## Article Information

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# Blockchain Bites: Court finds Earn product is not a debenture, UK Court Rules Australian is not Satoshi Nakamoto, Commonwealth proposes Model Law on Virtual Assets, Court measures the long arm of US law, Blistering SEC dissent published, HK launches stablecoin sandbox

***Michael Bacina, Steven Pettigrove, Tim Masters, Jake Huang, Luke Higgins, Luke Misthos & Kelly Kim of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.***

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**Court finds Earn product is not a debenture**

Justice Markovic of the Federal Court handed down judgment today finding that Finder Wallet's Earn product was not a debenture as alleged by the Australian Securities and Investments Commission (**ASIC**) and ordering ASIC to pay costs. The judgment is a sweeping win for Finder which had defended allegations brought by ASIC that its Earn product was a debenture under Section 9 of the *Corporations Act 2001* (Cth) (the **Corporations Act**).

ASIC had commenced civil penalty proceedings in the Federal Court of Australia against Finder Wallet in December 2022. The Finder.com subsidiary was alleged to have provided unlicensed financial services, breaching product disclosure requirements, and failing to comply with design and distribution obligations in connection with the Finder Earn product. Finder Wallet defended the matter which went to trial in the Federal Court in October last year.

The Finder product allowed users to transfer cash, purchase True AUD stablecoins and be paid a fixed return for giving Finder the use of the stablecoins. Customers were paid in AUD on a compounding return of either 4.01% or in some cases 6.01% with a nifty little second by second counter showing the interest clocking up.

ASIC alleged that this was a debenture under Section 9 of the Corporations Act and that it should have been offered under a financial services licence. A debenture is defined as follows under the *Corporations Act*:

> debenture of a body means a chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body. The chose in action may (but need not) include a security interest over property of the body to secure repayment of the money.

In his judgment, Markovic J held:

- While it was not disputed that Finder Wallet's users held a chose in action for return of their funds at common law, this alone did not make the product a debenture;
- Funds deposited in fiat currency were not in the nature of a deposit or for the purpose of raising capital;
- Accordingly, the funds were not deposited or lent to Finder in the way envisaged in the definition of a debenture in Section 9;
- The funds were not given to Finder Wallet for working capital purposes, but "*to promote the growth and use of the*

*Finder App which offered a range of services as well as giving customers an opportunity to sell their cryptocurrency to Finder Wallet and earn a return*";

- Accordingly, there was no undertaking by Finder Wallet to repay those sums as a debt within the meaning of the definition in Section 9;
- Rather, there was a contractual promise to return to the customer the TrueAUD allocated by the customer to Finder Wallet together with the return earned on that allocation over the Earn Term, which was also paid in TrueAUD.

It follows that the Court found that the product did not meet the definition of a debenture, being in effect a contractual arrangement between Finder and its users that created a contractual obligation to repay the TrueAUD allocated by the customer with a return.

It is notable in this case that ASIC had proceeded with its case only on the basis that the Finder Earn product was in the form of a debenture. In a similar recent case involving Block Earner, ASIC alleged that two yield bearing products also involving cryptocurrency related offerings were in the form of a managed investment scheme, financial investment or derivative. The Court in this case was not required to address these matters based on ASIC's pleaded case.

The decision and adverse costs order is a significant set back for ASIC, which has recently indicated its intention to test its regulatory perimeter in relation to cryptocurrency related offerings. It also follows a partial win in the Block Earner case, in which ASIC failed to establish that Block Earner's access product was a financial product.

Similarly, in the United States, the SEC has suffered several legal setbacks in taking enforcement action in relation to crypto-related offerings, underlining the risks of a "regulation by enforcement" approach and the importance of enacting fit for purpose legislation and industry guidance in relation to digital asset offerings.

Finder Wallet's Global CEO and Co-Founder, Frank Restuccia, heralded the decision on their website:

> We are delighted with this outcome, which confirms that Finder was compliant with our regulatory obligations in offering Finder Earn to our customers. We understand and respect the importance of good regulation to protect consumers and we engaged openly and proactively with ASIC from the outset

ASIC has indicated that they are carefully reviewing the judgment and have 28 days to lodge an appeal.

