FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (Penalty) [2024] FCA 578

File number:	NSD 1007 of 2022
Judgment of:	**JACKMAN J**
Date of judgment:	4 June 2024
Catchwords:	**CORPORATIONS** – civil penalty – whether to relieve defendant from liability – where defendant contravened *Corporations Act* ss 911A and 601ED – where contraventions involved investing customer funds in cryptocurrency – where defendant perceived there to be legal uncertainty, obtained competent legal advice, and genuinely concluded that there was no identified risk of breaching the law – defendant relieved from liability **COSTS** – effect of misleading media release by regulator
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) s 19 *Corporations Act 2001* (Cth) ss 601ED, 911A, 1317E, 1317G, 1317S *Federal Court of Australia Act 1976* (Cth) s 37N
Cases cited:	*Australasian Meat Industry Employees' Union v Australia Meat Holdings Pty Ltd* [1998] FCA 664; (1998) 82 IR 76 *Australian Building and Construction Commission v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 *Australian Competition and Consumer Commission v Lactalis Australia Pty Ltd (No 2)* [2023] FCA 839 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 *Australian Securities and Investments Commission v Allianz Australia Insurance Ltd* [2021] FCA 1062; (2021) 156 ACSR 638 *Australian Securities and Investments Commission v*

Citrofresh International Ltd (No 3) [2010] FCA 292; (2010) 268 ALR 303

Australian Securities and Investments Commission v GetSwift Limited (Penalty Hearing) [2023] FCA 100; (2023) 167 ACSR 178

Australian Securities and Investments Commission v Healey (No 2) [2011] FCA 1003; (2011) 196 FCR 430

Australian Securities and Investments Commission v Plymin (No 2) [2003] VSC 230; (2003) 21 ACLC 1237

Australian Securities and Investments Commission v Rio Tinto Ltd (No 2) [2022] FCA 184

Australian Securities and Investments Commission v Vines [2005] NSWSC 1349; (2005) 65 NSWLR 281

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

Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (No 2) [2024] FCA 197

Cameron v R [2002] HCA 6; (2002) 209 CLR 339

Cousins v Merringtons Pty Ltd (No 2) [2008] VSC 340

Dunlop v Woollahra Municipal Council [1982] AC 158

Eva v Southern Motors Box Hill Pty Ltd (1977) 15 ALR 428

Flight Centre Limited v Australian Competition and Consumer Commission (No 2) [2018] FCAFC 53; (2018) 260 FCR 68

Giannarelli v Wraith (No 2) (1991) 171 CLR 592

Gillfillan v Australian Securities and Investments Commission [2012] NSWCA 370; (2012) 92 ACSR 460

Hall v Poolman [2007] NSWSC 1330; (2007) 65 ACSR 123

Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (No 6) [2007] NSWSC 124; (2007) 63 ACSR 1

Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission [2022] FCAFC 170; (2022) 295 FCR 106

New Image Photographics Pty Ltd v Fair Work Ombudsman [2013] FCA 1385

Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich [2003] NSWSC 186; (2003) 44 ACSR 682

Siganto v R [1998] HCA 74; (1998) 194 CLR 656

Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; (2012) 287 ALR 249

	Times Travel (UK) Ltd v Pakistan International Airlines Corporation [2021] UKSC 40; [2023] AC 101 *Trilogy Funds Management Ltd v Sullivan (No 2)* [2015] FCA 1452; (2015) 331 ALR 185 *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* [2003] FCAFC 193; (2003) 131 FCR 529 *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 236; (2005) 224 ALR 390
	Australian Law Reform Commission, "Confronting Complexity: Reforming Corporations and Financial Services Legislation" (Report No 141, November 2023) Finnis, John, *Natural Law and Natural Rights* (Oxford University Press, 1980) Fuller, Lon L, *The Morality of Law* (Yale University Press, rev ed, 1969) Heydon, JD, *Cross on Evidence* (14th Australian edition, 2024)
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	84
Date of hearing:	15 May 2024
Counsel for the Plaintiff:	Mr J Giles SC and Ms EL Beechey
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 655 080 869** Defendant

ORDER MADE BY: **JACKMAN J**

DATE OF ORDER: **4 JUNE 2024**

THE COURT DECLARES THAT:

1. The defendant has contravened s 911A(1) and (5B) of the *Corporations Act 2001* (Cth) (the **Act**) 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 Act by operating an unregistered managed investment scheme with respect to the "Earner" product.

THE COURT ORDERS THAT:

3. The defendant be relieved pursuant to s 1317S(2) from liability to pay a pecuniary penalty under s 1317G(1) in relation to the contraventions of s 911A(5B) and s 601ED(8) of the Act.

4. Each party pay its own costs of the proceedings up to and including 9 February 2024.

5. The plaintiff pay the defendant's costs after 9 February 2024.

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

REASONS FOR JUDGMENT

JACKMAN J:

Introduction

1 In *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2024] FCA 64 (**Contravention Judgment**), I found that the defendant (**Block Earner**) contravened s 601ED(5) and (8) and s 911A(1) and (5B) of the *Corporations Act 2001* (Cth) (**Act**) with respect to its "Earner" product, but not with respect to its "Access" product. In relation to the "Earner" product, those contraventions were established by reason of Block Earner offering that product without an Australian Financial Services Licence (**AFSL**) and without registering the product as a managed investment scheme, for a period of about eight months between 17 March 2022 and 16 November 2022 (the **Contraventions**). I made declarations accordingly, which were subsequently amended so as to preserve Block Earner's ability to rely on ss 1317S and 1317QC of the Act: *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (No 2)* [2024] FCA 197. Block Earner no longer relies on s 1317QC, and relies on s 1317S only in relation to the making of an order that it pay a pecuniary penalty, and not in relation to the making of a declaration of contravention. Accordingly, in the orders which I now make, the original form of the declarations has been reinstated.

2 There are three issues which remain to be determined: first, whether Block Earner should be relieved of liability for a pecuniary penalty order pursuant to s 1317S; second, the amount (if any) of the appropriate penalty; and third, the question of the costs of the proceedings.

Should Block Earner be relieved of liability under s 1317S?

3 Section 1317S(2) of the Act provides as follows:

> If:
>
> (a) eligible proceedings are brought against a person; and
>
> (b) in the proceedings it appears to the court that the person has, or may have, contravened a civil penalty provision but that:
>
> (i) the person has acted honestly; and
>
> (ii) having regard to all the circumstances of the case (including, where applicable, those connected with the person's appointment as an officer, or employment as an employee, of a corporation or of a Part 5.7 body), the person ought fairly to be excused for the contravention;
>
> the court may relieve the person either wholly or partly from a liability to

which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention.

4 The term "eligible proceedings" is defined relevantly as meaning proceedings for a contravention of a civil penalty provision (s 1317S(1)), which includes ss 911A(5B) and s 601ED(8) of the Act.

