HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

WEB3 VENTURES PTY LTD — RESPONDENT

Australian Securities and Investments Commission v Web3 Ventures Pty Ltd
[2026] HCA 21
Date of Hearing: 12 March 2026
Date of Judgment: 17 June 2026
S136/2025

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 22 April 2025, and, in their place, order that:*

   (a) *The cross-appeal be allowed in part.*

   (b) *The declaration of contravention in para 2 of the orders made by the primary judge on 9 February 2024 and the declaration of contravention in para 2 of the orders made by the primary judge on 4 June 2024 be set aside.*

   (c) *The cross-appeal otherwise be dismissed.*

   (d) *Each party to bear its own costs of the cross-appeal.*

3. *The proceeding be remitted to the Full Court of the Federal Court of Australia for determination of the appellant's appeal against the penalty judgment (*Australian Securities and Investments Commission v Web3 Ventures Pty Ltd *[2024] FCA 578).*

4. *The appellant pay the respondent's costs of and incidental to this appeal.*

On appeal from the Federal Court of Australia

Representation

T M Begbie KC, acting Solicitor-General of the Commonwealth, and J C Giles SC with E L Beechey for the appellant (instructed by Australian Securities and Investments Commission)

F T Roughley SC with J Entwisle and B W Smith for the respondent (instructed by Gilbert + Tobin)

CATCHWORDS

Australian Securities and Investments Commission v Web3 Ventures Pty Ltd

Companies – Australian financial services licence – Provision of financial services – Where issuer did not hold or have benefit of Australian financial services licence for product – Where Australian financial services licence required if product is "financial product" – Where "financial product" includes facility through which person makes financial investment – Where "financial product" includes derivative – Where product involved deposit and withdrawal of Australian dollar amount – Where issuer converted deposit into cryptocurrency – Where product involved fixed rate of return on deposit paid in cryptocurrency and possible further return from increase in value of cryptocurrency – Whether product "financial product" – Whether product facility through which person makes financial investment – Whether product derivative.

Words and phrases – "arrangement", "contract for the future provision of services", "contribution", "convert", "credit facility", "crypto-asset", "cryptocurrency", "derivative", "derived from or varies by reference to", "exchange", "facility", "financial investment", "financial product", "financial services", "fixed rate of return", "general definition of a financial product", "generate a financial return, or other benefit, for the investor", "interest", "investor", "issuer", "lend", "money or money's worth", "nexus", "overriding exclusions", "return", "rights and title to", "specific inclusions", "use", "user".

Corporations Act 2001 (Cth), Ch 7, Pt 7.1 Div 3, ss 760A, 761A, 761B, 761D, 761E, 762A, 762B, 762C, 763A, 763B, 763E, 764A, 765A, 766A, 766C, 911A.
Corporations Regulations 2001 (Cth), Pt 7.1 Div 1, reg 7.1.06(1)(a)(iv).
Evidence Act 1995 (Cth), s 191.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. Under the *Corporations Act 2001* (Cth), a "person who carries on a financial services business" in Australia must hold an Australian financial services licence ("AFSL") covering the provision of those financial services.[1] A person provides a financial service if, among other things, they "deal in a financial product".[2] What is a "financial product" is addressed in Div 3 of Pt 7.1 of the *Corporations Act*.

2 The respondent, Web3 Ventures Pty Ltd trading as "Block Earner", operated an online platform through its website and mobile phone application ("the Block Earner Platform"). From 17 March 2022 to 16 November 2022, Block Earner issued a product called "the Earner Product", which was offered on the Block Earner Platform. Under Block Earner's Terms of Use ("the Terms of Use"), a user nominated an amount of Australian dollars ("AUD") it had deposited with Block Earner to be invested in the Earner Product and earned a fixed rate of return.[3]

3 In general terms, to use the Block Earner platform and invest in the Earner Product a user first had to register an account with Block Earner ("online Block Earner account"). The user would then transfer an AUD amount from their bank account into a bank account in the name of Block Earner (defined in the Terms of Use as "the Account"). To activate the Earner Product, a user logged into their online Block Earner account on the Block Earner Platform, selected "Lend" from the available services, nominated an "Eligible Cryptocurrency" and the amount of AUD to be invested, and reconfirmed their acceptance of the Terms of Use. Once those actions were completed, Block Earner took the AUD amount nominated by the user to be invested from the Account and "converted" it to the nominated cryptocurrency. The Earner Product offered users a fixed rate of return of seven per cent annualised percentage yield ("APY") on and paid in

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1 *Corporations Act*, s 911A(1) read with s 761A definition of "financial services business".

2 *Corporations Act*, s 766A(1)(b) read with s 766C.

3 The Terms of Use referred to the Earner Product as "Lend".

the relevant cryptocurrency,[4] rather than being interest on the AUD amount contributed.

4 To withdraw from the Earner Product, the user logged into their online Block Earner account on the Block Earner Platform and followed prompts to transfer an amount from the Earner Product. As part of that process, the user's online Block Earner account showed the approximate current AUD value of the Eligible Cryptocurrency and the APY earned as well as the exchange rate and any fees applied by Block Earner for the "conversion" of the relevant cryptocurrency into AUD. Block Earner would "convert" the relevant cryptocurrency, including the APY earned, back to AUD. The user could then withdraw the AUD 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.

5 Block Earner did not hold or have the benefit of an AFSL for the Earner Product.

6 The appellant ("ASIC") instituted proceedings in the Federal Court of Australia. ASIC's case before the primary judge (Jackman J) was that the Earner Product was a financial product within Div 3 of Pt 7.1 of the *Corporations Act* because it was a facility through which a person made a financial investment within the meaning of s 763B of the *Corporations Act*, in that "(a) the consumer gave money (AUD) or money's worth (crypto-assets) (the ***contribution***) to Block Earner" and "(b) Block Earner used the contribution to generate a financial return for the consumer, ... or Block Earner intended that it would do so" (emphasis in original). ASIC also contended that the Earner Product was a financial product because it was a derivative within the meaning of s 761D of the *Corporations Act* "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". ASIC also contended that the Earner Product was a financial

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4 Statements on Block Earner's website mainly referred to the "7% fixed option", which involved conversion of AUD into "the USD-backed stablecoin" ("USDC"). However, it was an agreed fact that the fixed rates offered under the Earner Product also included four per cent APY where the user nominated other Eligible Cryptocurrencies.

product because it was a managed investment scheme within the meaning of s 9 of the *Corporations Act*.