As Australia continues to move towards a regulatory framework for licensing of digital asset exchanges with strong industry engagement, this will help further define the regulatory perimeter in relation to cryptocurrency related offerings, and provide a clear framework for industry and enhanced consumer protections for users.

*Written by Steven Pettigrove and Michael Bacina*

**When Wright is Wrong: UK Court Rules Australian is not Satoshi Nakamoto**

The blockbuster trial between Crypto Open Patent Alliance (**COPA**) and the computer scientist Craig Wright has concluded, with the English High Court ruling that Wright is not the inventor of Bitcoin, Satoshi Nakamoto. The ruling represents a sweeping victory for COPA. Rather than reserving judgment which is typical in cases of this nature, Justice Mellor delivered his ruling at the conclusion of the trial stating:

> I've reached the conclusion that the evidence is overwhelming

Justice Mellor made the following declarations:

> First, that Dr. Wright is not the author of the Bitcoin white paper.
>
> Second, Dr. Wright is not the person who adopted or operated under the pseudonym Satoshi Nakamoto in the period 2008 to 2011.
>
> Third, Dr. Wright is not the person who created the Bitcoin System.
>
> And, fourth, he is not the author of the initial versions of the Bitcoin software.

COPA sued Wright in 2021 to thwart him from taking legal actions against Bitcoin developers and other members of the crypto community, and making claims to intellectual property rights over Bitcoin's open-source technology.

A final written judgment detailing the judge's reasoning and final relief is anticipated in due course. The industry is watching closely as the findings of this case are likely to impact Wright's other cases, one of which concerns a claim to database rights in the bitcoin blockchain and file format. Those proceedings were stayed pending the outcome of this case.

A spokesperson for COPA trumpeted the ruling stating that its victory was:

> for developers, for the entire open-source community, and for the truth

and broadly supports the association's philosophy to

> encourage the adoption and advancement of cryptocurrency technologies and to remove patents as a barrier to growth and innovation.

While Wright declined to comment immediately on his defeat, it remains to be seen whether he will appeal. In a curious twist, his lawyers also sought to oppose an injunction application which would prevent Wright from continuing to declare himself the inventor of Bitcoin (if anyone is still listening) on freedom of speech grounds.

The Wright trial has cast further light on the origins of Bitcoin following the discovery of early emails involving Satoshi Nakamoto and testimony from a number of early participants in the ecosystem. While it has offered the opportunity for Bitcoin enthusiasts and other to speculate on an improbable mystery, it has also demonstrated the future of Bitcoin and open source technology is now high stakes and the worthy subject of a high profile London legal spectacle.

*Written by Kelly Kim and Steven Pettigrove*

**Commonwealth proposes Model Law on Virtual Assets**

Commonwealth Law Ministers, Attorney General's, and Senior Officials from 32 member countries of the Commonwealth recently met in Zanzibar to discuss emerging trends in digitalisation. The specific theme of the meeting was "Technology and Innovation: How digitalisation paves the way for people-centred access to justice."

One of the major topics discussed at the meeting was digital assets. In particular, members discussed a Model Law on Virtual Assets, which has been developed by the forum over the past two years and is intended to act as a framework model law which aligns with Commonwealth values. The proposed Model Law is intended to comply with the Financial Action Task Force (FATF) Recommendation 15, which requires that virtual asset service providers (VASPs) be regulated for anti-money laundering and counter-terrorism financing purposes, and that they additionally be licensed or registered and subject to effective systems for monitoring or supervision.

The drafting of the Model Law was led by Loretta Joseph, the Co-Chair of the International Digital Asset Exchange Association (IDAXA). In a LinkedIn post, Joseph stated that the Model Law was intended to act as an example of how countries can adopt a digital assets regime even if they lack sufficient resources or guidance to do so themselves. Alternatively, countries may be able to choose to develop their own framework from the Model Law based on their own specific needs and circumstances.

Joseph highlighted the importance of adaptive laws:

> As crypto evolves, the model law must adapt, addressing emerging trends like DeFi and stablecoins. Financial stability risks, especially in jurisdictions with weaker currencies, underscore the need for robust regulation.
>
> By closely monitoring standard-setting bodies' recommendations, such as the FATF, the model law aims to ensure effective implementation and trust in the [virtual assets] sector.