5 The effect of relief under s 1317S is not to remove the breach, but to operate as a dispensing power to excuse the contravener: *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003; (2011) 196 FCR 430 at [86] (Middleton J); *Deputy Commissioner of Taxation v Dick* [2007] NSWCA 190; (2007) 242 ALR 152 at [78] (Santow JA). Relief from liability under s 1317S is not relief from the finding of contravention itself, but rather relief from liability resulting from orders after a finding of contravention: *Australian Securities and Investments Commission v Vines* [2005] NSWSC 1349; (2005) 65 NSWLR 281 at [50] (Austin J); *ASIC v Healey (No 2)* at [94] (Middleton J). Relief under s 1317S may thus operate in respect of all or any of the orders which the Court may make following a finding of contravention, including a pecuniary penalty order: *Australian Securities and Investments Commission v Plymin (No 2)* [2003] VSC 230; (2003) 21 ACLC 1237 at [7] (Mandie J); *ASIC v Healey (No 2)* at [96] (Middleton J). Block Earner submits, and I accept, that even if the Court is not satisfied that a contravener should be relieved of liability in respect of declarations (for example, because of their deterrent effect), the Court may be prepared to grant relief from liability for any pecuniary penalty order.

6 As Middleton J said in *ASIC v Healey (No 2)* at [84], the question of relief under s 1317S involves three stages of inquiry:

(a) whether the applicant for relief has acted honestly;

(b) whether having regard to all the circumstances the applicant ought fairly to be excused; and

(c) whether the applicant should be relieved from liability wholly or in part, and if partly, to what extent.

Did Block Earner act honestly?

7 In relation to the first stage of the inquiry, the Court must be positively satisfied that the applicant has acted honestly; a mere absence of dishonesty is insufficient: *ASIC v Healey (No 2)* at [87]. It has been said that a person acts honestly if the person's conduct is without moral turpitude, that is: (a) without deceit or conscious impropriety; (b) without intent to gain an

improper benefit or advantage; and (c) without carelessness or imprudence that negates the performance of the duty in question: *ASIC v Healey (No 2)* at [88]. The last element of that proposition by Middleton J requires some further explanation. Middleton J was not saying that honesty requires a lack of carelessness or imprudence. Ordinary language draws a clear distinction between a lack of honesty and a lack of carelessness. The expression "without carelessness or imprudence that negates the performance of the duty in question" must be understood as meaning "without carelessness or imprudence to such a degree as to demonstrate that no genuine attempt at all has been made to comply with the duty". A formulation substantially to that effect was adopted in *Hall v Poolman* [2007] NSWSC 1330; (2007) 65 ACSR 123 at [325] (Palmer J), and subsequently approved in *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370; (2012) 92 ACSR 460 at [293] (Sackville AJA, with whom Beazley and Barrett JJA agreed), and in my view that is the preferable way in which the relevant principle should be expressed.

8 In the present case, I am satisfied that Block Earner acted honestly. The unchallenged evidence of Mr Karaboga is that at the time the Earner product was launched, he considered whether an AFSL was required to provide that product, and formed the view that it was not a regulated financial product and that an AFSL was not required (paras 16–17 of his third affidavit). He neither intended nor understood that the Earner product was a managed investment scheme or an investment facility (para 17 of his third affidavit). Mr Karaboga met with Block Earner's Head of Risk and Compliance, Tawanda Mangere, and together they were satisfied that the Earner product was aligned with Block Earner's overall risk appetite (para 18). That evidence is a reference to Block Earner's Enterprise Risk Management Framework (**ERMF**), which Mr Karaboga described as setting out Block Earner's risk appetite and the process for assessing risks as and when they arise (third affidavit at para 10(a)). The ERMF identified "Compliance" as one of the principal risk types, defined as "Potential for penalties or loss to Block Earner or for an adverse impact to our clients, stakeholders or to the integrity of the markets we operate in through a failure on our part to comply with laws, or regulations". Mr Karaboga referred to the ERMF stating that Block Earner had "no appetite for breaches in laws and regulations" (third affidavit at para 12). The "Risk Appetite Statement" in the ERMF in relation to "Compliance" risk was as follows:

> Block Earner has no appetite for breaches in laws and regulations. Whilst recognising that regulatory non-compliance cannot be entirely avoided, Block Earner strives to reduce this to an absolute minimum.

Accordingly, the effect of Mr Karaboga's unchallenged evidence is that Block Earner concluded that there was no identified risk of Block Earner breaching any laws or regulations by implementing the Earner product. While Mr Kariboga's evidence was expressed elliptically, I accept it in the absence of any challenge.

9 In addition, senior counsel for the Australian Securities and Investments Commission (**ASIC**) accepted in his oral submissions in reply that the evidence shows that Block Earner received legal advice from Gilbert & Tobin in relation to its products before launching the Earner product (T62.24–27, 63.21–25). On 11 April 2022, ASIC issued a notice under s 19(2) of the *Australian Securities and Investments Commission Act 2001* (Cth) requiring Block Earner to provide a written statement, among other things, as to the steps that Block Earner had taken to consider whether it was offering or providing financial products and whether it required an AFSL, and whether Block Earner had obtained legal advice in relation to whether its products or services were financial products and whether it needed to obtain an AFSL. Block Earner's solicitors, Gilbert & Tobin, responded by letter dated 27 April 2022, saying that Block Earner obtained legal advice from Gilbert & Tobin in relation to those matters. Block Earner has maintained legal professional privilege over the advice, and I do not draw any adverse inference against Block Earner from the fact that Block Earner has chosen not to disclose the legal advice which it obtained, consistently with *Giannarelli v Wraith (No 2)* (1991) 171 CLR 592 at 605 (McHugh J) and *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (No 6)* [2007] NSWSC 124; (2007) 63 ACSR 1 at [168] (McDougall J); and see JD Heydon, *Cross on Evidence* (14th Australian edition, 2024) at [25040]. Mr Karaboga did not refer to that advice in his third or fourth affidavits, but there was no need for him to do so as the earlier affidavit of Ms Johnston of ASIC dated 22 March 2024 had already exhibited the correspondence of 11 and 27 April 2022 which proved that Block Earner had obtained legal advice. Block Earner was evidently keen to avoid any waiver of privilege in the preparation of Mr Karaboga's affidavits.

10 Block Earner submits that it sought at all times to comply with the law, did not engage in conscious impropriety, and did not seek to obtain an improper financial gain by launching or maintaining the Earner product without an AFSL or as an unregistered managed investment scheme. Block Earner submits that the Contraventions were breaches resulting from a misapplication of the technical definitions of managed investment scheme and financial products in the Act, as to which it was found to be correct in respect of the position which it took in relation to the Access product.

11 ASIC accepts that Block Earner acted without any deceit or conscious impropriety, and without any intent to gain an improper benefit or advantage. However, ASIC submits that Block Earner's conduct was so unreasonable as to constitute carelessness or imprudence of such a degree as to permit the Court to find that Block Earner did not meet the statutory requirement of acting honestly. In particular, ASIC submitted in writing and in its oral submissions in chief that, while a failure to obtain legal advice before acting does not prevent a finding that the defendant acted honestly, it may be a relevant consideration, citing *ASIC v Vines* at [41] and [43] (Austin J). However, as I have indicated above, ASIC ultimately accepted in its reply that Block Earner did obtain legal advice before launching the Earner product (T62.24–27, 63.21–25).

12 In the present case, I do not regard Block Earner as having been careless or imprudent, let alone guilty of carelessness or imprudence of such a degree as to demonstrate that no genuine attempt at all had been made to carry out the requirements of the Act or the general law. There can be no doubt, on the unchallenged evidence of Mr Karaboga and the correspondence of 11 and 27 April 2022 with ASIC, that Block Earner did make a genuine attempt to comply with the requirements of the Act. Indeed, in his oral submissions, senior counsel for ASIC accepted that Block Earner made a genuine attempt to comply (T16.11–13). In those circumstances, I am satisfied that Block Earner acted honestly.

Should Block Earner fairly be excused?

