

Introduction

- On 4 September 2025, the High Court of Australia (HCA) granted ASIC special leave to appeal the Full Federal Court's decision in *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2025] FCAFC 58.
- This is the latest decision in the ongoing legal battle between ASIC and Block Earner, and a part of the broader trend in which ASIC attempts to seek clarification from the Courts on the application of the *Corporations Act 2001* (Cth) (the Act) to cryptocurrency assets and transactions.

What Is Cryptocurrency? A Refresher

- Cryptocurrency refers to digital tokens that are created from code, can be used to make payments and do not exist physically in the form of notes or coins. It is created using blockchain technology. A blockchain is a ledger method for recording transactions, where data is organised in blocks or groups across many computers that are linked and secured.¹
- Each block can only hold a certain amount of information, so new blocks are added to the ledger, and this forms a chain. Each block has its own unique identifier, which is known as a cryptographic hash. The hash protects the information in the block from anyone without the required code and protects the block's place on the chain from being tampered with. People interact with the blockchain by creating a wallet, which acts like a user account. The unique features of blockchain have changed how people can make transactions.²

Background

- Between March 2022 and November 2022, digital asset service provider Web3 Ventures Pty Ltd (trading as Block Earner) offered its customers an "Earner Product", which allowed users to loan crypto assets to Block Earner in exchange for a fixed interest rate being paid over the term of the loan. As part of the loan, customers could either convert Australian dollars into crypto assets using Block Earner's digital currency exchange service (Exchange Service) and transfer those assets to Block Earner, or directly transfer their own crypto assets, to be held and aggregated by Block Earner.

- ASIC commenced civil penalty proceedings in the Federal Court of Australia, alleging that Block Earner was providing unlicensed financial services in relation to the Earner Product and another crypto asset-based product, Access. The proceeding in relation to the Access product was dismissed by the Federal Court and was not the subject of the subsequent appeals. In respect of the Earner Product, Jackman J found at first instance that it was both a managed investment scheme and a financial investment under the Act (Liability Judgment). The judge also found that the Earner Product had been offered by Block Earner without an Australian Financial Services License (AFSL).
- Despite the adverse finding against Block Earner, Jackman J decided not to impose a financial penalty pursuant to S 1317S of the Act, noting Block Earner's good faith and the uncertainty in the application of the law to cryptocurrency based digital assets (Penalty Judgment).³
- ASIC appealed the decision to waive penalties, while Block Earner cross-appealed from the Liability Judgment, arguing that the Earner Product should not have been held to be a managed investment scheme or an investment facility. In April 2025, the Full Federal Court allowed the cross-appeal by Block Earner, dismissed ASIC's appeal and set aside all previous findings of contraventions made by Jackman J.
- ASIC subsequently sought leave from the HCA to appeal the decision of the Full Federal Court, which was granted on 4 September. The issues in dispute will therefore be ventilated before Australia's highest appellate court.

Is the Earner Product a Managed Investment Scheme (MIS)?

- At first instance, the Federal Court held that the Earner Product was a MIS.⁴

Definition of a MIS Under S 9 of the Act

- "A scheme with the following features:
 - (i) people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);

¹ *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2025] FCAFC 58

² Ibid.

³ *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (Penalty)* [2024] FCA 578.

⁴ *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2024] FCA 64.

- (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
- (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)."
- Jackman J held that the Earner Product satisfied the definition of a MIS as contributions from customers are pooled and, in return, they receive a fixed-interest yield.⁵
- On appeal, the Full Federal Court found that the Earner Product was not a MIS because the contribution of money made by Block Earner's customers was not in consideration for the acquisition of rights to a benefit produced by the scheme within the meaning of a MIS under section 9(a)(i) of the Act.⁶
- In the Full Federal Court's view, the interest to be paid to customers under the loan terms was not from the benefits of Block Earner's own lending activities, and customers had no right to such benefits, nor was a right vested in the customers to the benefits of Block Earner's own lending activities.⁷ What customers do have is a contractual entitlement to be paid a fixed interest rate, regardless of how well or how poorly Block Earner might be doing in its own investment activities.⁸
- On that basis, the first criterion of the statutory definition was not satisfied.

Was the Earner Product a Facility for Making a Financial Investment?

Definition of Investment Facility Under S 763B of the Act

"A person (the investor) makes a financial investment if: (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)."

- Jackman J found that the fixed interest rate paid to Block Earner's customers from the revenue generated by the Earner Product is a financial return or other benefit to the customers, and so the product was an investment facility. In his Honour's view, this remains true even if the revenue generated by the Earner Product is greater than the fixed interest rate paid to their customers.⁹
- The Full Federal Court disagreed on this issue and held that the product was not an investment facility. The court suggested that the same conceptual error as made with respect to the MIS decision at first instance had also infected the consideration of whether the product was an investment facility. The full court found that 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" the investors.

Was the Product a Derivative?

- The Full Federal Court agreed with the first instance decision that the product was not a derivative, although for different reasons.

Definition of Derivative Under S 761D of the Act

"An arrangement 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 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."

- ASIC contended that the product acquired the characteristics of a derivative because when a customer sought to end the loan arrangement, the amount of Australian dollars the customer received would depend on the exchange rate between the Australian dollar and the particular cryptocurrency on the day of exchange. In that way, ASIC contended, the return was "pegged" to the value of something else, making it a derivative.

⁵ Ibid [40]-[44].

⁶ *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2025] FCAFC 58 at [56].

⁷ Ibid

⁸ Ibid at [58].

⁹ [2024] FCA 64 at [50].

- Block Earner submitted that the conversion of cryptocurrency to Australian dollars was not part of the same “arrangement” for the purpose of S 761D as the “arrangement” comprising the loan of cryptocurrency by the customer to Block Earner. Block Earner submitted, and the full court agreed, that in any event, a customer could opt out of the “exchange service” either when signing up (by loaning their own cryptocurrency) or on termination of the arrangement, because there was an option to receive a loan of cryptocurrency in kind – as cryptocurrency.¹⁰
- On that basis, the Earner Product, when considered by itself, did not constitute a derivative, and the exchange service was a distinct arrangement.

Special Leave Granted by HCA

- On 20 May 2025, ASIC sought special leave from the HCA to appeal the Full Federal Court’s decision in *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2025] FCAFC 58.
- ASIC argued that the Full Federal Court had erred in finding that the Earner Product was not an investment facility under S 763B of the Act, and also by finding that the product was not a derivative under S 761D of the Act. The full court’s decision that the Earner Product was not a MIS has not been challenged by ASIC on further appeal.
- Special leave was granted on the condition that ASIC pays Block Earner’s legal costs on the appeal. In its 5 September 2025 media release, ASIC emphasised the importance of seeking clarifications from the HCA, as the definition of financial product under the Act is drafted in a “broad and technology-neutral way”.

Key Takeaways

- ASIC argues that the Full Federal Court’s interpretation of Chapter 7 of the Act narrows its operation and is at odds with the flexibility intended by the Parliament for the legislation to apply to a wide array of financial products, including newer digital assets.
- As such, ASIC is concerned that the current interpretation of S 761D and S 763B of the Act may result in products offering fixed yield or exchange services to be framed in such a way to avoid the operation of the legislation designed to regulate these products.
- The HCA’s view on this will provide clarity for not only consumers but also product providers, including companies that provide digital based products. This is especially important given the emerging trend of digitalisation.
- The HCA has yet to set a date to hear the appeal but nevertheless, this would be a highly anticipated judgment that provides guidance on the boundaries of Chapter 7.

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¹⁰ [2025] FCAFC 58 at [124] to [135].