ASIC APPEALS FULL FEDERAL COURT'S FINDING IN FAVOUR OF BLOCK EARNER: KEY TAKEAWAYS FOR CRYPTO COMPANIES

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The crypto-asset industry has undergone unparalleled expansion and growth in recent years, leaving regulators globally grappling with how to keep up and enforce the existing regulatory frameworks. In Australia, the crypto-asset industry has been preparing for the impending regulation of crypto-assets, with the Government consulting on changes to the existing regulatory framework that will create additional licensing requirements for providers of services (such as exchanges and custodians) in respect of crypto-assets (previously discussed in our post). In addition, the Australian Securities & Investments Commission (ASIC) is consulting on changes to its own Information Sheet 225 (INFO 225), which provides guidance on the circumstances in which a crypto-asset related offering may be a financial product.

Against this backdrop, ASIC continues to pursue enforcement action against crypto-asset providers, most recently, seeking special leave from the High Court of Australia (HCA) to appeal the Full Federal Court's recent decision. On 22 April 2025, the Full Federal Court in *ASIC v Web3 Ventures* (Block Earner) found in favour of Block Earner, reversing aspects of the primary judgment which had found in favour of ASIC in some respects.

The Full Federal Court's decision was noteworthy for other cryptocurrency exchange and digital asset providers, given the clarity provided by the court regarding the characteristics of "managed investment schemes", "facilities through which a person makes a financial investment", and derivatives.

This decision may have implications for ASIC's proposed updates to INFO 225, as it had been relying in part on the primary judge's findings in this case as one of the justifications for needing to update INFO 225.

However, ASIC has now sought special leave to the High Court. If leave to appeal is granted, ASIC may use the appeal as a 'test case' for clarifying the definitions of a variety of products in the market. In these circumstances, even if the Full Federal Court's decision is overturned, Block Earner is likely to seek to ensure that the penalty relief granted in the Federal Court remains.

BACKGROUND

Block Earner provided two main "products" or "services" known as the "Earner" and "Access" products. The Access product was not considered by the Federal Court to be a financial product. The Earner product allowed customers to "loan" specified cryptocurrency in return for interest paid at a fixed rate. Block Earner was then able to use the loaned crypto assets to generate income by lending the cryptocurrency to third parties. At the end of

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the loan, users received their AUD calculated by reference to the price of the relevant cryptocurrency plus the fixed rate of return.

Customers were bound by the Terms of Use upon opening an account with Block Earner. Imperatively, under the Terms of Use, Block Earner was required to pay the fixed interest rate to users regardless of the amount of income it earned (if any) in relation to the cryptocurrency which was the subject of the loan.

THE FULL FEDERAL COURT'S DECISION (22 APRIL 2025)

The Full Federal Court found that the Earner and Access products were not "financial products" under the Corporations Act for reasons which are detailed below. On this issue, the Full Federal Court overturned the finding of the primary judge.

Managed Investment Schemes

In assessing whether there was a managed investment scheme, the Full Federal Court emphasised the need to assess the Terms of Use and some key provisions in it. In particular, the Terms of Use explicitly stated that the loaned cryptocurrency would not be used to generate a financial benefit for the users.

The Full Federal Court consider that what Block Earner did with the loaned crypto assets was entirely at its own discretion and customers had no right to benefits produced by those activities.

The primary judge had found that, although the Terms of Use did not mention pooling for any common benefit, it was sufficient that Block Earner had represented that contributions would be pooled in order to generate a financial benefit for users.

The FCAFC rejected this notion, instead finding that the clauses within the Terms of Use should be taken literally and objectively, as they were unambiguous.

The court also distinguished this case from cases where the court has gone beyond the terms of the loan agreement; where specific representations are made outside of and contrary to terms of loan and where there were specific commitments to use the funds in particular ways for the benefit of investors. Here, the Block Earner customers had no exposure to the benefits of whatever activities Block Earner undertook once it had borrowed cryptocurrency from those users.

Facility for Making a Financial Investment

The Full Federal Court also held that the Earner product was not a facility for making a financial investment under section 763B of the Corporations Act. The primary judge considered that money was being used to generate revenue to then pay a fixed yield back to customers, and therefore the users were making a financial investment. On the contrary, the Full Federal Court found that Block Earner had used the profit generated for itself, and to benefit itself, rather than 'for' the investors. The Full Federal Court again emphasised that users were bound by the Terms of Use which clearly indicated their fixed yield entitlement.

KEY TAKEAWAYS

- The Full Federal gave emphasis to the Terms of Use – and their literal interpretation–as opposed to what ASIC considered the terms to have "conveyed".

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- Terms or other representations should be unambiguous and explicit, and not overly long or complex. This ensures that the terms are unable to be construed in any other way than how the business intends.
- The legal relationship between the business and its customers should be clearly defined.

CONCLUSION

Further developments at the High Court are being watched closely, given their potential impact on digital asset businesses.

In the meantime, the Full Federal Court's judgment provides clarity on the characteristics of managed investment schemes, facilities through which a person makes a financial investment and derivatives.

There may be implications for Information Sheet 225 as a result of the judgment, but this remains uncertain ahead of ASIC's special leave request. We will provide further updates if there are any developments.

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