HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S136 of 2025

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
Appellant

and

WEB3 VENTURES PTY LTD ACN 655 090 869
Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

2. The respondent uses a different definition of "Earner" to the definition used by the appellant (Respondent's Submissions (**RS**) [2], cf Appellant's Submissions (**AS**) [7]-[8]). By defining "Earner" as merely "a service which allowed customers of the respondent to 'loan' specified cryptocurrency to the respondent in return for interest paid at a fixed rate", the respondent has assumed the answer to the construction question, being what forms part of the facility for the purpose of determining whether it is a financial product. This issue infects the whole of the respondent's submissions each time it refers to "Earner".

Investment facility (s 763B(a)(i) or (iii))

3. The respondent's submissions import into the definition of investment facility (s 763B) limits that appear in the definition of managed investment scheme (s 9) (see RS[16], [32]-[33]) but not in s 763B. There is no requirement in s 763B that the contribution be "to an endeavour" or for the "carrying on of an enterprise or undertaking". Nor does the defined term "contribution" in s 763B(a) have the meaning attributed to it at RS[30], derived from cases about managed investment schemes as defined in s 9. There is no "broader endeavour" required under s 763B(a).

4. Contrary to RS[24], s 763B(a)(i) does not involve "a contribution by person A to be used by person B for a particular purpose" (emphasis in original). Section 763B(a)(i) directs attention to the use by the other person of money or money's worth, that has been given by the investor, to generate a return for the investor, in contrast to s 763B(a)(ii) and (iii). The respondent's formulation introduces "to be" and "particular purpose" into the definition, the inclusion of which obscures and narrows the text.

5. What is the facility? Contrary to RS[27] and RS[49], the appellant does not exclude the conversion from AUD to cryptocurrency from the facility (see AS[10], [11], [37]). The facility

included both the conversion from AUD to cryptocurrency on entry and the conversion from cryptocurrency to AUD on exit. To establish that it was an investment facility, neither conversion is required. To establish that the facility was a derivative, the appellant does not need to establish that the facility included the initial conversion from AUD to cryptocurrency. That is not an inconsistency. Rather, it is to focus on the features of the facility that are relevant to whether the arrangement meets the statutory definition.

6. At RS[42], the respondent, like the Full Court, has misunderstood the fixed interest cases. In each case, the investor was entitled only to fixed interest. That fact, combined with the investor having been told that their money would be used in a certain way, brought the products within the relevant definition. Additionally, in *Australian Securities and Investments Commission v* ***Secure Investments*** *Pty Ltd (No 2)*,[1] a loan product was found to be a facility through which a person makes a financial investment under s 763B(a)(ii) because of what investors had been told about the use of their investment.

Investment facilities include deposit accounts (s 763B)

7. The respondent's argument that a deposit account cannot be an investment facility (RS[40]-[46]) is based on the false premise that a product specifically identified as a financial product by s 764A(1) cannot also be a financial product as defined in s 763A. A facility may be a financial product both by application of the definition in s 763A and by the specific inclusions in s 764A, as explained in the "overview" in s 762A(2). See also the Revised **Explanatory Memorandum** at [6.44].[2] The Explanatory Memorandum addressed deposit accounts as falling within the definition of "financial product" by reason of both the general definition of investment facility[3] and because they were listed as specific inclusions under s 764A(1)(i).[4] As identified in Note 1 to s 763B, shares in a company and interests in a registered scheme are investment facilities. They are also specifically included as financial products: ss 764A(1)(a) and (b)(i). Nothing in the Wallis Inquiry[5] or CLERP 6[6] suggests otherwise (cf RS[44]).

Derivative (s 761D(1)(c) and s 761B)

8. The respondent says at RS[53] that the facility is not a derivative because the conversion to and

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1 (2020) 148 ACSR 154 at [52].
2 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 at [6.44].
3 Explanatory Memorandum at [6.58]; see AS[33].
4 Explanatory Memorandum at [6.89].
5 Financial System Inquiry, Final Report (March 1997).
6 Corporate Law Economic Reform Program, Proposal for Reform: Paper No. 6, "Financial Markets and Investment Products: Promoting Competition, financial innovation and investment" (December 1997) (**CLERP 6**).

from AUD was "ancillary or incidental such as not to form part of the substance of the arrangement for the purposes of s 761D." That particularly contestable description departs from the statutory definition. The definition directs attention to, and only to, the three characteristics of the facility identified in s 761D(1), not to a characterisation of the "substance of the arrangement". Consistent with the structure of Chapter 7, the possible overinclusive effect of the definition is ameliorated by the specific exclusions both in s 761D(3) and s 765A. Further, contrary to RS[51], there is no requirement that the "something else" in the definition of derivative be "some secondary something else", "something extrinsic to the arrangement". The language of s 761D(1)(c) does not support that condition, which also introduces distinctions which do not advance an apparent legislative purpose. The statutory framework contemplates that a foreign exchange contract that is not to be settled within 3 business days (s 764A(1)(k) and reg 7.1.04) and an arrangement to buy and sell property at a future date (subject to the exception in s 761D(3)(a)) are both capable of being derivatives. The minority view of Young JA on this point in *International Litigation Partners Pte Ltd v Chameleon Mining NL*[7] is wrong.