7 The primary judge relevantly declared that Block Earner had contravened s 911A(1) and (5B) of the *Corporations Act* by carrying on a financial services business without holding an AFSL covering the provision of financial services with respect to the Earner Product. That declaration was based on a finding that the Earner Product was a financial product as defined in s 763A(1)(a) of the *Corporations Act* because it was a facility through which users of the Earner Product made a "financial investment" within the meaning of s 763B(a)(i) and (iii) of that Act. His Honour also declared that Block Earner had contravened s 601ED(5) and (8) of the *Corporations Act* by operating an unregistered managed investment scheme with respect to the Earner Product. Given that latter finding, the primary judge did not consider that the Earner Product was a derivative within the meaning of s 761D of the *Corporations Act*, because a managed investment scheme within the meaning of s 9 of the *Corporations Act* is excluded from the definition of "derivative".[5]

8 The Full Court of the Federal Court of Australia (O'Callaghan, Abraham and Button JJ) allowed Block Earner's appeal on liability and set aside the primary judge's declarations of contravention, holding that the Earner Product was not a financial product within Div 3 of Pt 7.1 of the *Corporations Act* because: it was not a facility through which a person makes a financial investment under s 763B; it was not a managed investment scheme within the meaning of s 9 of the *Corporations Act*; and it was not a derivative within the meaning of s 761D of the *Corporations Act*.

9 In ASIC's appeal to this Court, it again contended that the Earner Product was a financial product within Div 3 of Pt 7.1 of the *Corporations Act* because it was a facility through which a person makes a financial investment within the meaning of s 763B and because it was a derivative within the meaning of s 761D. ASIC did not seek leave to appeal to contend that the Earner Product was a managed investment scheme. By a notice of contention, Block Earner sought to uphold the Full Court's judgment that the Earner Product was not a derivative on two grounds not addressed by the Full Court.

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5 *Corporations Act*, s 761D(3)(c) read with s 764A(1)(ba).

10 For the reasons that follow, ASIC's appeal must be allowed. The Earner Product was a financial product as defined in s 763A(1)(a) of the *Corporations Act* as it was a facility through which a person made a financial investment within the meaning of s 763B of that Act and as it was also a derivative within the meaning of s 761D of that Act.

Chapter 7 of the *Corporations Act*

11 Chapter 7 of the *Corporations Act* contains a regime for the regulation of financial products and services in Australia. The main object of Ch 7, stated in s 760A, is to promote:[6]

> "(a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
>
> (aa) the provision of suitable financial products to consumers of financial products; and
>
> (b) fairness, honesty and professionalism by those who provide financial services; and
>
> (c) fair, orderly and transparent markets for financial products; and
>
> (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities."

12 Part 7.1 contains complex definitional provisions. These are relevantly supplemented and qualified by Div 1 of Pt 7.1 of the *Corporations Regulations 2001* (Cth).[7] The legislative scheme has two significant characteristics:

> "One is overinclusiveness. Rights and liabilities are drawn in overtly broad terms, on the footing that instances of overreach which become apparent in the administration of the legislation may be remedied by adjustments to the Act made not by remedial legislation but by exercise of powers

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6 See also *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at 458-459 [2]-[4].

7 *Chameleon* (2012) 246 CLR 455 at 459 [6].

> conferred upon the Executive Government or bodies such as the Australian Securities and Investments Commission. The second characteristic is the creation by the legislation of rights and liabilities by means of criteria which reflect fluid market and economic usage rather than any ascertainable and stable meaning in the law."[8]

Financial product

13 Against that background, Div 3 of Pt 7.1 addresses "What is a financial product?"[9] Section 762A, which provides an overview of the approach to defining what a financial product is, explains that there are three parts: there is a general definition by which a facility is a financial product if it falls within that definition (s 762A(1) read with ss 763A-763E); there are specific inclusions – facilities that are financial products whether or not they are within the general definition (s 762A(2) read with s 764A); and there are also overriding exclusions – facilities that are not financial products even if they are otherwise within the general definition or specific inclusions (s 762A(3) read with ss 765A and 765B).

14 Section 763A contains the general definition of "financial product". Section 763A(1) relevantly provides that a financial product is "a facility through which, or through the acquisition of which, a person does one or more of the following": (a) makes a financial investment (s 763B); (b) manages financial risk (s 763C); (c) makes non-cash payments (s 763D).[10] This appeal is concerned with whether the Earner Product was a facility through which a person made a financial investment within the meaning of s 763B.

15 A "facility" includes, relevantly, "an arrangement or a term of an arrangement (including a term that is implied by law or that is required by law to

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8 *Chameleon* (2012) 246 CLR 455 at 459 [5].

9 *Corporations Act*, s 761A definition of "financial product".

10 Section 763A(1) has effect subject to s 763E.

be included)".[11] "Arrangement" is defined[12] to mean "a contract, agreement, understanding, scheme or other arrangement (as existing from time to time): (a) whether formal or informal, or partly formal and partly informal; and (b) whether written or oral, or partly written and partly oral; and (c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights".

16 Section 761B then extends the meaning of "arrangement". If "(a) an arrangement, when considered by itself, does not constitute a derivative, or some other kind of financial product; and (b) that arrangement, and one or more other arrangements, if they had instead been a single arrangement, would have constituted a derivative or other financial product; and (c) it is reasonable to assume that the parties to the arrangements regard them as constituting a single scheme; the arrangements are, for the purposes of [Pt 7.1], to be treated as if they together constituted a single arrangement".

17 Two other provisions should be noted. First, s 763A(1) has effect subject to s 763E. Section 763E provides, in substance, that if something, referred to as "the incidental product", that but for s 763E would be a financial product because of the general definition of a financial product, is "(i) an incidental component of a facility that also has other components; or (ii) a facility that is incidental to one or more other facilities", and it is reasonable to assume that the main purpose of the facility when considered as a whole is not relevantly the purpose of making a financial investment, the incidental product does not fall within the general definition of a financial product.[13] Second, a particular facility that is of a kind through which people commonly make financial investments is a financial product even if that facility is acquired by a particular person for some other purpose.[14]

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11 *Corporations Act*, s 762C(b). If a financial product is part of a broader facility, Ch 7 only applies in relation to the facility to the extent that it consists of the component that is the financial product: *Corporations Act*, s 762B.

