

## Article Information

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## Access all areas? Unpacking the lessons earned from the Block Earner v ASIC judgment

*Michael Bacina, Steven Pettigrove, Jake Huang of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.*

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The judgment in ASIC v Web3 Ventures Pty Ltd (trading as **Block Earner**) was released today and has been greatly anticipated. The matter focused on two products offered by Block Earner, “Access” through which customers could send funds through to [Aave](#) and [Compound](#), prominent DeFi lending protocols which compensate lenders for depositing cryptocurrency, and an “Earner” product, which paid users interest on crypto, and which was discontinued in November 2022. ASIC alleged that [Block Earner](#) should have obtained a financial services license to offer the Access and Earner products as it had created a facility through which a person makes a financial investment, that the products were an unregistered managed investment scheme or were a derivative.

### Earner Product

The Earner product operated by users lending cryptocurrency to Block Earner in return for daily interest payments. Block Earner took that cryptocurrency and loaned it to others for higher interest rates than the users were being paid. Importantly Block Earner had published a statement that the yields on Earner were from “pooling customer funds and lending it to our trusted partners” and despite claiming this statement was a mistake the Court found the description reflected reality.

The Court noted the ongoing legal controversy as to whether cryptocurrency is property at common law but sought not to take a position on this question to address the financial services aspects of the case, but later the Court noted that if cryptocurrency is not property there is difficulty in the application of the current regulatory regime to the Earner product.

ASIC alleged that the Earner product was a managed investment scheme, which is defined in Section 9 of the *Corporations Act 2001* (Cth) (**Corporations Act**) as a scheme that has the following features:

- 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);
- 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); and
- 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).

After perusing Block Earner’s Terms of Use and the representations on its website, the Court found that the Earner product met the definition of a managed investment scheme in that:

1. users paid money or money’s worth “in return for” a benefit, being a fixed yield of interest, produced by the Earner product;
2. the benefit was generated from pooling or a common enterprise (“pooled” and “pooling customer funds” were the terms once used on the Block Earner’s website); and
3. users did not have day-to-day control over the operation of the scheme.

An acknowledgement in the Terms of Use that a user did not “intend for Block Earner to use the loaned [crypto] to

generate a financial benefit or act as an investment for you” was considered inconsistent with the representation that contributions would be pooled to generate a financial benefit for users.

In addition, ASIC also contended that the Earner product met the definition of a financial investment in Section 763B of the Corporations Act, which requires an investor gives money or money’s worth (the **contribution**) to another person and any of the following apply:

- the other person uses the contribution to generate a financial return, or other benefit, for the investor;
- 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);
- 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 the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

Based on the representations on Block Earner’s website, the Court found that the Earner product satisfied all three alternatives in the definition of a financial investment in that:

1. the Earner product’s business model did use the users’ contribution to generate a fixed yield of interest;
2. Block Earner did intend the Earner product to generate the fixed yield; and
3. the users did intend that Block Earner would use their monetary contributions to generate a financial return or other benefit for them, by Block Earner generating revenue from which it would be able to pay the fixed yield.

The Court dismissed a suggestion that a “Risk Disclosure” and acknowledgements in the Terms of Use around investment would override an investor’s intentions where a prominent representation is made to the contrary. Put another way, disclaimers must be consistent with advertising and representations.

### **Access Product**

The Access product operated by means of an omnibus account, where users who wished to access DeFi protocols pooled their tokens with others and Block Earner’s tokens and Block Earner passed the tokens through, tracked returns from the protocols and credited those returns to the customer’s accounts.

In relation to the Access product, the Court rejected ASIC’s argument that “pooling” in the omnibus account satisfied the pooling requirements of the managed investment scheme definition, finding that ASIC had not properly pleaded this claim in the first instance, but that even if the matter had been the subject of proper pleading, there was no evidence that the pooling itself generated benefits, such as individual account fees being saved, and there was no representations that the omnibus accounts were providing any benefit, such as saving on individual account fees.

The Access product was also found not to meet the definition of a financial investment given the pass-through nature of the service. The Court compared Block Earner to a “broker” connecting users to smart contracts and referred to the notation in the definition of financial investment to the effect that the giving of money to a broker for the purpose of purchasing shares, in and of itself, is not a financial investment.

ASIC also failed to show the Access product met the definition of a derivative, as the Court accepted it was a “contract for the future provision of services” and so exempted from the definition in the Corporations Act. Had it not met that exemption, the Court would have found it was otherwise within the (extremely broad) definition of derivative set out in Section 761D of the Corporations Act.

Block Earner has sought to [play down](#) the decision, telling the Australian Financial Review that they had “moved on from the Earner product over a year ago”.

ASIC Deputy Chair Sarah Court [said](#):

This important decision provides some clarity as to when crypto-backed products should be considered financial products which require licensing under the law.

Until the regulator or government provides a pathway to compliance for crypto products of this kind, the decision stands to highlight:

- The importance of extremely careful analysis and design of products involving crypto-assets, particularly those offering yields; and

- The need to ensure careful consideration and alignment of representations and ongoing marketing and terms and conditions.