13 Section 1317S(2)(b)(ii) expressly requires that this question be addressed "having regard to all the circumstances of the case". The breadth of the expression "ought fairly to be excused" is capable of incorporating reasonableness as a consideration: *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023; (2016) 336 ALR 209 at [810] (Edelman J). Block Earner relies upon the following seven matters as the basis for it being excused from liability under s 1317S in respect of a pecuniary penalty order.

14 First, Block Earner submits that its conduct should not be characterised as a serious departure from the requirements of the Act, and should be seen as arising from an honest view about the application of technical definitions of financial products in the Act to the Earner product. I deal below with the question whether the contravention of s 601ED(8) (and also s 911A(5B)) was "serious" (as to which I find that it was serious), and I have already found that Block Earner acted honestly. Importantly, as I have said above, Block Earner formed the unchallenged view,

after obtaining legal advice from a leading law firm, that there was no identified risk that the Earner product would breach any laws or regulations.

15 Second, Block Earner relies on the proposition, which ASIC accepts, that no loss or damage was suffered by investors by reason of the provision of the Earner product without an AFSL or without registration as a managed investment scheme. The lack of consequences of the contravening conduct in the nature of harm to investors is a material factor weighing in favour of relief from liability: *ASIC v Vines* at [52]. By 7 December 2022, a few weeks after the Earner product was discontinued voluntarily by Block Earner, Block Earner had returned to users all of the cryptocurrency that had previously been lent as part of the Earner product (Mr Karaboga's third affidavit at para 26). Block Earner submits that, in circumstances where the terms and conditions of the Earner product provided customers with a contractual right to a fixed rate of return, the potential risk for loss to investors from the operation of the Earner product was relatively low, as the Earner product did not expose investors to the underlying risk of the performance of the cryptocurrency which was on-lent by Block Earner, and investors were also able to withdraw their funds loaned to Block Earner at any time, further limiting risks associated with fluctuations in the underlying value of the cryptocurrency. However, in my view, there was a real risk that Block Earner potentially may not have been able to repay its customers in the event that it was unable to recover amounts from defaulting counterparties. ASIC submits, and I accept, that investors were exposed to a risk of loss by Block Earner not meeting the requirement of $10 million in net tangible assets in order to be a responsible entity of a managed investment scheme (as set out in ASIC Regulatory Guide 166: see RG166.215 as issued in April 2021, and RG166.227 as issued in July 2022).

16 Third, Block Earner submits that the benefit obtained by it from the operation of the Earner product was modest, being a total profit of $21,309.60 for the period 17 March 2022 to 16 November 2022 (Mr Karaboga's third affidavit at para 30). Most of that profit, namely an amount of $14,573.97, was generated by the fees charged for the conversion of AUD to cryptocurrency and cryptocurrency to AUD (Mr Karaboga's third affidavit at [30(a)]). That conversion process was not an element of my reasons for finding that the Earner product was a managed investment scheme or investment facility, and the same conversion process formed part of the Access product, which was found not to have contravened the Act. I accept ASIC's submission that the fact of that profit is relevant to the grant of relief under s 1317S. But in light of the relatively small amount of the profit and the fact that most of it derived from the

lawful activity of currency conversion, I do not regard the profit as a matter of substantial weight in the circumstances of the present case.

17 Fourth, Block Earner submits that the Contraventions arose in an uncertain regulatory environment where government bodies were unsure as to the extent to which the financial product regime in the Act applied to cryptoasset service providers such as Block Earner. In this regard, Block Earner relies on various consultation papers released by the Department of Treasury in 2022 and 2023. For example, the consultation paper issued by the Department of Treasury on 21 March 2022 entitled "Crypto asset secondary service providers: Licensing and custody requirements" referred to the definition of "financial product" in s 763A of the Act and said (p 7):

> The current definition of a financial product, which was written prior to the invention and proliferation of crypto assets, does not provide sufficient clarity as to the intended regulatory treatment of a wide variety of novel crypto assets."

18 Block Earner also referred to a media release by the Australian Law Reform Commission dated 18 January 2024, referring to its Final Report entitled "Confronting Complexity: Reforming Corporations and Financial Services Legislation" (Report 141, 2023) which stated (p 1):

> The report found that the legislation governing Australia's financial services industry is a tangled mess – difficult to navigate, costly to comply with, and unnecessarily difficult to enforce.
>
> Judges have described the current laws as being like "porridge", "tortuous", "treacherous", and "labyrinthine".

19 The recommendations in the Final Report included making it easier to tell when something is a "financial product" or "financial service" by introducing a single, simplified definition of both terms (p 2). Mr Karaboga gave evidence that he perceived, based on the release (among other things) of the consultation paper issued by Treasury on 21 March 2022, that there was significant uncertainty as to whether Australia's existing financial services laws applied to products like the Earner product (third affidavit at para 36). However, this perception must be read in light of Mr Karaboga's evidence that Block Earner concluded in effect that there was no identified risk of the Earner product breaching any laws or regulations, and the documentary evidence shows that that conclusion was formed after obtaining legal advice from a leading law firm.

20 Fifth, Block Earner submits that it has received adverse media coverage as a result of these proceedings and the Contravention Judgment that has affected its legitimate and lawful business. In referring to "adverse publicity", Block Earner means unfair or incorrect reporting,

consistently with the relevant authorities. While adverse publicity in a general sense is often an inevitable consequence of wrongdoing and in most cases does not influence the assessment of the appropriate penalty, adverse publicity of an unfair or incorrect kind initiated by the prosecuting authority itself goes beyond the natural and probable consequences of the relevant wrongdoing, and may be taken into account in mitigation of penalty: *Eva v Southern Motors Box Hill Pty Ltd* (1977) 15 ALR 428 at 437 (Smithers J); *Cousins v Merringtons Pty Ltd (No 2)* [2008] VSC 340 at [61] (Hansen J); *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385 at [67] (Collier J). In my view, such unfair or misleading reporting is relevant also to whether a person ought fairly to be excused under s 1317S, given the likely detriment already suffered by reason of that reporting.

21 On the day that I delivered the Contravention Judgment, on 9 February 2024, ASIC issued a media release, which was available to members of the public through ASIC's website, with the title or headline: "Court finds Block Earner crypto product needs financial services licence". The text of the media release began as follows:

> The Federal Court has found fintech company Block Earner engaged in unlicensed financial services conduct when offering its crypto-backed Earner product.
>
> From March 2022 to November 2022, Block Earner offered consumers the Earner product which allowed them to earn fixed yield returns from different crypto-assets.
>
> In one of the first decisions on the application of the financial services law to crypto-backed products, today the Court found that Block Earner provided unlicenced [sic] financial services and operated an unregistered managed investment scheme when offering Earner. This is because the Earner product met the definition of the managed investment scheme and a facility for making a financial investment under the law.

22 The media release later stated that ASIC had been unsuccessful in its allegation that Block Earner's "Access" product was a financial product, stating that "Block Earner markets this product as giving consumers access to decentralised finance (DeFi) lending protocols." Later in the media release, ASIC said the following:

> Block Earner has been an authorised representative of Flash Partners Pty Ltd since 1 August 2022. This authorisation does not relate to the Earner or Access Products.

23 Block Earner submits that the title or headline was unfair to Block Earner (although not deliberately so) because it was apt to lead a reader to form an inaccurate view or understanding of the outcome of the proceeding, as:

(a) it failed to make any mention of the fact that the Access product was found not to require an AFSL, which formed half of ASIC's case against Block Earner and which is the product currently being offered by Block Earner; and

(b) it suggested that Block Earner currently "needs" a financial services licence for a crypto product, when in fact Block Earner ceased offering the Earner product on 16 November 2022 and it does not require an AFSL for its Access product.