12 *Corporations Act*, s 761A definition of "arrangement".

13 It may still be a financial product because of the specific inclusions: *Corporations Act*, s 763E(1).

14 *Corporations Act*, s 763A(2).

When financial product issued

18 Section 761E defines when a financial product is issued and who is the issuer of the financial product. If a financial product is issued to a person, the person acquires the product from the issuer and the issuer provides the product to the person.[15] A financial product is issued to a person generally "when it is first issued, granted or otherwise made available to a person".[16] The issuer is relevantly the person responsible for the obligations owed, under the terms of the facility that is the product, to a "client".[17]

Financial investment

19 Section 763B then sets out the meaning of "makes a financial investment" for the purposes of s 763A(1)(a). A person, referred to as "the investor", "makes a financial investment" if:[18]

> "(a) the investor gives money or money's worth (the ***contribution***) to another person and any of the following apply:
>
> (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
>
> (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
>
> (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and

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15 *Corporations Act*, s 761E(1).

16 *Corporations Act*, s 761E(2).

17 *Corporations Act*, s 761E(4).

18 Notes at the end of the section contain examples of actions that do and do not constitute making a financial investment under s 763B.

(b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit." (emphasis in original)

It was common ground that the requirements in the chapeau to s 763B(a) and the terms of s 763B(b) were satisfied. This appeal is concerned with whether the Earner Product satisfied s 763A(1)(a) via one or both of s 763B(a)(i) and (iii), namely whether the Earner Product was a facility through which either Block Earner used the contribution by each user to generate a financial return, or other benefit, for the user (sub-para (i)) or Block Earner intended that the contribution would be used to generate a financial return, or other benefit, for the user (sub-para (iii)). The answer is "yes" to both.

The Earner Product

20 Before the primary judge, the parties filed[19] a "Narrative of facts on liability" ("the Agreed Facts") in which the parties agreed, among other things, that the Earner Product was provided in accordance with the Terms of Use and that the Terms of Use were amended from time to time, but the key features relevantly remained the same during the relevant period. The primary judge made findings about the Earner Product by referring to the Agreed Facts, the Terms of Use and evidence given by Block Earner's Chief Executive Officer and co-founder, Mr Karaboga. None of these findings were challenged in the Full Court or in this Court.

21 Before turning to consider the Terms of Use, it is important to record that throughout the Terms of Use, Mr Karaboga's evidence, and the judgments in the courts below, labels were applied to and used to describe the Earner Product and the underlying arrangements between Block Earner and users that were inapposite. Indeed, in the course of making the relevant findings the primary judge placed a number of the inapposite labels and phrases in quotation marks. For example, the words "Lend" and "loan" were used to describe steps taken under, or arrangements made in accordance with, the Terms of Use in relation to the Earner Product when those steps and arrangements, properly characterised, did not involve the making of any loan. In addition, there were statements in the Terms of Use referring to Block Earner "return[ing]" a user's cryptocurrency,

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19 Pursuant to s 191 of the *Evidence Act 1995* (Cth).

or a user having "rights and title" to cryptocurrency, when the user had no rights or title to any such cryptocurrency (assuming that were possible).

22 As has been explained, to acquire, invest in or use the Earner Product, a user of Block Earner first had to register an account with Block Earner on the Block Earner Platform,[20] namely an online Block Earner account.[21] This requirement was set out in the Terms of Use.[22] To set up an online Block Earner account, a user went either to the Block Earner website, or accessed the mobile application, and clicked "Open Account". The Block Earner Platform then prompted the user to enter an email address and an Australian mobile number, and to provide a password.[23] The user was then shown the Terms of Use. To continue through to the platform and access the services (including the Earner Product), the user was required to click "I Agree" to confirm that they agreed to be bound by the Terms of Use and that they had read the risks disclosure document provided by Block Earner.

23 After registering an online Block Earner account, a user would then transfer AUD into the Account, which was a fiat account with an Australian authorised deposit-taking institution in the name of Block Earner.[24] This was a necessary step of the "Exchange service" set out in cl 4.1 of the Terms of Use. The reason why a user deposited AUD into the Account was stated in cl 4.1(a)(ii), relevantly, to be for the purpose of "exchanging such dollars for ... certain cryptocurrency as stated in the Block Earner Platform (**Eligible Cryptocurrency**) to participate in the loan service under which users can lend their Eligible Cryptocurrency to Block Earner in exchange for interest payments, known as 'Block Earner USD Coin Fixed Yield (Lending-Based)' (**Lend**) (see section 4.3)" (emphasis in original).[25] Once Block

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20 Terms of Use, cl 1.1(a).

21 Terms of Use, cl 1.2.

22 Terms of Use, cl 1.

23 Terms of Use, cl 1.1(b).

24 Terms of Use, cl 4.1(a).

25 The words "exchanging" and "loan" were inapposite.

Earner received a user's deposit of AUD in the Account, the user was permitted to nominate whether they wished to participate in "Lend", being the Earner Product.[26]

24 As noted, to activate the Earner Product, a user logged into their online Block Earner account on the Block Earner Platform, selected "Lend" from the available services, nominated an Eligible Cryptocurrency and the amount of AUD to be invested, and reconfirmed their acceptance of the Terms of Use.[27]

25 Once those actions were completed, Block Earner took the AUD amount to be invested from the amount that had been deposited by the user into the Account and "converted" it to the Eligible Cryptocurrency.[28] By accepting the Terms of Use, a user acknowledged and agreed that Block Earner had facilitated the "conversion" by exchanging the "user's" AUD in the Account for the Eligible Cryptocurrency nominated by the user[29] and that Block Earner could charge the user a conversion fee to exchange AUD to the Eligible Cryptocurrency.[30]

26 Of course, the user did not have AUD in the Account, which was an account in Block Earner's name,[31] so none of the "user's funds" were in fact converted into or exchanged for any Eligible Cryptocurrency. It was also inapposite to describe a user as "giving" any cryptocurrency or Block Earner using "their [namely, the user's] cryptocurrency".[32] The Eligible Cryptocurrency was "held" in Block

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26 Terms of Use, cl 4.1(c).

