HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S136/2025

BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Appellant

AND

WEB3 VENTURES PTY LTD

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Facts and provisions (AS [7]-[18])

2. At all times, the services provided by the respondent were provided in accordance with the Terms of Use. Those terms detailed (relevantly) its "Earner" product (also called "Lend"). Under the Earner product, the respondent exchanged an investor's AUD for cryptocurrency. It then acquired the cryptocurrency from the investor under a "loan", for which entitled the investor to a fixed rate of interest. When the "loan" was ended by the investor, the respondent returned the cryptocurrency together with the interest accrued, by converting those amounts to AUD. **(PJ [16], CAB 12-18)**

3. Under the Terms of Use the Earner product included, as a matter of course, a conversion to and from AUD through the Exchange service. Although 6 users accessed the Earner product directly, these were ad hoc variations. **(PJ [23]-[24], CAB 19-20; BFM 27-28)**

4. The respondent's business model was to on-lend the cryptocurrency obtained from an investor to third parties for a higher rate of interest than it was paying under the Terms of Use. This higher yield was sufficient to both (i) meet its obligations to pay fixed interest to the investor and (ii) generate a profit for itself (being the difference between the interest it was required to pay and the higher rate of interest it had received). **(PJ [20], [28]-[33], [43], [50]-[51], CAB 19-31; FC [89], CAB 125)**.

5. It is common ground that the respondent contravened s 911A of the *Corporations* ***Act*** *2001* (Cth) if the Earner product was a "financial product" within the meaning of ss 762A, 762C, 763A, 763B, 764A and 761D of the Act. **(Vol 1, Tab 3)**

Ground 1 – "financial investment" within s 763B (AS [19]-[35])

6. ***What the Full Court held****:* The Full Court set out the primary judge's factual findings and his Honour's conclusions **(FC [32]-[41], CAB 109-111; FC [87]-[89], CAB 123-125)**. The Full Court then dealt with the application of s 763B. In doing so it proceeded, without explanation, on the basis that the provision required a choice be made as to whether the respondent used the investors' cryptocurrency to generate a financial return or other benefit "for" itself or "for" the investors. **(FC [90]-[91], CAB 125-126)**

7. ***Errors with the Full Court's construction:*** The Full Court misunderstood and misapplied s 763B. It was plain from the facts found by the primary judge, which were not overturned by the Full Court, that the respondent used the investors' cryptocurrency to generate a financial return or other benefit both "for" itself and "for" the investors. Section 763B does not create a dichotomy or choice between those things as is apparent from the statutory text, statutory context and extrinsic materials.

8. *Statutory text.* The plain language of s 763B is unqualified and inclusive. It does not require that financial returns be for only one person, and does not limit the ways in which an investor's contribution may be used to generate such returns. **(Vol 1, Tab 3)**

9. *Statutory context.* The objects of the Act and the deliberately overinclusive drafting of the core provisions stands against reading s 763B as subject to an unexpressed limitation of the kind found by the Full Court. *International Litigation Partners v Chameleon Mining* (2012) 246 CLR 455 at [2]-[5] (**Vol 3, Tab 9**)

10. *Extrinsic materials.* The extrinsic materials underline the deliberate breadth of the "financial product" provisions, to provide the flexibility to cover new and innovative products. They also illustrate that the provisions were intended to cover deposit accounts. Financial System Inquiry, *Final Report* (March 1997) (Wallis Report) at 38 (recommendation 19) **(Vol 7 Tab 30 1647)**; Revised Explanatory Memorandum, *Financial Services Reform Bill 2001* at [1.1]-[1.5], [2.8]-[2.9], [2.23]-[2.24], [6.44]-[6.45], [6.56]-[6.58] **(Vol 7 Tab 28 1372, 1376, 1379, 1405-7)**; Corporate Law Economic Reform Program, *Paper No 6: Financial Markets and Investment Products* (1997) at 40, 44-45 **(Vol 7 Tab 25 894-899)**

Ground 2 - "derivative" within s 761D (AS [42]-[56])

11. The Earner product is a derivative within the meaning of s 761D **(Vol 1, Tab 3)**. That is because the value of the arrangement that comprises the financial product satisfies the requirements set out in s 761D(1)(a)-(c). It is common ground that paragraphs (a) and (b) are satisfied.

12. ***Identifying the "arrangement"***: Identifying the "arrangement" said to constitute the derivative is a logically anterior issue to the others. The definition of "arrangement" is broad: see ss 761A-761B **(Vol 1, Tab 3)**. The "arrangement" in this case included the respondent's obligation to return the investor's cryptocurrency investment to them in Australian dollars using the Exchange service. The Full Court erred because it conceptualised the relevant arrangement in a way that was inconsistent with the written

contract terms between the investors and the respondent **(CAB 106, 137)**. If there were two arrangements, as the Full Court postulated, the same result follows because a reasonable person in the position of the investors would have regarded those arrangements as forming part of a single scheme.

13. ***"Something else"***: The consideration of the derivative in the present case was the Australian dollars the respondent paid to the investors for their cryptocurrency. Since the fixed interest was paid in cryptocurrency and then paid out to investors by converting the cryptocurrency back into Australian dollars using the Exchange service, the consideration varied by reference to the exchange rate between that cryptocurrency and Australian dollars. The respondent's contention that the "something else" in s 761D(1)(c) must be external to the arrangement is atextual.

14. ***Contract for the future provision of services***: The Earner product did not fall within the exception in s 761D(3)(a) because it was not a contract for the future provision of services. The proper approach is to assess the "objective purpose" of the parties entering into the relevant contract: *Joffe v The Queen* (2012) 82 NSWLR 510 **(Vol 4, Tab 19)**. The purpose of this contract was to invest money to receive a return; not for the conversion of currency in the future.

15. ***Credit facility***: The respondent's future contractual obligation to transfer cryptocurrency to the investor and then purchase the cryptocurrency from the investor with Australian dollars is not a debt: therefore, no debt is created or deferred. It is neither financial accommodation nor a benefit arising from a loan (because there is no loan of money). The Earner product is not a "credit facility" and is therefore not excepted from the definition of "financial product" by s 765A(1)(h) of the Act **(Vol 1, Tab 3)** read with reg 7.1.06 of the *Corporations Regulations 2001* (Cth) **(Vol 1, Tab 4)**.

Dated: 12 March 2026

Tim Begbie **Jeremy Giles** **E L Beechey**