24 Following ASIC's media release, a number of articles were published reporting the findings of contravention in relation to the Earner product. There are seven such articles in evidence. One of those articles was published by "cryptonews" on 9 February 2024 with the headline "Australian Federal Court Rules Against Block Earner for Unlicensed Financial Services Conduct". It reproduced a Twitter post by ASIC Media which displayed the title or headline of the ASIC media release.

25 Mr Karaboga gave unchallenged evidence that he is "incredibly concerned" that such articles, along with the findings of contravention, will have devastating business and reputational consequences for the services that Block Earner continues to offer, including the Access product which was found not to have contravened the law (third affidavit at para 42). Mr Karaboga said that, in his professional experience, these kinds of business and reputational consequences can be particularly severe for new companies like Block Earner, which do not have significant cash reserves or are dependent on future fundraisings (in that potential investors may consider the adverse news coverage and the Contravention Judgment when making investment decisions) (third affidavit at para 43). Mr Karaboga is also concerned that the adverse media publicity will result in existing business partners deciding no longer to work with Block Earner, which could have severe consequences for Block Earner's operations (third affidavit at paras 44–50). Mr Karaboga refers to one of Block Earner's service providers deciding to terminate its agreement due to the potential for these proceedings to cause it reputational damage, but ultimately being persuaded not to do so (paras 45–48). Another service provider has terminated its arrangement with Block Earner concerning a product which is unrelated to Earner and Access (paras 49–50). Mr Karaboga refers to the adverse media coverage as one of the factors which led to Block Earner being unsuccessful in obtaining new equity funding in the second half of 2023 (third affidavit at para 57). I note, however, that Mr Karaboga's evidence appears to refer to the media publicity generally, rather than unfair or inaccurate reporting in particular.

26 ASIC disputed in its written submissions that its media release of 9 February 2024 was unfair or inaccurate, and submitted that it was inappropriate to refer only to the heading of a media release and not the text which followed. However, during the hearing before me, senior counsel for ASIC accepted that the headline of ASIC's media release was wrong, and that the media release as a whole had a tendency to mislead, and on that ground was unfair (T21.21–42).

27 In my view, Block Earner is correct to submit that ASIC's media release was unfair and misleading. The title or headline clearly stated that, according to the Court, Block Earner's crypto product "needs" a financial services licence. Using the present tense, ASIC was conveying that there was a need as at 9 February 2024 for Block Earner to hold a financial services licence in order to provide its crypto product. That was false. The crypto product offered by Block Earner which needed an AFSL was the Earner product which had not been offered since November 2022. The product which is still provided by Block Earner, namely the Access product, does not require an AFSL. Although the text of the article did refer to Block Earner having offered the Earner product from March to November 2022, many readers would not have been sufficiently astute to realise that there was no finding by the Court that Block Earner "needs" an AFSL to offer the crypto product that it was offering as at 9 February 2024. Indeed, the finding was that the crypto product which was on offer as at 9 February 2024 did not require an AFSL. At the very least, ASIC's media release had a "tendency to lead into error" in the sense discussed in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 at [39] (French CJ, Crennan, Bell and Keane JJ). While most of the published articles reported fairly on the Contravention Judgment, ASIC's media release was available to members of the public through ASIC's website, and one of the articles showed the headline of the ASIC media release.

28 Sixth, Block Earner relies upon the fact that it has never previously been found by a court to have engaged in similar conduct. However, Block Earner was founded only in November 2021 and its platform was launched in March 2022 (third affidavit of Mr Karaboga at para 5). Accordingly, I do not regard this as a matter of any real significance.

29 Seventh, Block Earner relies on the unchallenged evidence of Mr Karaboga (third affidavit at para 9) to the effect that it has been actively involved in policy discussions with key industry participants and regulators concerning crypto-related products, and has actively sought to engage with the government on proposals relevant to the impact of cryptocurrency and related services on the existing financial services, including through its membership of representative

bodies concerning the fintech and blockchain industries. Block Earner submits, and I accept, that its active participation in these industry bodies demonstrates a willingness on its behalf to engage with government and regulatory bodies on effective ways to regulate crypto-related products and services. Block Earner submits, and I accept, that this participation supports a finding that Block Earner has, at all times, sought to conduct its business in a lawful manner and has not consciously sought to provide cryptocurrency services in a way that contravenes the Act. Further, Mr Karaboga refers to two instances in which Block Earner determined that it did require a licence, whether an AFSL or an Australian Credit Licence, and ensured that it obtained one (third affidavit at para 49; fourth affidavit at para 12).

30 I accept that the first, second, fourth, fifth and seventh matters relied on by Block Earner favour Block Earner's application for relief from liability, except that: (a) in relation to the first matter, I find below that Block Earner's contravention of s 601ED(8) was serious, and I would have made the same finding in relation to the contravention of s 911A(5B) if it were necessary to do so; and (b) in relation to the second matter, I regard the potential risk of loss to customers as real and significant.

31 ASIC submits that the provisions which Block Earner contravened are important in terms of public policy: see *ASIC v Vines* at [52] (Austin J). I accept that submission, which I regard as a significant matter against the grant of relief from liability.

32 ASIC also submits that the questions whether or not the Earner product was a regulated financial product and involved a managed investment scheme are quintessentially legal questions, involving complex and technical questions of statutory construction and the application of judicial reasoning from other cases. ASIC submits that there is no evidence that Block Earner's personnel held sufficient qualifications and experience for Block Earner reasonably to have relied on its own resources. Although ASIC accepts that Block Earner obtained legal advice before launching the Earner product, ASIC submits that there is no evidence that the legal advice dealt with the question whether Earner involved a managed investment scheme, and no evidence that the advice was relied on by Mr Karaboga or others.

33 While there is no express evidence to the effect that the legal advice extended to whether the Earner product involved a managed investment scheme, that is readily explained by reference to the fact that ASIC's notice of 11 April 2022 did not refer to any such issue, and was said to be issued in relation to an investigation of suspected contraventions of ss 911A, 1041E and 1041H of the Act. In light of Block Earner having "no appetite for breaches in laws and

regulations" (as stated in its ERMF), it is more likely than not that the advice which was sought and obtained from Gilbert & Tobin was directed generally to whether Block Earner's products and services complied with all relevant laws and regulations. There would have been no practical point in Block Earner confining its request for legal advice more narrowly at a time before ASIC had raised any particular potential contraventions with Block Earner. Further, I reject ASIC's submission that there is no evidence that Block Earner considered and relied on the legal advice from Gilbert & Tobin in concluding that the Earner product did not involve any contravention. Such consideration and reliance are obvious inferences to draw from the direct evidence that the legal advice was obtained, particularly when it was obtained by a company whose personnel were apparently not legally qualified. The inference is reflected in ASIC's notice of 11 April 2022, which asks whether legal advice was obtained, without adding superfluous questions as to whether it was considered and relied on.

34 ASIC further submits that if the Court were to grant Block Earner relief from liability in the present circumstances, then it may convey an impression to promoters of financial products, including those related to cryptoassets, that they need not rigorously evaluate whether their offerings are regulated financial products, and even that they may be better off by not obtaining legal advice on the question. ASIC submits that such a scenario risks creating a perception that the uncertainty inherent in a lay person's understanding of the Act will give rise to successful defences of an honest misapplication of a complex law, or a misapplication of the technical definitions of financial products and managed investment scheme in the Act.