27 Terms of Use, cl 4.3(e).

28 Terms of Use, cl 4.3(f); see also cl 4.3(k).

29 Terms of Use, cl 4.1(e)(i) and (iii).

30 Terms of Use, cl 4.1(f).

31 See, eg, *Pott v Clegg* (1847) 16 M & W 321 [153 ER 1212]; *N Joachimson (a Firm Name) v Swiss Bank Corporation* [1921] 3 KB 110 at 117-118, 123, 126-127; *Russell v Scott* (1936) 55 CLR 440 at 450-451. There was no contention that the funds in the Account were subject to any trust in favour of the user: cf *Harrods Ltd v Tester* [1937] 2 All ER 236.

32 See further [37], [42]-[44] below.

Earner's wallet, not a user's wallet, in that Block Earner held the private key that provided access to the wallet and the underlying cryptocurrency.

27 The Earner Product offered users a fixed rate of return (the APY) on and paid in the relevant cryptocurrency.[33]

28 During the term of the Earner Product, if a user viewed their online Block Earner account on the Block Earner Platform, they would see the unit amount of Eligible Cryptocurrency and the APY earned to date expressed in units of the Eligible Cryptocurrency, as well as the approximate AUD value of the Eligible Cryptocurrency and the APY.[34]

29 As we have seen, to withdraw from the Earner Product, either at the expiry of the fixed term selected by the user when they elected to use "Lend" or at any time when a user elected to terminate "Lend",[35] the user accessed their online Block Earner account on the Block Earner Platform and followed prompts to seek to transfer an amount from the Earner Product. As part of that process, the user's online Block Earner account on the Block Earner Platform again showed the equivalent amount of AUD of the Eligible Cryptocurrency and the APY earned as well as the exchange rate and any fees applied by Block Earner for the "conversion" of the Eligible Cryptocurrency into AUD.[36] Block Earner would "convert" the Eligible Cryptocurrency, including the APY earned, back to AUD and that amount would be held in the Account.[37] The user could then elect to withdraw the AUD by requesting a bank transfer of that amount to a third party bank account, or nominate for the amount to be placed into the same or a different Block Earner product.[38] The amount of AUD received back by the user varied by reference to the exchange rate between AUD and the Eligible Cryptocurrency.

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33 See fn 4 above.

34 Terms of Use, cl 4.3(h).

35 Terms of Use, cl 4.3(i) sub-paras (i) and (iii).

36 Terms of Use, cl 4.3(j).

37 Terms of Use, cl 4.3(j) read with cl 4.1(a).

38 Terms of Use, cl 4.3(j) read with cl 4.1(g).

In other words, the market value of the Eligible Cryptocurrency in US dollars ("USD") fluctuated and the exchange rate of USD for AUD fluctuated.

30 The unchallenged evidence of Mr Karaboga was that:

> "Block Earner's business model was to loan the cryptocurrency borrowed from users, together with its own cryptocurrency that it had purchased from other sources, to third parties at a higher interest rate than it was paying to Block Earner's users under the 'Terms of [U]se'. Block Earner's profit was then the difference between the amount of interest it had to pay to the user and the amount it received from the third party. This profit was not paid to the user, who only received the fixed interest rate in cryptocurrency as agreed with Block Earner."

Under the Terms of Use, Block Earner was required to pay the APY (denominated in the Eligible Cryptocurrency nominated by the user) to users regardless of the amount of income that Block Earner earned by "on-lending" the cryptocurrency to third parties.[39]

Earner Product a financial product because it involved the making of a financial investment

31 By s 763A(1)(a), a financial product is a facility through which a person makes a financial investment. A financial investment within the meaning of s 763B(a)[40] has key elements, relevantly: a "contribution" of money or money's worth from the investor to the other person; and a "use" of that contribution by the other person to "generate a financial return, or other benefit, for the investor"[41] or the other person intending that the contribution would be used to "generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated)".[42]

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39 Terms of Use, cl 4.3(c) and (l)(iv).

40 See [19] above.

41 *Corporations Act*, s 763B(a)(i).

42 *Corporations Act*, s 763B(a)(iii).

Primary judge

32 ASIC's case before the primary judge was that the Earner Product was a facility through which a person makes a "financial investment" within the definition in s 763B of the *Corporations Act* because "(a) the consumer gave money (AUD) or money's worth (crypto-assets) (the ***contribution***) to Block Earner" (emphasis in original) and "(b) Block Earner used the contribution to generate a financial return for the consumer, or the consumer intended that Block Earner would do so, or Block Earner intended that it would do so".[43]

33 And that is how the primary judge understood ASIC's case and decided it. The primary judge held that a user of the Earner Product made a financial investment for the purposes of s 763B(a)(i) and (iii), having regard to Mr Karaboga's evidence as to Block Earner's business model of "on-lending" cryptocurrency to third parties at a higher interest rate than it was paying to a user of the Earner Product. His Honour held that that business model:

> "provid[ed] Block Earner with the funds from which it would pay the fixed yield to users and also derive a profit for itself. ... In that way, Block Earner used the money or money's worth given to it by the investors to generate a financial return or other benefit for the investors, by generating revenue from which it would be able to pay the fixed yield which it was legally obliged to pay."

Full Court

34 The Full Court held that the primary judge had erred in finding that Block Earner used the money or money's worth given to it by an investor (namely, a user) to generate a financial return or other benefit "for" the investor. Their Honours also had regard to Mr Karaboga's evidence of Block Earner's business model, but their Honours considered that, in light of that evidence:

> "Block Earner used the money or money's worth given by investors to generate a financial return 'for' itself, and to benefit itself. It did not use those contributions to generate a financial return or other benefit 'for'

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43 ASIC also contended that the Earner 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".

the investors. The contrary conclusion conflates the generation of a return that would enable Block Earner to meet its obligations to its users with the generation of a return or other benefit 'for' those users."

