ASIC submitted in its oral address that the scheme is identified at paragraphs [16B]–[16I] and [16K] of the Amended Concise Statement, which are to the following effect:

(a) Block Earner markets the Access product as providing consumers with access to the Aave protocol, a smart-contract governed, DeFi lending protocol operating on the Ethereum blockchain, and until late 2022 the Access product could also be used to access the DeFi lending protocol known as Compound which operates in a similar fashion to the Aave protocol;

(b) the key features of the Terms of Use relevant to the Access product have relevantly remained the same since March 2022;

(c) for a consumer to acquire, invest in or use the Access product, they must have an account with Block Earner into which they deposit AUD, which process includes agreeing to the Terms of Use;

(d) to use the Access product, the consumer chooses USDC, BTC or ETH, and Aave or Compound (when it was available and for USDC only);

(e) the following steps are then taken:

(i) Block Earner converts the consumer's AUD deposits into the nominated cryptoasset through a centralised exchange service provider;

(ii) once a day, Block Earner transfers the cryptoassets onto the DeFi protocol and in return, Block Earner is issued the relevant DeFi tokens corresponding to the underlying cryptoasset (eg Block Earner would receive the tokens aUSDC in exchange for USDC transferred to the Aave protocol);

(iii) Block Earner aggregates the DeFi tokens in Block Earner's omnibus account connected to the DeFi protocol; and

(iv) Block Earner receives yield for the cryptoassets it has transferred to the DeFi protocol, which is reflected in increases to the DeFi token balance held in its omnibus account (in the case of Aave) or in the exchange rate between the DeFi token and the underlying cryptoasset in the case of compound;

(f) when the consumer chooses to exit the Access product, the following steps are taken:

(i) Block Earner redeems the DeFi tokens (including earnings) from the DeFi protocol for the underlying cryptoassets;

(ii) Block Earner converts the cryptoassets to AUD;

(iii) Block Earner notionally transfers the AUD to the consumer's account on the Block Earner platform; and

(iv) the customer can withdraw the AUD to their nominated bank account;

(g) the Terms of Use provide that under the Access product, Block Earner "aggregates" the DeFi tokens on its Block Earner omnibus account on each DeFi protocol;

(h) the Terms of Use also provide that Block Earner is responsible for tracking and calculating returns on DeFi tokens for each user on its ledger, and Block Earner will perform daily reconciliation procedures and update the displayed user holdings on Block Earner platform accounts;

(i) the terms provide that all earnings from DeFi tokens are passed through to the user but that Block Earner does not pass along additional incentives or promotions offered by the underlying platforms (eg deposit incentives on Aave where tokens are locked up for one year); and

(j) the amount of AUD received back by the consumer varies by reference to both the variable yield generated on the DeFi protocol and the exchange rate between AUD and the relevant cryptoassets.

67 I am satisfied that the evidence establishes that those alleged elements were in fact implemented, and that they constitute a "scheme" in the sense identified above.

68 The next question is whether subpara (a)(i) of the definition of "managed investment scheme" is satisfied, namely people contribute money or money's worth as consideration to acquire rights to benefits produced by the scheme. As discussed above, the verb "contribute" conveys joint rather than independent action. ASIC draws attention to the element of the Access service whereby Block Earner aggregates the tokens exchanged under the Exchange Service from all users who have nominated Compound or Aave and holds such tokens in its Block Earner "omnibus account" on each platform, being a matter reflected in cl 4.2(a)(ii) of the Terms of Use, which also contains the acknowledgment and agreement of users that Block Earner will use an "omnibus account" on Compound and Aave. From the point of view of individual users, however, the performance of their individual "holdings" of the relevant tokens is displayed on the Block Earner accounts on a daily basis pursuant to daily reconciliation procedures which Block Earner is obliged to perform under cl 4.2(a)(iii) of the terms. From the user's perspective, the money which they have paid to Block Earner for the Access product, and the financial performance of the tokens purchased with it, are treated on an individuated basis. The point is reinforced by the Agreed Facts at [29], which states that at all times, users retain "ownership" of their cUSDC, aWETH, aWBTC or aUSDC tokens. I am therefore not satisfied that users "contribute" money or money's worth, in the requisite sense of doing so jointly with others or to furnish a common fund. That conclusion is further reinforced by the next issue relating to pooling.

69 In relation to subpara (a)(ii), concerning whether any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits for the people who hold interests in the scheme, ASIC relies again on the use of the Block Earner "omnibus account" on the Compound and Aave protocols. ASIC submits that it need only establish that contributions are to be pooled and that there are financial benefits through the scheme to those who hold interests in the scheme, and need not establish that there is any link between the pooling and the financial benefits other than the pooling and the financial benefits both being elements of the scheme (T39.06–40.40). I reject that submission, given that the statutory language clearly requires a

link by use of the word "to" in the expression "any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits … for the people … who hold interests in the scheme". The word "to" in that context means "in order to", thereby requiring that there be a purposive link. The submission was also contrary to the earlier (and correct) submission by ASIC that "there is required to be a link between the contributions that are pooled and the production of benefits, and that must be one which is objectively disclosed" (T27.23–25), that submission being based (correctly) on *National Australia Bank v Norman* at [148]–[150] (Gilmour J, with whom Spender J agreed).

