

## NOTICE OF FILING

### Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	21/03/2023 10:04:18 AM AEDT
Date Accepted for Filing:	21/03/2023 10:05:41 AM AEDT
File Number:	NSD1007/2022
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v WEB3 VENTURES PTY LTD ACN 655 090 869
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

### Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



## Amended Concise Statement

(Filed pursuant to the order of Jackman J dated 20 March 2023)

No. ~~NSD~~ NSD1007 of 2022

Federal Court of Australia

District Registry: New South Wales

Division: General

### **Australian Securities and Investments Commission**

Plaintiff

### **Web3 Ventures Pty Ltd (ACN 655 090 869)**

Defendant

#### **A. The important facts giving rise to the claim**

1. The defendant, Web3 Ventures Pty Ltd trading as Block Earner (**Block Earner**) offered a suite of fixed-yield earning products to consumers known as USD Earner (based on USD Coin), Gold Earner (based on Paxos Gold), and Crypto Earner (based on Bitcoin and Ethereum) (collectively, the **Earner Product**). It also offers a variable-yield earning product to consumers known as Access (**Access Product**). By this proceeding, the plaintiff (**ASIC**) contends that the Earner Product was and the Access Product is, a financial product for the purposes of the *Corporations Act 2001* (Cth) (**Corporations Act**), such that there were a number of requirements of the Corporations Act with which Block Earner did not comply, because the Earner Product was and the Access Product is, one or more of a managed investment scheme, a facility through which a person makes a financial investment (**Investment Facility**) or a derivative.

1A Block Earner has "Terms of Use" (**Terms**) for the Earner Product and the Access Product which have been amended from time to time.

#### **Earner Product**

2. On about 17 March 2022, Block Earner first commenced offering the Earner Product to consumers. After ASIC notified it of its concerns, on or about 16 November 2022, Block Earner ceased the marketing of offering the Earner Product.

Filed on behalf of (name & role of party)	The Plaintiff, Australian Securities and Investments Commission		
Prepared by (name of person/lawyer)	Nick Kelton, Lawyer		
Tel	(03) 9280 4787	Fax	1300 729 000
Email	nicholas.kelton@asic.gov.au		
Address for service	Level 7, 120 Collins Street, Melbourne, Victoria, 3000		

3. The Earner Product was marketed on Block Earner’s website at <https://blockearner.com.au/>. According to the website, Block Earner consumers could “Buy and earn fixed yield on Tier-1 digital assets” and “Earn yield on USD Coin, Paxos Gold, Bitcoin and Ethereum”. The fixed yield rates offered most recently prior to 16 November 2022 by Block Earner were 7% annualised percentage yield (**APY**) for USD Earner, and 4% APY for Gold Earner and Crypto Earner.
4. ~~The Earner Product has “Terms of Use” (Terms) which have been amended from time to time, but~~ From 17 March 2022 until around 16 November 2022, the key features ~~have of the Terms relevant to the Earner Product had~~ relevantly remained the same ~~since at least 17 March 2022.~~ The effect of the Terms ~~is was~~ that the consumer, in acquiring, investing in or using the Earner Product, ~~deposits deposited~~ money with or “~~lends lent~~” money (“lend” being the expression used in the Terms) to Block Earner, and Block Earner ~~undertakes undertook~~ to repay that money.
5. The Earner Product was marketed as making use of:
  - a. for USD Earner, a crypto-asset called USD Coin (**USDC**), which was described by Block Earner on its website as “a regulated and routinely audited digital stablecoin that is pegged 1:1 to the United States dollar and fully backed by USD cash equivalents and U.S. treasuries” and “always redeemable 1:1 for U.S. dollars”;
  - b. for Gold Earner, a crypto-asset called Paxos Gold (**PAXG**) which was described by Block Earner on its website as “digital gold” and “Powered by blockchain and backed by LBMA-accredited gold bars”; and
  - c. for Crypto Earner, the crypto-assets Bitcoin (**BTC**) and Ethereum (~~ETC~~**ETH**), being the two largest crypto-assets by market capitalisation. On its website, Block Earner described Bitcoin as the “Best performing digital asset in the last decade” and a “global and decentralised crypto”. It described Ethereum as a “New Internet Revolution” and “the ~~worlds world’s~~ first programmable blockchain.” In respect of Crypto Earner, the website also included the statement “Portfolio value moves with the price of the crypto”.
6. Block Earner posed the question “How is fixed yield generated?” on its website under ‘Frequently Asked Questions’ (**FAQs**). Block Earner initially answered by stating “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.” Block Earner ~~has more recently~~ subsequently changed its response to this FAQ.