35 I reject ASIC's submission that granting relief from liability in the particular circumstances of the present case may convey false impressions as to the standards which are expected of promoters of financial products. I accept that the complexity and uncertainty of much of this area of law heightens the imperative that such promoters obtain legal advice from experienced and competent lawyers before launching their products and services, but that is what Block Earner did in the present case.

36 I note that Mr Entwisle, counsel for Block Earner, properly drew my attention to *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 236; (2005) 224 ALR 390 at [18]–[22] and [46]–[49], in which Stone and Allsop JJ referred to *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* [2003] FCAFC 193; (2003) 131 FCR 529 at [306]–[310] (Wilcox, French and Gyles JJ). In *Universal Music* the Full Court regarded the fact that the contravener had received favourable and relevantly

unqualified legal advice as a matter which, if relevant at all, was entitled to minimal weight in the assessment of a penalty: at [306]–[307]. The Full Court said that giving a substantial discount by reason of such legal advice would send the wrong signal to the commercial community, in particular by encouraging risk-taking and pushing the boundaries of anti-competitive conduct: at [310]. However, the Full Court's reasoning was made in the context of the finding in that case that the contravening conduct was "plainly and deliberately anti-competitive in its intent" and thus "ran a serious risk" of breaching the *Trade Practices Act* 1974 (Cth) (at [308]). In my view, no comparable finding as to Block Earner's intention is appropriate in the present case. In light of the fact that Block Earner obtained legal advice from a leading law firm and concluded that its appetite for no risk of breaches of laws or regulations was satisfied, I do not think that granting relief from liability is likely to send the wrong signal to other industry participants. The Full Court has confirmed that *Universal Music* and *Visy Paper* do not set down an "inflexible rule": *Flight Centre Limited v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; (2018) 260 FCR 68 at [64] (Allsop CJ, Davies and Wigney JJ).

37 The present case is also distinguishable from the circumstances considered in *Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission* [2022] FCAFC 170; (2022) 295 FCR 106 at [235]–[236] (Jagot, O'Bryan and Cheeseman JJ), where the defendant's argument was merely that statements had been "reviewed and approved" by solicitors. Here, by contrast, the defendant adduced unchallenged evidence to the effect that, after taking legal advice, there was no identified risk of a breach of any laws.

38 This issue raises a deeper question concerning the rule of law, being the state of affairs in which a legal system is legally in good shape. Among the desiderata of the rule of law are that the rules of the legal system are promulgated and clear. These qualities of predictability in the legal system, among others, generate what Professor Lon L Fuller described in *The Morality of Law* (Yale University Press, rev ed, 1969) as "a relatively stable reciprocity of expectations between lawgiver and subject" (p 209). The lawgiver expects that subjects will comply with the laws that have been previously announced to them, and the subjects expect to be able to go about their lives by way of self-directed conduct in the knowledge that they are the laws which will be applied: see to similar effect Professor John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980), pp 272–3. These are, of course, matters of degree, and I have already referred to the views of Commonwealth government bodies as to the lack of clarity and predictability in the law applicable to the present case. Importantly, Professor Finnis says of

the promulgation of laws that it is "not fully achieved by printing ever so many legible official copies of enactments, decisions, forms and precedents; it requires also the existence of a professional class of lawyers whose business it is to know their way around the books, and who are available without undue difficulty and expense to advise anybody who wants to know where he stands" : *Natural Law and Natural Rights*, p 271. Before engaging in conduct in an area where the law is complex or otherwise uncertain, a person who is acting responsibly will consult a member of that professional class of lawyers to ascertain where he or she stands. As Lord Diplock asked rhetorically of the local council accused of negligence and other wrongs in *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 171: "What more could the council be reasonably expected to do than to obtain the advice of qualified solicitors whose competence they had no reason to doubt?" A person who acts in that manner in obtaining the advice of a competent lawyer is entitled, as a general matter, to be accorded the dignity of responsible self-direction and autonomy which the rule of law is designed to secure, even though a court may ultimately find that the law was breached, and should not be treated censoriously.

39 Accordingly, subject to the circumstances of the particular case, a person who perceives there to be legal uncertainty in a proposed course of conduct, who then obtains legal advice from a person who is qualified to give it competently, and who then genuinely concludes that there is no identified risk of breaching the law, ought fairly to be excused from liability for a civil pecuniary penalty for later engaging in that conduct and thereby breaching the law, at least in circumstances where the person does not thereby derive a substantial profit or cause substantial harm. It is not necessary in the present case to consider other scenarios, such as where legal advice leads the person to conclude that the conduct is probably lawful but that the question is relatively finely balanced and carries a substantial risk of contravention, or where the person derives a substantial profit or causes substantial harm by virtue of the contravention. It should also be noted that I am not dealing here with the issue whether the law was contravened (as to which a belief that the conduct would not contravene the law is no defence), but whether in all the circumstances the defendant ought fairly to be excused for the contravention.

40 This reasoning must be read consistently with the Full Court's statement in *Flight Centre* at [63] that "It is misconceived to extrapolate from [Kiefel J's judgment in *Australasian Meat Industry Employees' Union v Australia Meat Holdings Pty Ltd* [1998] FCA 664; (1998) 82 IR 76], as Flight Centre does in its submissions, a proposition that if one reasonably misunderstands one's liability position in circumstances that give rise to a civil penalty, one

should be relieved of the penalty or one should receive a light penalty." As I have sought to make clear in the preceding paragraph, the particular circumstances of the case remain paramount.

41 It is also worth clarifying that the general proposition set out in paragraph 39 will not be applicable merely because the defendant asserts that it concluded, after receiving competent legal advice, that there was no identified risk of breaching the law. The more unreasonable the conclusion, the more will be required from the defendant: see *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2021] UKSC 40; [2023] AC 101 at [118] (Lord Burrows). In the present case, Mr Karaboga's evidence of his conclusion was unchallenged and does not appear to be unreasonable.

42 ASIC also relies on the lack of contrition by Block Earner in relation to the Contraventions. However, I do not regard that as a significant matter on the question of relief from liability under s 1317S, unless in the particular circumstances of the case a lack of contrition can be treated as indicating a propensity to contravene the law in a similar way in the future. I do not regard that as a realistic possibility in the present case, particularly having regard to the first and seventh matters relied on by Block Earner as discussed above.

43 In my view, despite the importance of the provisions which Block Earner contravened, the seriousness of the Contraventions and the small profit which was made, in all the circumstances of the case Block Earner ought fairly to be excused for the Contraventions. I accept ASIC's submission that the issues involved in the Contraventions were complex and technical legal questions, but it is clear that Block Earner obtained legal advice from a leading law firm before launching the Earner product and genuinely concluded that there was no identified risk in implementing the Earner product.

To what extent should Block Earner be relieved from liability?

44 The relevant considerations for the Court's discretion at this third stage merge to some extent with the considerations in the second stage: *Trilogy Funds Management Ltd v Sullivan (No 2)* [2015] FCA 1452; (2015) 331 ALR 185 at [874] (Wigney J). General deterrence and the public interest are relevant factors at the third stage of deciding whether to grant relief from liability in whole or in part: *ASIC v Healey (No 2)* at [91]–[92]. However, general deterrence must be weighed against hardship to the contravener. In Bryson J's characteristically felicitous and much-quoted phrase, "No-one should be sacrificed to the public interest": *Re One.Tel Ltd (in*

liq); *Australian Securities and Investments Commission v Rich* [2003] NSWSC 186; (2003) 44 ACSR 682 at [26].