70 ASIC submits that, in any event, there is a link between the "pooling" in the "omnibus account" and financial benefits to those who hold interests in the scheme by reason of the saving of account fees by the use of the omnibus account. As I have indicated above, Mr Karaboga gives evidence at [86] of his first affidavit that when Block Earner first launched the Access service, he looked into setting up individual accounts for each user but this was not feasible as additional fees would be incurred for each account when it connected to the DeFi protocols. Accordingly, instead of maintaining individual accounts, Block Earner sends users' cryptocurrency to the DeFi Access Wallet in daily batches and keeps a database ledger recording the amount of that cryptocurrency sent on behalf of each user and the proportionate yield earned and belonging to each user, those entitlements being reflected at all times in the amounts displayed on the platform.

71 There are three insuperable obstacles to ASIC's submission that the saving of account fees by use of the "omnibus account" was a financial benefit to those who hold interests in the scheme arising from the pooling of their contributions. First, the contention was not expressed in the Amended Concise Statement, and emerged only in ASIC's written submissions filed after the evidence was complete. Although concise statements are not simply a shorter form of pleading, they must provide fair disclosure of the nature of the case to be advanced, and if a claim that is at the heart of the case that the party seeks to advance at the final hearing is not to be found in the concise statement, then there will need to be an application for leave to amend: *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* [2021] FCAFC 121; (2021) 287 FCR 388 at [140], [144] and [149] (McKerracher and Colvin JJ); *Australian Securities and Investments Commission v National Australia Bank Limited (No 2)* [2023] FCA 118 at [31], [35] and [38] (Derrington J). This particular submission by ASIC did lie at the heart of its case that the Access product was a managed investment scheme and procedural fairness required

that an application to amend should have been made. Second, even if the contention had been made in the Amended Concise Statement, there is no evidence to the effect that the saving in account fees referred to by Mr Karaboga was a benefit to members, rather than a benefit simply to Block Earner (as ASIC accepted at T34.25–34). Whether Block Earner would have passed on some or all of the added costs of individual account fees may well have depended on the competitive pressures that Block Earner faced and the myriad other factors capable of influencing the price elasticity of supply and demand in the relevant market. Third, there is no evidence that the saving in account fees was ever disclosed to users, and accordingly, there is no basis from which it could be inferred that users objectively intended that their payments would be pooled to produce financial benefits for them in this way. ASIC bears the onus of proof of the elements of the definition of the "managed investment scheme" and has not discharged that onus in relation to subpara (a)(ii). ASIC ultimately accepted that it had not shown that there is a link between any pooling and any financial benefit for members (T41.08–17). Accordingly, subpara (a)(ii) of the definition of "managed investment scheme" is not satisfied.

72 As to the requirement in subpara (a)(iii) that the members do not have day-to-day control over the operation of the scheme, in my view that element is satisfied. As with the Earner product, the members could decide when they would enter and exit the scheme, but otherwise had no control over the operation of the scheme, and I do not regard the decisions as to entry and exit as constituting day-to-day control. The administrative tasks required to implement the scheme were conducted by Block Earner, and once those administrative steps were undertaken, the algorithms in the Aave and Compound protocols operated automatically to generate financial returns.

73 ASIC has not established the requirements of subparas (a)(i) and (ii), and thus the Access product was not a managed investment scheme.

Did users of the Access product make a financial investment?

74 I have set out above the terms of s 763B, which apply to this question. As I have said above, only one of the alternatives in para (a) of s 763B need apply, but in my view none of them apply to the Access product.

75 As to subpara (a)(i), this requires that the other person, namely Block Earner, uses the money or money's worth given by the investor to generate a financial return, or other benefit, for the

investor. ASIC submits that that is satisfied because Block Earner uses the payments by investors of AUD or cryptocurrency by exchanging AUD to cryptocurrency, transferring the cryptocurrency to the DeFi Access Wallet and receiving tokens from Aave or Compound in return, and then reversing those transactions when a user decides to exit the transaction. The fundamental difficulty with that submission is that, in substance, Block Earner is doing no more than providing services which involved, in the first place, exchanging AUD for cryptocurrency, and second, connecting users' cryptocurrency to smart contracts on DeFi protocols to earn yield. Block Earner does nothing with the cryptocurrency other than deposit it into a smart wallet connected to the applicable DeFi protocol on instructions from the user. At all times, users retain "ownership" of their tokens (Agreed Facts at [29]). In essence, Block Earner is in the position of a broker, effecting transactions on behalf of its customers, who were themselves using money or money's worth to generate a financial return or other benefit for themselves.