Parties' contentions

35 In this Court, ASIC contended that the Full Court erred in finding that the fact that Block Earner received (and intended to receive) a benefit for itself prevented the Earner Product from falling within s 763B(a)(i) or s 763B(a)(iii). It contended that the critical question of construction concerns the meaning of the word "for" in the phrase "for the investor", and that the construction adopted by the Full Court was premised on a false dichotomy that assumed a benefit could be generated only *for* the investor or *for* the issuer, rather than for both. ASIC further submitted that the construction adopted by the Full Court was at odds with the structure and objects of Ch 7, and inconsistent with an explicit statement in the Revised Explanatory Memorandum to the *Financial Services Reform Bill 2001* (Cth) that s 763B was intended to cover deposit accounts.[44]

36 Block Earner, on the other hand, contended that the metes and bounds of the relevant facility, rather than a company's overall business activities or "business model", supplied the relevant facts for the inquiry s 763A (read with s 763B) requires. It submitted that, under the Terms of Use, the Earner Product involved a user giving Block Earner "money's worth" in the form of cryptocurrency, which was the relevant "contribution" for the purposes of s 763B(a)(i) and (iii), and that the Earner Product as a facility did not include the conversion of AUD to cryptocurrency or vice versa, those services being offered as part of other services a user could access on the Block Earner Platform, namely the Exchange service, rather than "Lend" (namely, the Earner Product).

37 Block Earner then contended that s 763B(a)(i) and (iii), in requiring the "other person" to use the contribution (or intend that the contribution will be used) "to generate a financial return, or other benefit, for the investor", required a "demonstrated nexus between the provision of the contribution ... and the use (or intended use) of that contribution", such that the "deployment" of the contribution is "for the purpose of generating a return or benefit" for the investor. Importantly, in Block Earner's submission, a user of the Earner

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44 Australia, Senate, *Financial Services Reform Bill 2001*, Revised Explanatory Memorandum at 36 [6.58].

Product did not "give their cryptocurrency" as a contribution to the carrying on of an enterprise or undertaking by Block Earner in which the user would have a right to receive a return or benefit from the use by Block Earner of "their cryptocurrency".[45] Rather, a user received a fixed interest entitlement that was not dependent on or derivative of Block Earner's use of the cryptocurrency. Block Earner relied on an observation in *Australian Securities and Investments Commission v Secure Investments Pty Ltd [No 2]* that a mere loan arrangement would be unlikely to satisfy the requirements of s 763B(a), because "[i]n the ordinary course, a borrower uses borrowed funds for their own purposes to generate a benefit for themselves and the interest rate is the price paid for the use of the funds".[46]

38 In oral argument, counsel for Block Earner developed this further, contending that s 763B required a "nexus" between the contribution made by the investor and the return generated by the issuer, which required the investor to have some right or interest (whether or not enforceable) in the downstream activities of the business of the issuer. Block Earner resisted the proposition that its construction, or that of the Full Court, hinged only on the meaning of the word "for" in s 763B(a).

Earner Product involved the making of a financial investment

39 In order to determine whether a product is a financial product because it is a "facility through which ... a person ... makes a financial investment" for the purposes of s 763A(1)(a), it is necessary to first identify the relevant "facility". As has been explained, a facility is defined by s 762C(b) to include "an arrangement or a term of an arrangement", and an "arrangement" is defined broadly in s 761A. In determining what is the relevant facility, s 761E is also relevant, in defining when a financial product is issued and who is the issuer of the product.[47]

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45 As explained at [21] and [26] above, it was inapposite to speak of a user "giving" any cryptocurrency or Block Earner using "their [namely, the user's] cryptocurrency".

46 (2020) 148 ACSR 154 at 167 [52].

47 See [18] above.

40 In this appeal, ASIC's case was that the Earner Product was a facility, and that facility was identified by the contractual arrangement comprising the Terms of Use and went no wider than the Terms of Use. That contention must be accepted. The Earner Product was activated when a user accessed their online Block Earner account on the Block Earner Platform and the user selected "Lend" from the available services, nominated an Eligible Cryptocurrency and the amount of AUD to be invested, and reconfirmed their acceptance of the Terms of Use[48] ("the Acquisition Steps"). Block Earner offered the Earner Product to a user on the Block Earner Platform and, by completing the Acquisition Steps, the user acquired the Earner Product. This was the point at which Block Earner "first issued, granted or otherwise made available" the Earner Product to the user, and therefore when the Earner Product was "issued" within the meaning of s 761E(2). Block Earner was thereby responsible for the obligations owed to the user under the Terms of Use.[49] Put in different terms, it was by the user completing the Acquisition Steps that a contract was concluded, and it was also by the user completing the Acquisition Steps that the Earner Product was issued. Accordingly, it must be accepted that the Earner Product was a facility which was identified by the contractual arrangement comprising the Terms of Use.

41 Importantly, the Earner Product was not acquired when a user deposited an amount of AUD into the Account in accordance with cl 4.1(a) of the Terms of Use, because the AUD could have been used for other Block Earner products.[50] The Earner Product was activated or acquired by the user completing the Acquisition Steps.[51] It was only when those actions were completed that Block Earner took the AUD amount to be invested from the amount that had been transferred by the user into the Account and "converted" it to the nominated cryptocurrency in accordance with the Terms of Use.

42 So, what was the contribution of money or money's worth under the Terms of Use within the meaning of s 763B(a) of the *Corporations Act*? Section 763B(a) applies where the investor "gives money or money's worth (the ***contribution***)"

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48 Terms of Use, cl 4.3(e).

49 *Corporations Act*, s 761E(4).

50 Terms of Use, cl 4.1(a)(i).

51 Terms of Use, cl 4.3(e).

(emphasis in original). The word "give" relevantly means "pay" or "supply".[52] That construction is reinforced by the fact that, "[a]t a superficial level", it appears s 763B intended that a financial investment be made when a person lays out money or capital for the purpose of getting a return.[53]

43 The user gave money, an amount of AUD, that they nominated to be invested in the Earner Product. That was the amount of AUD a user gave to Block Earner under and in accordance with the Terms of Use in order to acquire the Earner Product. While the user had already transferred an amount of AUD into the Account, it was by nominating an amount of AUD *in* the Account to be invested in the Earner Product that the user "supplied" that money to Block Earner to be invested in the Earner Product (or, in the language of s 763B, to be "used" by Block Earner). That was the user's contribution. What the user could "give" and did "give" was the AUD.