45 As I have indicated above, Block Earner does not seek to be relieved from the making of declarations as to the Contraventions, but only as to a penalty. Declarations of this kind themselves have an important deterrent effect, in serving as a warning to others of the risk of engaging in similar contraventions: *Australian Securities and Investments Commission v Allianz Australia Insurance Ltd* [2021] FCA 1062; (2021) 156 ACSR 638 at [121] (Allsop CJ); and see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 at [93] (Dowsett, Greenwood and Wigney JJ).

46 In the present case, in my view, the widely publicised declarations of contravention are more than adequate for general deterrence and the protection of the public from similar conduct by others. I do not think that relieving Block Earner from liability for a penalty in the particular circumstances of this case will encourage others to engage in complacent, careless or imprudent conduct in relation to the need to comply with the Act.

47 Accordingly, in my view, Block Earner should be relieved from liability for a pecuniary penalty. It is therefore unnecessary for me to deal with the question of the appropriate amount of any pecuniary penalty. However, I set out below the additional matters relevant to why I would not have ordered any pecuniary penalty even if I had not granted relief from liability under s 1317S.

Pre-requisites to imposition of a penalty

48 Sections 911A(5B) and 601ED(8) are civil penalty provisions (see s 1317E), and they were so throughout the period of the contraventions from 17 March 2022 to 16 November 2022. Sub-sections 911A(1) and 601ED(5) are not themselves civil penalty provisions, but are offence provisions (see s 1311).

49 Under s 1317G(1), the Court may order a person to pay a pecuniary penalty if a declaration of contravention has been made under s 1317E, unless the provision contravened is a "corporation/scheme civil penalty provision" or a "financial services civil penalty provision", in which case there are additional requirements. Section 911A is not a "corporation/scheme civil penalty provision" nor is it a "financial services civil penalty provision" (s 1317E). Accordingly, there is no additional requirement for imposition of a pecuniary penalty in respect

to the contravention of s 911A(5B) beyond the Court having made the declaration of contravention.

50 For contraventions of a "corporation/scheme civil penalty provision" such as s 601ED(8), the additional requirement is that the contravention be serious, or that it materially prejudices the interests of the corporation, scheme, fund or its members, or the corporation's ability to pay its creditors: s 1317G(1)(b). As to that additional requirement, ASIC relies on the contravention being "serious". A range of synonyms of "serious" has been deployed in the authorities, which are helpfully summarised in *Australian Securities and Investments Commission v GetSwift Limited (Penalty Hearing)* [2023] FCA 100; (2023) 167 ACSR 178 at [54] (Lee J). Ultimately, whether a contravention is "serious" is a question of fact: *Australian Securities and Investments Commission v Rio Tinto Ltd (No 2)* [2022] FCA 184 at [36] (Yates J).

51 In the present case, in my view, Block Earner's contravention of s 601ED(8) in operating an unregistered managed investment scheme with respect to the Earner product is properly described as "serious". It is sufficient to reach that conclusion to note that:

(a) Block Earner contravened the provision for a period of about 8 months;

(b) the contravention involved approximately 492 members of the public providing approximately $3.1 million to Block Earner as loans plus fees;

(c) Block Earner offered the product to generate profit for itself (although its actual profit made from the Earner product over the 8-month period of $21,309.60 was modest); and

(d) there was a real risk that Block Earner may potentially not have been able to repay its customers in the event that it was unable to recover amounts from defaulting counterparties.

The appropriate amount of penalty

52 It is common ground between the parties that, although the conduct engaged in by Block Earner technically comprised a number of separate offences, the conduct can fairly be characterised as a single act or course of conduct, and thus the penalty should reflect that fact and avoid double (or more) punishment: see *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243 at [226]–[229] (Allsop CJ, Middleton and Robertson JJ); *ASIC v GetSwift* at [45] (Lee J). ASIC thus seeks the imposition of a single penalty amount in respect of both the contraventions of s 601ED(8) and the contraventions of s 911A(5B). I agree with that approach.

53 Section 1317G(4) provides that the maximum pecuniary penalty for contravention of a civil penalty provision by a body corporate is the greatest of:

(a) 50,000 penalty units; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention – that amount multiplied by three; and

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) if the amount worked out under subpara (i) is greater than an amount equal to 2.5 million penalty units – 2.5 million penalty units.

The value of a penalty unit is fixed by s 4AA of the *Crimes Act 1914* (Cth), and was $222 throughout the relevant period. Accordingly, 50,000 penalty units is $11.1 million.

54 In the present case, three times the benefit derived (being the profit of $21,309.60 made on the Earner product) is approximately $64,000, and 10% of Block Earner's annual turnover is about $2,000. Accordingly, the maximum penalty for the contraventions is $11.1 million.

55 Section 1317G(6) provides that in determining the pecuniary penalty, the Court must take into account all relevant matters, including five particular matters. The first four of those matters are as follows (the fifth not being applicable): (a) the nature and extent of the contravention; (b) the nature and extent of any loss or damage because of the contravention; (c) the circumstances in which the contravention took place; and (d) whether the person has previously been found by a court to have engaged in similar conduct. In addition, a list of relevant factors, albeit not a rigid catalogue of matters for attention, was cited with approval in *Australian Building and Construction Commission v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 at [18]–[19] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). In the present case, ASIC relies on four particular matters in that list: the size of the contravening company, the deliberateness of the contravention and the period over which it extended, whether the contravention arose out of the conduct of senior management or at a lower level, and whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention.

56 There was no dispute between the parties as to the relevant principles concerning penalties. Those principles may be summarised as follows. The purpose of a civil penalty regime is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the relevant Act by the deterrence, specific and general, of further contraventions: *Pattinson* at [9], [15] and [31] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 at [87] (Keane, Nettle and Gordon JJ). The penalty must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 at [66] (French CJ, Crennan, Bell and Keane JJ); *Pattinson* at [17]. In other words, those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [63] (Keane CJ, Finn and Gilmour JJ). However, the penalty should not be greater than is necessary to achieve the object of deterrence, and severity beyond that is oppression: *Pattinson* at [40].

The nature and extent of the contraventions

57 On about 17 March 2022, Block Earner commenced offering the Earner product to consumers, and ceased offering Earner on 16 November 2022: Contravention Judgment at [18]. The Earner product comprised several product options tied to the cryptoassets known as USD Coin, Paxos Gold, Bitcoin and Ethereum. In the usual case, Block Earner converted the customer's AUD into the 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 return: Contravention Judgment at [19]. Block Earner used the loaned cryptoassets to generate income for itself by lending the cryptoassets to third parties at a higher interest rate than it was paying to Block Earner's users under the Terms of Use: Contravention Judgment at [20], [28]. 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: Contravention Judgment at [28]. Block Earner also generated revenue by charging consumers a fee to exchange their AUD deposits to cryptoassets and vice versa: Contravention Judgment at [36(e)(ii) and (v)].

58 I concluded that the Earner product was a managed investment scheme and that it was also a facility by which a person makes a financial investment. The contraventions were of the requirement not to operate an unregistered managed investment scheme (s 601ED(8)), and the requirement to hold an AFSL to carry on a financial services business in Australia (s 911A(5B)): Contravention Judgment at [85].