9. The respondent's attempt at RS[28] to remove the conversion back to AUD from the scope of the facility by characterising an agreed fact that some users exited the Earner product in cryptocurrency as being a part of the facility *at the time of its issue* fails for at least two reasons. *First*, as the respondent acknowledges at RS[8], the facility was provided in accordance with the Terms at all times. RS[28] is therefore contrary to cl 4.3(j) of the Terms ("Block Earner will return … in each case by Block Earner converting the Final Amount to an equivalent value of Australian dollars" (emphasis added)). *Secondly,* the agreed fact regarding withdrawals said nothing about the facility at the time that it was issued. Contrary to RS[14], the Full Court (at FC[130]) did not find these to be "facts about how users might enter and exit from Earner". It found them to be facts about how some users *did* exit from Earner. As noted at AS[55], the Full Court's finding at FC[136] in respect of the agreed fact, if read in the way contended for by the respondent as identifying the terms of the facility *at the time of its issue*, was contrary to the agreed fact. Alternatively, if there were two arrangements (the "loan" of cryptocurrency and the asserted "ancillary" service of conversion back to AUD (see RS[28])), by s 761B they are to be treated as if they together constituted a single arrangement because it is reasonable to assume that the parties to the arrangements regarded them as constituting a single scheme.

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7 (2011) 276 ALR 138 at [236]-[238].

Contract for the future provision of services

10. The exception to the definition of derivative in s 761D(3)(b) requires a characterisation of the arrangement which directs attention to the substantial object or substance of this contract.[8] That objective inquiry is answered in this case by cl 4.3(a) of the Terms: the object is the "loan" of cryptocurrency to the respondent and the earning of interest on a "loan" of cryptocurrency by the investor. The conversion of the cryptocurrency to AUD was part of but in effect ancillary or incidental to that object.[9] It may be added that almost inevitably a service will facilitate a derivative. To give content to the definition it is necessary to direct attention to the object of the arrangement, not to the mechanical steps which facilitate achieving that object. RS[53] involves incorrect characterisations of both the arrangement and the definition. The arrangement was a derivative because the amount of the consideration in AUD varied by reference to the value of something else (the cryptocurrency). The conversion to AUD did not have the consequence that the contract was for the future provision of services because the object of the contract was as described in this paragraph. Nor does a finding that the facility is a derivative within the meaning of s 761D(1) require rejection of the respondent's contention that the conversion was "ancillary or incidental" (cf RS[53]).

Credit facility

11. *Deferred debt*: What was "lent" was cryptocurrency, not AUD. However, as the primary judge observed, the concept of "lending" cryptocurrency is a misnomer. Rather, the use of the word "lend" here is akin to its use in securities lending, whereby securities are actually transferred outright by way of sale and purchase from the "lender" to the "borrower", with the borrower being contractually obliged to redeliver to the lender at a later time securities which are equivalent in number and type (PJ[11]). Both parties accept this as the correct analysis (see RS[18]).

12. The question of whether an arrangement is a credit facility is not determined by reference to some perceived economic equivalence with other types of transactions.[10] It is the actual contractual rights and obligations that must be analysed. Under the terms, the "loan" of cryptocurrency is not a contract, arrangement or understanding under which payment of a debt is deferred or a deferred debt is incurred (r 7.1.06(3)(a)) because a debt is a monetary obligation,[11] not an obligation to

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8 ***Joffe*** *v The Queen; Stromer v The Queen* (2012) 82 NSWLR 510 at [20], [165]-[167] (Barrett JA, Bathurst CJ and Allsop P agreeing). See also *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* (1970) 121 CLR 154 at 160 (Barwick CJ, McTiernan J concurring) and 173-174 (Walsh J).

9 *Joffe* (2012) 82 NSWLR 510 at [168].

10 *Joffe* (2012) 82 NSWLR 510 at [18] (Bathurst CJ), [103]-[104] (Allsop P).

11 *Webb v Stenton* (1883) 11 QBD 518.

return assets. As Nicholas J held in *ASIC v Bit Trade Pty Ltd*,[12] "[a]n obligation to pay an amount of cryptocurrency of some type is not an obligation to pay a sum of money and therefore cannot be a debt". The conversion of the cryptocurrency into AUD required under cl 4.3(j) was not payment of a debt, rather it was the performance of a contractual obligation to convert what had been returned.

13. *Financial accommodation*: The transfer of cryptocurrency with an obligation to return that and more cryptocurrency was not a form of financial accommodation (r 7.1.06(3)(b)(i)). *First*, it was not something that "supplied a want" of Block Earner.[13] Block Earner's business model was to borrow the cryptocurrency to on-lend at a higher rate of interest. *Secondly*, the primary meaning of "financial"[14] in the Macquarie Dictionary is "relating to monetary receipts and expenditures; relating to money matters; pecuniary: financial operations." Neither the appellant nor the respondent contends that cryptocurrency is money. Indeed, some of the relevant cryptocurrencies "lent" by customers to Block Earner had functionalities quite different to money: see NAF [43(b) and (c)].[15] There was no evidence before the primary judge or in the Full Court, nor is there evidence in this Court, to support the respondent's new contention at RS[54] that any accommodation was "financial" because the facility involved "the provision of digital tokens that could be used to make payments and had intrinsic value" (emphasis added). Such assertions could only be proven by evidence. Further, this argument is also inconsistent with the finding that cryptocurrency was used by Block Earner only for on-lending. It was not used to make payments.

14. *Derived a financial benefit as a result of a loan*: The transfer of cryptocurrency is not a loan for the reasons explained at [11] to [12] above. The word "loan" in the definition of a credit facility must mean a loan by which a person gives credit or incurs a debt. Otherwise, any transfer of property with an obligation to return the property would be a credit facility.

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12 [2024] FCA 953 at [38].
13 See *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2012) 246 CLR 455 at [43]-[44] (Heydon J).
14 *Macquarie Dictionary* (9th ed, 2023) 'financial' (def 1).
15 In the NAF, the respondent accepted that this fact was accurate but contended that it was irrelevant.