44 In contrast, the users could not "give" any cryptocurrency to Block Earner because they never had any rights to any cryptocurrency "used" by Block Earner. The AUD in the Account was only "converted" to cryptocurrency after a user's acquisition of the Earner Product.[54] Contrary to Block Earner's submissions, and despite some of the labels used in the Terms of Use, at no stage did any user have any cryptocurrency and at no stage did any user "lend" any cryptocurrency to Block Earner.[55] As soon as the AUD was "converted" to cryptocurrency, by cl 4.3(f) of the Terms of Use the user agreed "to grant Block Earner all rights and title to such [cryptocurrency] for Block Earner to use in its sole discretion during the term of the loan under Lend". Under the Terms of Use, the user had no rights to the cryptocurrency into which the user's contribution of AUD was "converted". Any rights to the cryptocurrency lay with Block Earner. In sum, a user's contribution of "money" or "money's worth" to Block Earner could not be

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52 See, by way of analogy, *LCM Funding Pty Ltd v Stanwell Corporation Ltd* (2022) 292 FCR 169 at 172 [10]. See also *Burton v Arcus* (2006) 32 WAR 366 at 382 [57].

53 See *Australian Securities and Investments Commission v Money for Living (Aust) Pty Ltd (administrators appointed) [No 2]* (2006) 155 FCR 349 at 354 [20].

54 cf *LCM Funding* (2022) 292 FCR 169 at 173 [13]; see also 171 [1], [3].

55 See also [21] and [26] above.

the cryptocurrency because the cryptocurrency owed its existence to Block Earner's actions following the user's activation of the Earner Product.[56]

45 The next element asks if there was a "use" of that contribution by Block Earner to "generate a financial return, or other benefit, for" the user[57] or if Block Earner intended that the contribution would be used to "generate a financial return, or other benefit, for" the user (even if no return or benefit was in fact generated).[58] The answer is yes. The relevant fixed rate offered by Block Earner for the Earner Product was "7% [APY] for loans denominated in USDC".[59] The APY constituted, and was intended to constitute, a "financial return … for the [users]". After a user completed the Acquisition Steps to acquire the Earner Product, as the Terms of Use recorded, the amount of AUD nominated by the user to be invested in the Earner Product was taken by Block Earner, and intended to be used, and in fact used, by Block Earner to generate a return "for" the user, namely the APY.

46 That conclusion is reinforced by Mr Karaboga's evidence. Mr Karaboga's evidence was that Block Earner's business model was to "on-lend" the user's "loaned" cryptocurrency, together with other cryptocurrency, to third parties at higher interest rates than the fixed rates it was obliged to pay to the users of the Earner Product, and its profit was the difference between those rates.

47 Thus, as the primary judge held, Block Earner used (and intended to use) the user's contribution of AUD to generate a financial return for the investor (the APY) and to generate a profit for itself (the margin or differential between interest rates).

48 Contrary to the Full Court's reasoning, the conclusion that the Earner Product is captured by s 763B(a) does not "conflate[] the generation of a return that would enable Block Earner to meet its obligations to its users with the generation of a return or other benefit 'for' those users". The text of s 763B(a) does not confine the way in which a contribution may be used to generate a

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56 cf *LCM Funding* (2022) 292 FCR 169 at 173 [13]; see also 171 [1], [3].

57 *Corporations Act*, s 763B(a)(i).

58 *Corporations Act*, s 763B(a)(iii).

59 See fn 4 above.

financial return "for" the investor. For example, there is nothing in the text of s 763B(a) that suggests that the "financial return, or other benefit" must be only for the investor. Any contention otherwise would ignore the commercial reality of any such financial investment. In any profit-making investment business, the business uses the funds invested to generate a return both for it, and for its investors. Every provider of a financial product is looking to make a profit out of the venture.

49 Further, as ASIC submitted, the conclusion that the Earner Product is captured by s 763B(a) is reinforced by the Revised Explanatory Memorandum to the *Financial Services Reform Bill* which, in discussing s 763B, observed that "[b]y focussing on the actual, as well as the intended, use of the money the definition is intended to cover deposit accounts, which for many consumers are used for transactional purposes, although they also generate some return".[60] The Earner Product shared some characteristics with an interest-bearing deposit account, including, relevantly, that a bank will often pool its customers' deposited funds and on-lend those funds so as to derive a return from which it can pay a return to customers.

Rejection of Block Earner's contentions

50 Block Earner's contentions that s 763B(a)(i) and (iii), in requiring the "other person" to use the contribution (or intend that the contribution will be used) "to generate a financial return, or other benefit, *for* the investor" (emphasis added), required a "demonstrated nexus between the provision of the contribution ... and the use (or intended use) of that contribution", such that the "deployment" of the contribution is "for the purpose of generating a return or benefit" for the investor must be rejected.

51 Block Earner was correct that a user of the Earner Product did not "give their cryptocurrency" as a contribution to the carrying on of an enterprise or undertaking by Block Earner in which the user would have a right to receive a return or benefit from the use by Block Earner of "their cryptocurrency". The user had no cryptocurrency to give. Block Earner was also correct that a user received a fixed interest entitlement, the APY, that was not dependent on or derivative of Block Earner's use of the cryptocurrency. As explained, the user contributed AUD

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60 Australia, Senate, *Financial Services Reform Bill 2001*, Revised Explanatory Memorandum at 36 [6.58].

in return for the APY and Block Earner took the AUD in return for the obligation to pay the user the APY on the expiry of the Earner Product. None of these matters prevent the Earner Product from satisfying s 763B(a)(i) or s 763B(a)(iii).

52 Block Earner's reliance on an observation in *Secure Investments* that a mere loan arrangement would be unlikely to satisfy the requirements of s 763B(a)[61] also did not advance its argument. The Earner Product was not a loan arrangement: the user did not lend any money to Block Earner by nominating AUD to be invested in the Earner Product; nor was the user capable of loaning any cryptocurrency.[62]

53 Block Earner's contention that there must be a nexus between the user's contribution and the return generated by Block Earner which required the user to have some right or interest in Block Earner's downstream activities (or "skin in the game") must also be rejected. It is inconsistent with the plain language of s 763B, as reinforced by the structure of Ch 7 of the *Corporations Act*. First, there is nothing in the text of s 763B(a) that suggests that there must be a direct nexus between the financial return or other benefit and the particular endeavour in which the contribution is used by the "other person". Under s 763B(a), an investor must give money or money's worth to another person. Here, the user gave AUD to Block Earner.