7. In response to the FAQ on its website “*How does Block Earner work?*”, Block Earner initially stated “*Block Earner will begin generating a daily compounding yield within 24 hours of making a deposit. Simply, manage your holdings, track performance, and withdraw your deposit and yield at any time.*” This response was recently revised to “*When you lend your digital assets you will begin earning daily compounded yield. Simply, manage your holdings, track performance, and withdraw your assets and yield at any time*”.
8. In response to a FAQ on its website “*What makes Block Earner unique?*”, Block Earner initially stated “*We take care of the heavy lifting by providing a user-friendly portal for earning higher yields. This is facilitated with industry leading-security, to make decentralised finance a more inclusive space for all*”. Block Earner ~~has more~~ ~~recently~~subsequently changed its response to this FAQ.
9. 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 ~~deposit~~deposited Australian dollars (**AUD**), which process ~~includes~~included agreeing to the Terms. ASIC contends that by using the Earner Product, the consumer then provided that AUD to Block Earner.
10. From the consumer’s perspective, the following process took place when they participated in the Earner Product via the Block Earner platform (either through its website or app):
  - a. 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;
  - b. at the same time the user was shown the equivalent amount of relevant crypto-assets (corresponding to the Earner ~~product~~Product selected) and the exchange rate and any fees applied by Block Earner for the conversion. The user was also shown the fixed yield they ~~will~~would receive for the deposit;
  - c. users were required to tick a box agreeing to the Terms (which they would have previously accepted by registering their account) and click ‘Transfer In’;
  - d. Block Earner’s platform then displayed the user’s cash balance, holdings in the Earner Product and any yield earned to date (in AUD) as well as the annualised percentage yield (**APY**). ~~Users~~Users’ Block Earner accounts were credited with their yield on a daily basis;

- e. 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'. As part of this 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 crypto-asset into AUD; and
  - f. 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~~product).
11. The following processes occurred concurrently with the processes set out in the previous paragraph, but were not necessarily apparent to consumers using the platform:
- a. once the user clicked 'Transfer In', Block Earner converted the nominated amount of AUD to the relevant crypto-asset through an overseas crypto exchange platform. Block Earner's Terms referred to this as its 'exchange service';
  - b. the newly converted crypto-assets were automatically "loaned" to Block Earner on an unsecured basis. Block Earner's Terms referred to this as its 'lend service';
  - c. Block Earner then lent those crypto-assets on an unsecured basis to a third party under a pre-existing commercial arrangement, for which it received a fixed yield; and
  - d. 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. Block Earner converted the crypto-assets back to AUD at the prevailing exchange rate and charged the customer a fee for the conversion.
12. The Terms provided that by using the Earner Product, consumers "lend" the crypto-assets (into which their AUD has been converted) to Block Earner, in return for daily interest which was paid in the same crypto-asset "loaned" to Block Earner. Users also agreed to grant Block Earner all rights and title to those crypto-~~assets~~assets, for Block Earner to use at its sole discretion during the term of the "loan".
13. There was no mechanism to exit the Earner Product by withdrawing underlying crypto-assets. ~~There must be a~~ "conversion" back into AUD was required. That is, just as the consumer started with AUD deposited into their account with Block Earner upon entry into the Earner Product, the consumer also received AUD back into their account when they ~~exit~~exited the Earner Product.
14. The amount of AUD received back by the consumer varied by reference to the exchange rate between AUD and the relevant crypto-asset.

15. Block Earner did not hold, or have the benefit of, an Australian financial services licence (AFSL) covering the provision of financial services with respect to the Earner Product.
16. The Earner Product is not registered as a managed investment scheme.

### **Access Product**

- 16A. In about March 2022, Block Earner commenced offering the Access Product to consumers.
- 16B. Block Earner markets the Access Product as providing consumers with “access” to the Aave protocol, a smart contract-governed, decentralised finance (DeFi) lending protocol operating on the Ethereum blockchain. Until late 2022, the Access Product could also be used to access the DeFi lending protocol, Compound, which operates in a similar fashion to the Aave protocol.
- 16C. The key features of the Terms relevant to the Access Product have relevantly remained the same since March 2022.
- 16D. 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. ASIC contends that by using the Access Product, the consumer then invests that AUD with Block Earner.
- 16E. To use the Access Product, the consumer chooses USDC, BTC or ETH, and Aave or Compound (when it was available and for USDC only). The following steps are then taken:
  - a. Block Earner converts the consumer’s AUD deposits into the nominated crypto-asset through a centralised exchange service provider;
  - b. once a day, Block Earner transfers the crypto-assets onto the DeFi protocol and in return, Block Earner is issued the relevant DeFi tokens corresponding to the underlying crypto-asset. For example, Block Earner would receive the tokens aUSDC in exchange for USDC transferred to the Aave protocol;
  - c. Block Earner aggregates the DeFi tokens in Block Earner’s omnibus account connected to the DeFi protocol; and
  - d. Block Earner receives yield for the crypto-assets 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 crypto asset (in the case of Compound).