It is important to note that the Model Law does not have force of law in any Commonwealth country. It must be adopted and implemented by a particular member country on a national level before it is enforceable. In this sense, the Model Law

is in the form of best practice guidance and not a comprehensive cross border legal framework like the EU's MiCA crypto-asset regulation which has direct application in the EU alongside national laws. In this sense, it will operate more like the UNCITRAL model law on international commercial arbitration, which countries can choose to adopt in the interests of establishing consistent rules based on international best practice

The Model law has not yet been published on the Commonwealth's website. The Commonwealth has in the past published a number of Model Laws and best practice guidelines as part of its Office of Civil and Criminal Justice Reform.

This Commonwealth is part of a series of initiatives by global standard setting bodies aimed at ensuring consistent digital assets regulation. As nations recognise the need for fit for purpose digital assets regulation, blockchain enthusiasts and developers are hopeful that compatible legal frameworks will emerge, mitigating conflicts, and paving the way for future innovation and consumer protections.

*Written by Steven Pettigrove and Luke Higgins*

**Court measures the long arm of US law in Binance class action**

The 2nd US Circuit Court of Appeals in Manhattan has revived a class action lawsuit from 2020 in which investors allege that Binance violated US securities laws by selling cryptocurrencies which were not registered with the SEC to US persons, despite not being a US-based company.

Binance was granted a motion to dismiss the original application in March 2022 which led to the appeal. Binance is separately battling the US Securities and Exchanges Commission after it filed 13 charges against the company last year alleging similar violations of US securities laws.

The plaintiffs in this civil action appealed the 2022 decision claiming that Binance offered and sold billions of dollars' worth of tokens, including to US citizens, which were not registered as securities, and damages. The Plaintiffs argued that because they accepted Binance's Terms of Services, were themselves US based, and wired money to Binance from their home states, the transactions entered into fell within US jurisdiction even where Binance was based elsewhere.

While the District Court concluded the plaintiff's claims constituted an impermissible extraterritorial application of US securities law and were outside the applicable statute of limitations, the plaintiffs argued in the appeals court that the transactions are subject to domestic securities law and are within the limitation period. The appeals court unanimously agreed.

> we conclude that Plaintiffs have plausibly alleged that the transactions at issue are domestic transactions subject to domestic securities laws because the parties became bound to the transactions in the United States, and therefore irrevocable liability attached in the United States.

The matter will be remitted to the District Court for determination on the facts.

The decision could set a precedent for further claims against international companies engaging with US persons or maintain other nexus to US jurisdiction. While the Court did not find that use of US servers and data centres, like AWS based in California, alone would found US jurisdiction, there was a plausible argument established on the basis of other connections to US jurisdiction in this case.

> Our conclusion might be different were we faced with plaintiffs seeking to apply United States securities laws based on the happenstance that a transaction 22 was initially processed through servers located in the United States despite all parties to the transaction understanding that they were conducting business on a foreign-registered exchange.

The principle of comity between Courts in different jurisdictions, whereby one Court may give deference to another which maintains jurisdiction, was also an important consideration in the decision. The fact that Binance was not otherwise regulated or based in another jurisdiction (having no identified headquarters) during the relevant period was a relevant factor in persuading the Court to accept jurisdiction.

> since Binance notoriously denies the applicability of any other country's securities regulation regime, and no

> other sovereign appears to believe that Binance's exchange is within its jurisdiction, the application of United States securities law here does not risk "incompatibility with the applicable laws of other countries"

The Court's decision to apply US securities law to transactions that became irrevocable within the United States underscores that while the long arm of US law has its limits, it is nevertheless very long. Any company dealing in digital services of any kind, including cryptocurrency, should carefully consider the extent of any nexus or connections to the United States, which may take various forms, and seek legal advice on compliance with US laws or steps to ensure that they appropriately ring fence their operations to avoid unintended consequences.