54 Section 763B(a)(i) then requires that the other person use that contribution to generate a financial return or other benefit for the investor. Section 763B(a)(iii) provides an alternative route, namely that the other person intends that the contribution will be used to generate a financial return or other benefit for the investor (even if no return or benefit is in fact generated). Block Earner's construction is contrary to the express statement that s 763B(a)(iii) applies even if there is no return. Moreover, Block Earner's construction would require that the parties to an arrangement mutually intend for the user's contribution to be used in a particular way, which is inconsistent with the text of s 763B(a)(i) and (iii). Indeed, the way in which the other person uses the funds provided by an investor does not deny that the investor has given the money to the other person for the purposes of generating a return. In the present case, a user has a guaranteed return of seven per cent (paid in the Eligible Cryptocurrency) (the APY) and

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61 (2020) 148 ACSR 154 at 167 [52].

62 See [21] and [26] above.

the market value of the Eligible Cryptocurrency subject to the risks of currency arbitrage.

55 Second, the structure of Ch 7,[63] and its stated object,[64] are undermined if the investor must have some right or interest in the downstream activities of the other person's business. Block Earner's construction of s 763B placed a gloss on the general definition of what is a financial product. Block Earner sought to have the broad, general definition in s 763A(1)(a) and s 763B read as if it were a confined form of financial investment akin to a managed investment scheme without the pooling of funds. That is contrary to the text, structure and purpose of Ch 7. It is also contrary to the Revised Explanatory Memorandum, which stated that "[n]othing in the definition of managed investment or making a financial investment is intended to limit the interpretation of the other".[65]

Conclusion

56 The Earner Product is a financial product: it involved a facility through which a person made a financial investment within the meaning of s 763B of the *Corporations Act*. ASIC's appeal in relation to s 763B must be allowed.

Earner Product a financial product because it was a derivative

57 ASIC also contended that the Earner Product was a financial product because it was a derivative within the meaning of s 761D of the *Corporations Act*. The balance of these reasons address the parties' arguments on the application of s 761D to the Earner Product: whether the Earner Product was a "credit facility", whether it satisfied the requirement in s 761D(1)(c), and whether it was a contract for the future provision of services.

Overriding exclusion – "credit facility"

58 Block Earner's second ground of contention, that the Earner Product was a "credit facility" within the meaning of s 765A(1)(h)(i) of the *Corporations Act*,

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63 See [12]-[13] above.

64 See [11] above.

65 Australia, Senate, *Financial Services Reform Bill 2001*, Revised Explanatory Memorandum at 37 [6.60].

and thereby excluded from the definition of "financial product", does not arise. That statement needs some explanation.

59 Section 765A lists specific things that are not financial products for the purposes of Ch 7 of the *Corporations Act*. One of the listed things is, relevantly, "a credit facility within the meaning of the regulations (other than a margin lending facility)".[66]

60 Regulation 7.1.06(1)(a)(iv) relevantly defines a "credit facility" as "the provision of credit" which is "not a financial product mentioned in paragraph 763A(1)(a) of the [*Corporations Act*]". Both must be satisfied. In other words, given the finding that the Earner Product was a financial product within the meaning of s 763A(1)(a) (a facility through which a person made a financial investment), the Earner Product could not have been a credit facility.

Specific inclusion – "derivative"

61 Section 764A in Subdiv C of Div 3 lists specific things that are financial products for the purposes of Ch 7 including, relevantly, a "derivative".[67] A "derivative" is defined in s 761D, relevantly, in the following terms:

> "(1) For the purposes of this Chapter, subject to subsections (2), (3) and (4), a ***derivative*** is an arrangement in relation to which the following conditions are satisfied:
>
> (a) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time consideration of a particular kind or kinds to someone; and
>
> (b) that future time is not less than the number of days, prescribed by regulations made for the purposes of this paragraph, after the day on which the arrangement is entered into; and
>
> (c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or

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66 *Corporations Act*, s 765A(1)(h)(i).

67 *Corporations Act*, s 764A(1)(c).

varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following:

(i) an asset;

(ii) a rate (including an interest rate or exchange rate);

(iii) an index;

(iv) a commodity.

(2) Without limiting subsection (1), anything declared by the regulations to be a derivative for the purposes of this section is a derivative for the purposes of this Chapter. A thing so declared is a derivative despite anything in subsections (3) and (4).

(3) Subject to subsection (2), the following are not derivatives for the purposes of this Chapter even if they are covered by the definition in subsection (1):

...

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

(c) anything that is covered by a paragraph of subsection 764A(1), other than paragraph (c) of that subsection; ..." (emphasis in original)

It was common ground that s 761D(1)(a) and (b) were satisfied. What was in dispute was whether the Earner Product satisfied s 761D(1)(c).

62 A derivative, as a specific inclusion in what constitutes a financial product by s 764A(1)(c), may, but does not necessarily, fall within the general definition of a financial product in s 763A. That the same arrangement may be both a derivative and a financial product within the general definition is reinforced by the bracketed words in s 762A(2): "Subdivision C identifies, or provides for the identification of, kinds of facilities that, subject to subsection (3), are financial products (*whether or not they are within the general definition*)" (emphasis added). But what is clear from the definition of a derivative is that "anything that is covered

by a paragraph of subsection 764A(1), other than paragraph (c) of that subsection", is not a derivative for the purposes of Ch 7.[68] Accordingly, the definition of a "derivative" does not overlap with other specific inclusions in s 764A(1).

63 Under s 761D(1)(c), there are two pathways to the sub-section being satisfied: either the amount of the consideration *or* the value of the arrangement[69] "is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable)", including, for example, an asset; a rate (including an interest rate or exchange rate); an index; or a commodity.

64 ASIC's case before the primary judge was that the Earner Product was a derivative because, relevantly for s 761D(1)(c), "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". As we have seen, the primary judge did not consider this issue. The Full Court resolved the issue on the basis that the Exchange service, the "conversion" by Block Earner of cryptocurrency to AUD, was a distinct arrangement to the Earner Product.