- 16F. When a consumer chooses to exit the Access Product, the following steps are taken:
- a. Block Earner redeems the DeFi tokens (including earnings) from the DeFi protocol for the underlying crypto-asset;
  - b. Block Earner converts the crypto-assets to AUD; and
  - c. Block Earner notionally transfers the AUD to the consumer's account on the Block Earner platform;
  - d. the customer can withdraw the AUD to their nominated bank account.
- 16G. The Terms provide that under the Access Product, Block Earner "aggregates" the DeFi tokens on its Block Earner omnibus account on each DeFi protocol.
- 16H. The Terms 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.
- 16I. 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)".
- 16J. There is no mechanism to exit the Access Product by withdrawing DeFi tokens or crypto-assets. There must be a "conversion" back into AUD.
- 16K. 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 crypto-asset.
- 16L. Block Earner does not hold, or have the benefit of, an AFSL covering the provision of financial services with respect to the Access Product.
- 16M. The Access Product is not registered as a managed investment scheme.

**B. The relief sought from the Court**

17. The relief sought by ASIC is set out in the accompanying Amended Originating Process.

## C. The primary legal grounds for the relief sought

### Earnar Product

18. *Managed investment scheme*: ASIC contends that the Earnar Product was a managed investment scheme within the definition in s 9 of the Corporations Act. It met the definition because it had the following features:
  - a. consumers ~~contribute~~contributed money (AUD) or money's worth (crypto-assets) as consideration to acquire rights to benefits produced by the scheme (the yield and any increase in value of the crypto-assets);
  - b. there is an objectively discernible intention that the contributions ~~are~~were to be pooled to produce financial benefits for the members, including because Block Earnar ~~has~~ told consumers via its website that the fixed yield ~~is~~was generated by pooling ~~customer~~consumer funds; and
  - c. the members ~~do~~did not have day-to-day control over the operation of the scheme.
19. *Investment Facility*: ASIC contends that the Earnar Product was an Investment Facility within the definition of s 763B of the Corporations Act. It was a facility as defined in s 762C of the Corporations Act, being an arrangement. Alternatively, if the Earnar Product ~~consists~~consisted of more than one arrangement, it is reasonable to assume that the parties to those arrangements regarded them as constituting a single scheme, such that by virtue of s 761B of the Corporations Act, they will be treated as if they together constituted one arrangement.
20. The Earnar Product was an Investment Facility because it had the following features:
  - a. the consumer gave money (AUD) or money's worth (crypto-assets) (the **contribution**) to Block Earnar;
  - b. Block Earnar used the contribution to generate a financial return for the consumer, or the consumer intended that Block Earnar would do so, or Block Earnar intended that it would do so, as evidenced by Block Earnar making the statements at paragraphs 5 to 8, and other similar statements; and
  - c. the consumers had no day-to-day control over the use of the contribution to generate the return.
21. *Derivative*: ASIC contends that the Earnar Product was a derivative because the amount of consideration, measured in AUD (being the currency that users deposit and receive back) varied by reference to the value of the crypto-assets. This is the case because, on



exiting the Earner Product, consumer's funds were converted from the crypto-assets to AUD at the prevailing exchange rate applied by Block Earner.

### Access Product

21A. *Managed investment scheme*: ASIC contends that the Access Product is a managed investment scheme within the definition in s 9 of the Corporations Act. It meets the definition because it has the following features:

- a. consumers contribute money (AUD) or money's worth (crypto-assets) as consideration to acquire rights to benefits produced by the scheme (the yield and any increase in value of the crypto-assets);
- b. there is an objectively discernible intention that the contributions are to be pooled to produce financial benefits for the members, including because the Terms state that Block Earner aggregates the DeFi tokens in its omnibus account; and
- c. the members do not have day-to-day control over the operation of the scheme, because Block Earner, or the DeFi protocol, or both of them, have day-to-day control over the operation of the scheme.