59 As I have indicated above in relation to the question whether the contravention of s 601ED(8) was serious, the contravention lasted over a period of about eight months, involving 492 members of the public who provided approximately $3.1 million to Block Earner, and Block Earner offered the product in order to generate profit (even though the actual profit made was modest). Although ASIC accepts that no actual harm was suffered by members of the public, ASIC points out that the potential harm was significant in that Block Earner did not meet the requirements for an AFSL as set out in ASIC Regulatory Guide 166, being requirements that are designed to protect investors. In particular, Block Earner did not meet the $10 million net tangible assets requirement for a responsible entity (see RG 166.215 as issued in April 2021, and RG 166.227 as issued in July 2022).

The circumstances in which the contraventions took place

60 This factor overlaps with the nature and extent of the contraventions, to which I have referred above. ASIC relies on Mr Karaboga's evidence as to his perception of significant uncertainty as to whether Australia's existing financial services laws applied to products like the Earner product, and submits that Mr Karaboga did not give evidence of resolving that uncertainty other than meeting with the Head of Risk and Compliance prior to the launch of Earner and reaching a view that they were satisfied that Earner was aligned with Block Earner's overall risk appetite (which, as I have indicated above, was that Block Earner had no appetite for breaches of laws and regulations). That submission overlooks the evidence that Block Earner sought external legal advice from Gilbert & Tobin before launching the Earner product. ASIC accepts that there was a degree of uncertainty in the application of the regulatory framework to cryptoasset-related products generally, and submits that that uncertainty, once it was appreciated, was a reason for taking particular care in relation to compliance. I accept that submission, but as I have indicated above, in my view, Block Earner conducted itself with sufficient care by obtaining advice from Gilbert & Tobin.

61 As I have found above, the Contraventions were not the result of deliberate or reckless conduct by Block Earner. Nor should the contraventions be seen as the product of careless or imprudent

conduct, in that Block Earner sought and obtained the advice of a highly competent and experienced firm of solicitors, and concluded that its appetite for no risk of breaches of laws and regulations was satisfied.

62 In my view, the Contraventions should be regarded as the result of Block Earner adopting a reasonably arguable, but erroneous, belief that the Earner product complied with the Act, after having obtained external legal advice from a leading law firm. It is well established that an honest and reasonable belief may, in the particular circumstances of the case, be a relevant mitigating or ameliorating factor in determining whether or not a penalty is to be imposed and, if so, the extent of the penalty: see *Flight Centre* at [31] and [63]–[64]; *Australian Competition and Consumer Commission v Lactalis Australia Pty Ltd (No 2)* [2023] FCA 839 at [18]–[20] (Derrington J).

The nature and extent of any loss or damage suffered because of the contraventions

63 ASIC accepts that no loss or damage was suffered because of the contraventions. Block Earner returned all funds, including accrued yield, to the customers of the Earner product (third affidavit of Mr Karaboga at para 26).

No prior contraventions

64 ASIC accepts that Block Earner has not been previously found by a court to have engaged in any similar conduct.

The size of the contravening company

65 Block Earner is a relatively new business, which in late April 2024 had only seven full-time employees (all of whom are located in Australia) and four contractors (third affidavit of Mr Karaboga at para 6). Block Earner's total trading profit for the financial years ended 30 June 2022 and 2023 was $68,532 and $15,722 respectively (third affidavit of Mr Karaboga at para 51). Block Earner's total income for the financial years ended 30 June 2022 and 2023 was $73,078 and $20,268 respectively. Block Earner's net profit after tax for the financial years ended 30 June 2022 and 2023 was a loss of $2,687,220 and $3,960,683 respectively (third affidavit of Mr Karaboga at para 51). Block Earner anticipates that in the financial year ended 30 June 2024 it will make a net loss of $2.4 million (third affidavit of Mr Karaboga at para 54).

66 In relation to the Earner product, the total profit that Block Earner derived in the period between 17 March 2022 and 16 November 2022 was $21,309.60, comprising $14,573.97 derived from the conversion of AUD to cryptocurrency and cryptocurrency to AUD, and $6,735.63

comprising Block Earner's revenue generated from investing the funds provided by customers, net of the yield paid to those customers (third affidavit of Mr Karaboga at para 30).

67 Block Earner has been funded in the following ways. In November 2021, Block Earner received initial funding of $6.25 million, which was raised by its parent company (Web3 Investments Pty Ltd) from third parties. Those funds were contributed to Block Earner by its parent company as "working capital" and were designed to give Block Earner up to 18 months of "runway" for product and infrastructure capabilities (third affidavit of Mr Karaboga at para 56). That funding is recorded in the Block Earner balance sheet as an intercompany loan, and Block Earner does not expect that this amount will become repayable to its parent company in circumstances that would impair Block Earner's ability to pay its current liabilities (letter of 22 March 2024 by Gilbert & Tobin to ASIC at para 3). In addition, in September 2023 Block Earner announced a further fundraising round structured through a Simple Agreement for Future Equity (**SAFE**) vehicle, and to date Block Earner has raised approximately $2.9 million through the SAFE vehicle (and aims to raise approximately $3.8 million through that vehicle) (third affidavit of Mr Karaboga at paras 58–59). Mr Karaboga expects that, based on Block Earner's current projections for the year ended 30 June 2024, all of the funds raised through the SAFE vehicle will be required to continue to operate the Block Earner business (third affidavit at para 60). Block Earner anticipates that additional funding will be required in the financial year ended 30 June 2025 in order to continue its operations (letter of 22 March 2024 by Gilbert & Tobin to ASIC at para 7).

68 Mr Karaboga gives evidence that the "agreed valuation cap" of the first round of priced fundraising was USD39.5 million, and the "agreed valuation cap" of the SAFE fundraising round was USD22.5 million, being a reduction of 43%. However, as Block Earner submits, and I accept, one must not confuse the agreed valuation cap with the actual valuation of a company. The valuation cap of a company during a funding round is the agreed value at which an investor's debt will be converted to equity if a relevant trigger event occurs (such as a further funding round). It is thus (at most) a prediction of the company's future valuation to manage risk and reward for investors, rather than a present valuation of the company.

69 As at 9 April 2024, Block Earner had $349,978.40 in available cash and cash equivalents, but also had $572,267.03 in pending, unpaid invoices (third affidavit of Mr Karaboga at paras 52–53). Block Earner's parent company had $652,169.48 in available cash and cash equivalents as

at 9 April 2024, but ASIC does not contend that it is relevant to have regard to the size or financial position of Block Earner's parent (T27.44–28.06).

70 ASIC draws attention to certain expenses in the financial statements for Block Earner for the years ended 30 June 2022 and 2023. In particular:

(a) advertising, marketing, brands and communications were $786,913 and $301,209 in 2022 and 2023 respectively;

(b) legal, tax and accounting advisory were $145,057 and $535,001 in 2022 and 2023 respectively;

(c) wages and salaries were $667,457 and $1,477,623 in 2022 and 2023 respectively; and

(d) contractors' expenses were $692,802 and $1,121,674 in 2022 and 2023 respectively.

71 However, those expenses must be seen in the context of the operations of Block Earner as a whole, and in particular the substantial losses which it sustained in those two financial years. In addition, the amount of legal expenses is likely to have increased in the financial year ended 30 June 2023 as a result of ASIC's investigation and these proceedings.