65 In this Court, Block Earner sought to uphold that finding. Block Earner submitted that the Full Court had been correct to regard the "conversion" by Block Earner of cryptocurrency to AUD as a process or "arrangement" distinct from the Earner Product. It submitted that ASIC's case was that the Earner Product involved the "loan" of cryptocurrency, rather than AUD. In support of its contention, Block Earner relied on the fact that a derivative is first issued when "the person enters into the legal relationship that constitutes the financial product";[70] and that the entry point for the Earner Product being after the exchange of AUD for cryptocurrency was supported by findings that there were other ways to enter and exit the Earner Product, as well as the Agreed Facts, which established that, at all times, users had the option of withdrawing their cryptocurrency in kind, even if this was not expressly contemplated by the Terms of Use.

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68 *Corporations Act*, s 761D(3)(c).

69 ASIC did not rely on the value of the arrangement pathway in s 761D(1)(c).

70 *Corporations Act*, s 761E(3), item 3.

66 Block Earner's characterisation of the arrangement was wrong. By s 761E(3), a derivative is first issued when "the person enters into the legal relationship that constitutes the financial product". Here, the legal relationship that constitutes the financial product was entered into by the user completing the Acquisition Steps.[71] Those steps preceded any "conversion" of AUD to cryptocurrency and certainly preceded the steps taken at the end of the term of the Earner Product.

67 The so-called "Exchange service" was not an arrangement separate from the Earner Product. First, the contribution made by a user to Block Earner for the purposes of s 763B(a) was AUD, not cryptocurrency.[72] Consequently, Block Earner's contention that the entry point for the Earner Product was *not* the provision of AUD and did not occur until after the AUD was "exchanged" for or "converted" to cryptocurrency must be rejected. Block Earner's construction is inconsistent with the express terms of the arrangement which record why and how the Earner Product was issued and acquired. As has been explained, the Terms of Use recorded that the user giving AUD to Block Earner and then getting back AUD constituted a single arrangement.[73]

68 Here, for the purposes of s 761D(1)(c), the amount of consideration the user was entitled to receive was the amount of AUD to be paid by Block Earner to the user when the term of the Earner Product ended and where the amount of AUD to be received by the user was to be "derived from or varie[d] by reference to" the exchange rate between AUD and the Eligible Cryptocurrency. That is, the amount of AUD a user was entitled to receive back was to depend upon the market value of the Eligible Cryptocurrency in USD and the exchange rate of USD for AUD at the end of the term of the Earner Product.[74] The "conversion" back to AUD was a part of the Earner Product under the Terms of Use.

69 The Full Court considered that the Terms of Use provided for three types of services that those registered as users on the Block Earner Platform could

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71 See [40] above.

72 See [42]-[44] above.

73 See [24]-[25], [29] above in relation to cl 4.3(e), (f) and (j); see also [40] above.

74 See [29] above.

access: the Exchange service, the "Access service" and the Earner Product. The fact that a Block Earner user could access the Exchange service and convert AUD into cryptocurrency and vice versa *separate* to the Earner Product does not alter the express terms of the Earner Product, which included specific "exchanges" mandated by the Terms of Use. A user could not use the Earner Product without nominating an amount of AUD they had deposited into the Account to be invested in the Earner Product, "conversion" of that amount into the Eligible Cryptocurrency (denominated in USD) and, at the end of the term of the Earner Product, the amount of AUD the user received back depending upon the market value of the Eligible Cryptocurrency in USD and the exchange rate of USD for AUD at that time.

70 The existence of six users who were described as having used their own cryptocurrency which they transferred directly into digital crypto-asset addresses controlled by Block Earner does not alter that conclusion. As has been explained, by s 761E(3) a derivative is first issued when "the person enters into the legal relationship that constitutes the financial product". In the case of the Earner Product, that was on completion by the user of the Acquisition Steps. At that point, the Terms of Use governed the arrangements between Block Earner and each user. To the extent that it was said that six users used their own cryptocurrency which they transferred directly into digital crypto-asset addresses controlled by Block Earner, these constituted ad hoc variations to the Terms of Use. Those six users did not dictate and could not alter the terms of the legal relationship that constituted the financial product, which had been determined on completion of the Acquisition Steps. Under the Terms of Use, a user contributed AUD in return for a future payment of AUD, and did not "lend" any cryptocurrency to Block Earner.

71 Further, even if the Exchange service was considered to be a distinct "arrangement" to the Earner Product (and it is not), it is reasonable to assume that the parties to the arrangements regarded them as constituting a single scheme for the purposes of s 761B(c). The "conversion" of AUD to the Eligible Cryptocurrency (and vice versa) was the mechanism, under the Terms of Use, by which users were to enter and exit the Earner Product.

Contract for future provision of services

72 Block Earner submitted that the Earner Product was excluded from being a derivative under s 761D because it was a "contract for the future provision of services" within the meaning of s 761D(3)(b). That contention must be rejected.

73 The exemption in s 761D(3)(b) requires looking at the substance of the contract and focusing on the purpose or object of the contract, rather than focusing on services incidental to that purpose or object.[75] In the present case, under the contract between Block Earner and its users (namely, the Terms of Use), a user contributed a certain sum of AUD, and received a sum of AUD at the end, which sum was to be derived from or varied by reference to the market value of the Eligible Cryptocurrency in USD and the exchange rate of USD for AUD. The substance of the arrangement was not for Block Earner to provide an exchange service in the future, but for the provision of a return in AUD of which the Exchange service formed part.

Conclusion

74 For those reasons, the Earner Product was a derivative within the meaning of s 761D of the *Corporations Act*. ASIC's appeal in relation to s 761D must be allowed.

Conclusion and orders

75 For those reasons, the following orders should be made:

1. Appeal allowed.

2. Set aside the orders of the Full Court of the Federal Court of Australia made on 22 April 2025, and, in their place, order that:

   (a) The cross-appeal be allowed in part.

   (b) The declaration of contravention in para 2 of the orders made by the primary judge on 9 February 2024 and the declaration of contravention in para 2 of the orders made by the primary judge on 4 June 2024 be set aside.

   (c) The cross-appeal otherwise be dismissed.

   (d) Each party to bear its own costs of the cross-appeal.

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75 *Joffe v The Queen* (2012) 82 NSWLR 510 at 515 [20]-[21]; see also 536-537 [116], 544 [165]-[168].

3. The proceeding be remitted to the Full Court of the Federal Court of Australia for determination of the appellant's appeal against the penalty judgment (*Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2024] FCA 578).

4. The appellant pay the respondent's costs of and incidental to this appeal.