21B. *Investment Facility*: ASIC contends that the Access Product is an Investment Facility within the definition of s 763B of the Corporations Act. It is a facility as defined in s 762C of the Corporations Act, being an arrangement. Alternatively, if the Access Product consists of more than one arrangement, it is reasonable to assume that the parties to those arrangements regard them as constituting a single scheme, such that by virtue of s 761B of the Corporations Act, they will be treated as if they together constituted one arrangement.

21C. The Access Product is an Investment Facility because it has the following features:

- a. the consumer gives money (AUD) or money's worth (crypto-assets) (the **contribution**) to Block Earner;
- b. Block Earner uses the contribution to generate a financial return for the consumer through the DeFi protocol, or the consumer intends that Block Earner will do so, or Block Earner intends that it will do so; and
- c. the consumers have no day-to-day control over the use of the contribution to generate the return, because Block Earner, or the DeFi protocol, or both of them, have day-to-day control over the use of the contribution to generate the return.

21D. *Derivative*: ASIC contends that the Access Product is a derivative because:

- a. the amount of consideration, measured in AUD (being the currency that users deposit and receive back) varies by reference to the value of the crypto-assets; and
- b. further or alternatively, the yield paid to consumers by Block Earner varies by reference to the yield paid by the DeFi protocol.

#### *Contravention of s 911A of the Corporations Act*

22. Block Earner was the person responsible for the obligations owed under the terms of the Earner Product, it was therefore the issuer of the product (s 761E(4)). The Earner Product was a financial product for the reasons set out in paragraphs 18 to 21. Block Earner dealt in that financial product by issuing it (s 766C) and thereby provided a financial service (s 766A). It did so in the course of carrying on a financial services business, providing financial services in a repetitive manner in order to derive income.

22A. Block Earner is the person responsible for the obligations owed under the terms of the Access Product, it is therefore the issuer of the product (s 761E(4)). The Access Product is a financial product for the reasons set out in paragraphs 21A to 21D. Block Earner deals in that financial product by issuing it (s 766C) and thereby provides a financial service (s 766A). It does so in the course of carrying on a financial services business, providing financial services in a repetitive manner in order to derive income.

23. Block Earner therefore required an AFSL in respect of the Earner Product. and requires an AFSL in respect of the Access Product. As Block Earner did not, and does not, have an AFSL, Block Earner is in contravention of s 911A.

#### *Contravention of s 601ED(5) of the Corporations Act*

24. ASIC contends that, as the Earner Product was, and the Access Product is, a managed investment scheme, Block Earner is in contravention of s 601ED(5) because it was operating ~~an~~ unregistered managed investment ~~schemes~~ schemes, and in the case of the Access Product is still doing so.

#### **D. The alleged harm suffered**

25. The requirements of the Corporations Act which ASIC contends have been contravened by Block Earner are directed at the protection of investors in the context of financial investments. By Block Earner's failure to provide ~~those~~ these protections, consumers were and still are, exposed to risk ~~and made an,~~ making uninformed (or inadequately informed) or unsuitable ~~investment~~ investments, and ultimately exposed to loss in a manner inconsistent with the provisions of the Corporations Act.

26. As ASIC understands it:

- a. as of April 2022, approximately 240 ~~Block Earner clients~~consumers had deposited funds into the Earner Product; and
- b. -if, on or around 29 August 2022, Block Earner had been required to return all of the amounts it had borrowed from consumers via the Earner Product as at that date, it would have been required to repay approximately AUD 1.5 million in total to those consumers, being an amount (plus returns) borrowed from consumer investors in the absence of compliance with legislative protections.;

c. as of April 2022, approximately 50 consumers had deposited funds into the Access Product; and

d. if, on or around 8 March 2023, Block Earner had been required to return all of the amounts invested in the Access Product as at that date, it would have been required to pay approximately AUD 195,400 in total to those consumers, being an amount (plus returns) obtained from consumer investors in the absence of compliance with legislative protections.

Date: ~~23 November 2022~~21 March 2023



---

Signed by Nick Kelton  
Lawyer for the Plaintiff

This Amended Concise Statement was prepared by Jeremy Giles SC and Emma Beechey of Counsel.

### **Certificate of lawyer**

I, Nick Kelton, certify to the Court that, in relation to the Amended Concise Statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the Amended Concise Statement.

Date: ~~23 November 2022~~ 21 March 2023



---

Signed by Nick Kelton  
Lawyer for the Plaintiff