72 It is clear that Block Earner has very little available cash from which it would be able to pay a pecuniary penalty. The impact of a substantial penalty on the ongoing viability of Block Earner's business is the subject of unchallenged evidence by Mr Karaboga in his fourth affidavit dated 1 May 2024, responding to ASIC's submissions on penalty which indicated that ASIC was seeking a penalty of $350,000. Mr Karaboga said that if Block Earner was required to pay a penalty immediately in the order of $350,000, Block Earner would be required to use all of its available cash to pay the penalty, leaving essentially no funds available to fund its business operations, in which it incurs costs of around $220,000 per month (excluding legal costs of these proceedings) (paras 6–7). Mr Karaboga said that in those circumstances, he expects that it would be necessary for Block Earner immediately to let several employees go, as there would be insufficient funds available to pay their wages, which would have a detrimental impact on Block Earner's ability to continue running the business and generating further revenues. Mr Karaboga also said that this would negatively impact Block Earner's ability to attract funding, as investors would be less likely to be satisfied that Block Earner has adequate staffing resources to implement its plans for the business on which the proposed funding is based (para 8). Mr Karaboga says that it will be necessary for Block Earner immediately to seek to raise funds to continue its ongoing business operations, and it may be

difficult to raise funds quickly, if at all, especially because further publicity relating to these proceedings would be likely to make it more difficult to attract investors (para 9).

The deliberateness of the contraventions and the period over which they extended

73 ASIC submits that Block Earner was aware of the risk of contravention, and chose to offer the Earner product for eight months despite that awareness. I reject that submission. There is no evidence that Block Earner was aware of the risk of the particular contraventions which I have found to be established, as distinct from the general risk arising from uncertainty in the application of the regulatory regime overall to cryptoassets. The evidence of Mr Karaboga, to which I have referred above, is to the effect that he and the Head of Risk and Compliance formed the view that the Earner product was aligned with Block Earner's overall risk appetite, which was that it had no appetite for breaches of laws and regulations. That evidence was not challenged, and I accept it. In addition, the documentary evidence establishes that Block Earner obtained legal advice from Gilbert & Tobin before launching the Earner product.

Whether the contraventions arose out of the conduct of senior management or at a lower level

74 ASIC submits, and I accept, that the contraventions arose out of the conduct of senior officers of Block Earner, namely the Chief Executive Officer (Mr Karaboga) and the Head of Risk and Compliance (Tawanda Mangere) (see the third affidavit of Mr Karaboga at para 18).

Degree of cooperation with ASIC

75 ASIC accepts that Block Earner has cooperated with ASIC in the investigation phase, and in the conduct of the litigation. That cooperation included a statement of agreed facts for the initial hearing. However, ASIC points out that Block Earner has not admitted any contravention and seeks to be exonerated from any penalty for its contravention. ASIC also relies on the fact that Block Earner has not reached an agreed penalty with ASIC.

76 I do not regard the fact that Block Earner has contested the proceedings, including the application for a penalty, as a factor in favour of a penalty. A company alleged to have contravened a civil penalty provision is entitled to defend itself without thereby attracting the risk of the imposition of a penalty more serious than would otherwise be imposed (although an admission of contravention, like a plea of guilty, is ordinarily a matter to be taken into account in mitigation): *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 292; (2010) 268 ALR 303 at [23]–[27] (Goldberg J), citing a number of criminal cases including *Siganto v R* [1998] HCA 74; (1998) 194 CLR 656 at [22] (Gleeson

CJ, Gummow, Hayne and Callinan JJ) and *Cameron v R* [2002] HCA 6; (2002) 209 CLR 339 at [12] (Gaudron, Gummow and Callinan JJ). In the present case, I have found that Block Earner was right to seek relief from liability under s 1317S. In any event, in my view, Block Earner has adopted a bona fide and reasonably arguable position throughout these proceedings, and is not open to criticism for the way in which it has conducted the proceedings.

77 Block Earner ceased offering the Earner product on 16 November 2022. Mr Karaboga explains that it did so for commercial reasons (third affidavit at para 23), although he notes that the product was withdrawn within a month of receiving ASIC's letter of 21 October 2022 expressing ASIC's view (among other things) that the Earner product was a managed investment scheme and an investment facility.

Conclusion on amount of penalty

78 ASIC submits that the appropriate penalty is an amount of $350,000. Block Earner submits that no penalty should be awarded, but in the alternative the appropriate amount is $60,000. As Block Earner submits, an amount of $60,000 is approximately three times the benefit Block Earner received from offering the Earner product, including the profit generated by the currency conversion aspect of that product.

79 In my view, it is appropriate that no penalty be awarded, consistently with my conclusion that Block Earner should be relieved from liability under s 1317S. Even if I had not granted that relief, I would not have awarded any penalty. In stating that conclusion, I rely on the matters already discussed in relation to s 1317S. I also give particular weight to the constrained financial circumstances of Block Earner, and the need to ensure that the penalty does not cross the line from deterrence to oppression.

Costs

80 In relation to the costs of the proceedings up until the publication of the Contravention Judgment on 9 February 2024, ASIC was successful in relation to the Earner product and unsuccessful in relation to the Access product. In substance, these were two separate aspects of the litigation. It appears to me that there was roughly the same amount of time and cost incurred in relation to both aspects of the proceedings. If those proceedings had been conducted by way of separate cases, ASIC would be entitled to the costs of the Earner aspect of the litigation and Block Earner would be entitled to the costs of the Access aspect. It seems to me that the appropriate way in which to view the question of costs is that each of the parties has

been successful to the same extent on the two different aspects of the proceedings, and that the corresponding success and failure are effectively cancelled out in the overall outcome. Accordingly, each party should bear its own costs of the proceedings up to 9 February 2024.

81 As to the costs incurred after 9 February 2024, Block Earner has been successful in its application under s 1317S for relief from liability for a pecuniary penalty. It is therefore entitled to an order that ASIC pay its costs incurred after 9 February 2024.

82 There is a further aspect of the costs incurred since 9 February 2024 to be considered. Section 37N(4) of the *Federal Court of Australia Act 1976* (Cth) provides relevantly that in exercising the discretion to award costs in a civil proceeding, the Court "must" take account of any failure to comply with the duty imposed by subs 37N(1). Subsection 37N(1) imposes a duty on the parties to a civil proceeding to conduct the proceeding in a way that is consistent with the overarching purpose set out in 37M(1) namely:

> ... to facilitate the just resolution of disputes:
>
> (a) according to law; and
> (b) as quickly, inexpensively and efficiently as possible.

83 ASIC accepts that the publication of its media release on 9 February 2024 was part of its conduct of the proceeding (T30.12–17, 31.01–12). ASIC has also accepted that the media release as a whole had a tendency to mislead and, on that basis, was unfair (T21.21–42). I accept that ASIC's conduct in that regard was unintentional, and Block Earner did not contend to the contrary. However, the publication of a misleading and unfair media release by the regulator prosecuting the case does not facilitate the just resolution of the dispute. Nor is that conduct efficient, given the propensity of misleading public statements to generate their own complaints and claims. ASIC has thus failed to comply with the duty imposed by s 37N(1).

84 I am compelled by s 37N(4) to take that failure into account in exercising the discretion to award costs. The ASIC media release has increased the costs of the hearing, but not to a substantial extent. I do not think that the ASIC media release warrants any special costs order, and Block Earner does not seek one. However, the ASIC media release does reinforce the appropriateness of ordering (as I would have done in any event) that ASIC pay Block Earner's costs incurred after 9 February 2024.

I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 4 June 2024