76 That conclusion is fortified by reference to Note 2(b) to s 763B, which provides the following example of actions that do not constitute making a financial investment under s 763B:

> a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

The example set out in that Note forms part of the Act: *Acts Interpretation Act 1901* (Cth), ss 13(1), 15AD. While it does not govern the text, it can be used as an aid in interpretation: *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108; (2020) 279 FCR 1 at [289] (O'Callaghan and Steward JJ), and see DC Pearce, *Statutory Interpretation in Australia* (10th ed, LexisNexis, 2024) at [4.101]–[4.102]. Block Earner submits, and I accept, that the example supports an interpretation of s 763B that maintains a distinction between the giving of money or money's worth to a person to invest for a financial return, as against merely engaging someone to purchase an asset on one's behalf, the Access services squarely falling into the latter category. ASIC submits that the example in the Note does not apply to the Access product on the basis that the Access product also involved the repayment of money or money's worth to the user upon exiting the transaction, and also that the Note refers only to giving money and not to other matters. I do not regard those matters as detracting from the force of Block Earner's submission, in circumstances where the repayment of money at the end of the transaction (or series of transactions) is also a feature of the services provided by brokers, and where the service of holding tokens in Block Earner's

DeFi Access Wallet was a matter of administrative convenience with no demonstrated impact on the financial return or benefit which would accrue to users (as opposed to the alternative of a multiplicity of individual users' accounts on the relevant protocols). As I have said above, there is no evidence that the saving in account fees by using Block Earner's omnibus account was a benefit to users, rather than a benefit to Block Earner.

77 As to the alternatives in subparas (a)(ii) and (iii), there is no evidence that investors or Block Earner intended that the contribution would be "used" in the requisite sense to generate a financial return or other benefit for the investor. The relevant intention which can be inferred from the evidence is that investors would, as a matter of substance, themselves be using their money or money's worth to generate a financial return or benefit for themselves, with the role of Block Earner being that of a broker or intermediary to effect the transaction on the part of the investors.

78 As to para (b) of s 763B, I accept that the investors had no day-to-day control over the use of the contribution to generate a return or benefit, consistently with my reasoning in relation to the definition of "managed investment scheme".

79 Accordingly, in my view the users of the Access product did not make a financial investment within the meaning of s 763B.

Is the Access product a derivative?

80 The meaning of "derivative" is provided by s 761D, which provides relevantly as follows:

> (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.

…

(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):

…

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

81 Also relevant to this question is s 761B, which provides 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.

82 ASIC submits that the Access product is a derivative because, in the usual case of the user being repaid in AUD, the amount of AUD to be paid will vary according to the value of the tokens and the value of the cryptocurrency into which those tokens are converted. In the alternative but less common case of cryptocurrency being taken by the user at the end of the transaction, there is still a conversion from tokens into cryptocurrency, so that the cryptocurrency received will vary according to the value of the tokens.

83 ASIC submits that it does not matter whether the Exchange Service is treated as part of the Access product, or as a separate arrangement. ASIC submits that it is reasonable to assume that the parties to the arrangements regard the two as constituting a single scheme within the meaning of s 761B(c), and accordingly the arrangements are relevantly to be treated as if they together constituted a single arrangement.

84 There is considerable force in ASIC's submissions to the effect that s 761D(1) is satisfied, but I need not decide that question in view of the conclusion to which I have come that the Access product constitutes a contract for the future provision of services within the meaning of s 761D(3)(b), and is therefore excluded from being a derivative. The substance of the Access service is that users are given streamlined access to DeFi protocols (Mr Karaboga's first

affidavit at [87]), and obtain rights to require Block Earner to carry out certain steps that allow the users to generate yield from their cryptocurrency through the DeFi protocols and the digital tokens in which users "retain ownership" (in the language of the Agreed Facts at [29]). Those services include exchanging AUD and cryptocurrency to tokens (cll 4.1(a)(i) and (e)(i), 4.2(a)(ii)), aggregating users' tokens in an omnibus account that provides access to Aave and Compound and holding tokens in that omnibus account (cl 4.2(a)(ii)), tracking and calculating returns earned on their tokens (cl 4.2(a)(iii)), and ultimately remitting the tokens and any yield earned to the user when they elect to cease using Access (cl 4.2(c), (d)). The exemption in s 761D(3)(b) requires focus on the purpose or object of the contract, objectively ascertained from the contractual terms, and involves looking at the substance of the contract: *Joffe v The Queen* [2012] NSWCCA 277; (2012) 82 NSWLR 510 at [20] (Bathurst CJ), [165]–[167] (Barrett JA). The future provision of those services was at least the primary, if not the only, subject matter of the Access product. The future provision of those services could not be regarded as merely incidental or ancillary to some other purpose. In those circumstances, the exclusion from the definition of "derivative" relating to a contract for the future provision of services applies.

Conclusion

85 It follows that ASIC has succeeded in establishing contraventions of s 601ED and 911A of the Act in relation to the Earner product, but has failed in relation to the Access product. I will make declarations accordingly.

86 Both parties have expressed the view that I should reserve costs at this stage, and decide the question of costs when I have determined the next stage of the proceedings concerning the amount of any pecuniary penalty. That appears to me to be the appropriate course.

I certify that the preceding eighty-six (86) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 9 February 2024