*Written by Michael Bacina, Steven Pettigrove and Luke Misthos*

**Blistering SEC dissent published**

SEC Commissioner Hester Peirce, also known as Crypto Mom, has a history of publishing pointed dissents as the US SEC continues on a path of regulation by enforcement with countless actions commenced against crypto-asset product issuers.

A strange "come in and talk" without any path to compliance (save for the often ridiculed Prometheum project) has led to projects expecting to be sued if they visit the SEC. In response to a recent SEC action against a project which effectively ceased operating in 2021, Commissioner Peirce joined with Commissioner Uyeda in publishing what is likely her most viral dissent to date, saying:

> In sum, ShapeShift is in trouble because the Commission, nearly ten years after ShapeShift's platform started trading and more than three years after it changed its business model, now contends that some unidentified number of the 79 crypto assets it traded between 2014 and 2021 were investment contracts without explaining why. Notably, the Commission does not allege any harm—ShapeShift and its customers voluntarily transacted and the Order nowhere alleges that ShapeShift defrauded its customers.

Commissioner's Peirce and Uyeda then go on to draft an imaginary screenplay, which is reproduced in full below because it's so frighteningly accurate and also just amazing:

> One can imagine the dialogue for that scene in a future episode:
>
> Future ShapeShift ("FSS"): Hello, I would like to register as a dealer.
>
> SEC: Why?
>
> FSS: Because I think some of the assets that I plan to deal might be deemed at some point by the SEC to be securities.
>
> SEC: Which ones?
>
> FSS: I'm not sure because I can't really understand what criteria you use to decide whether a token offering is a securities transaction and, if it is, whether the token that was the subject of the investment contract remains a security in secondary market transactions.
>
> SEC: Well, if you don't know whether you're dealing in securities, you can't register. And by the way, if some of the assets you're dealing in are not securities, you also can't register.
>
> FSS: So can you help us think through which assets are securities?
>
> SEC: No. We suggest that you read the 2017 DAO report,[3] and it will all be clear to you. You can also look at our enforcement actions if you want.
>
> FSS: I read it, and I've read about your enforcement actions. I still have questions.
>
> SEC: Hire a lawyer.
>
> FSS: I did, and the lawyer has even more questions.

> SEC: Sorry, we cannot help any more than we already have. We don't give legal advice.
>
> END SCENE
>
> This scene is by no means hypothetical.

That final point was immediately backed up by leading US crypto lawyers on X (formerly Twitter) and has been turned into a musical. The dissent closes powerfully noting:

> The environment we have created for the crypto asset markets, especially as it relates to secondary trading, is untenable. It exposes well-meaning entrepreneurs to a regulatory sword of Damocles. Cases like this do not protect investors; they intimidate innovators and entrepreneurs.

In Australia, the guidance in INFO225 is "signpost" only and similarly there has been no bright line guidance on where a crypto-asset token would constitute a financial product. However, as the Australian regulator ASIC has commenced proceedings against crypto-asset products (principally yield and derivative-like instruments) and has not sought to asset that any particular token is a financial product, there is somewhat less of a sword of Damocles. Proposed regulation for crypto-exchanges in Australia does not address the issue of tokens themselves, leaving somewhat of a sword of Damocles over Australian crypto-businesses, which must be constantly vigilant around what they are offering.

*Written by Michael Bacina*

**HK launches stablecoin sandbox**

On 12 March, the Hong Kong Monetary Authority (HKMA) announced the launch of its stablecoin issuer sandbox representing another step forward in the city's efforts to establish itself as Asia's leading digital assets hub.

A regulatory sandbox is a concept often deployed in the fintech space to permit individuals to test innovative products and services in a risk-controlled environment. The HKMA has deployed a number of sandbox programs previously, including the 'Fintech Supervisory Sandbox' and 'Wholesale Central Bank Digital Currency' (wCBDC) sandbox.

In a press release, HKMA's Chief Executive Eddie Yue highlighted the importance of the sandbox arrangement as a channel to:

> Exchange views…facilitate the formulation of fit-for-purpose and risk-based regulatory requirements, which is key to promoting the sustainable and responsible development of the stablecoin issuance business.

The Official Notice identifies four key objectives of the Sandbox as follows:

> Support the development of virtual asset ecosystem in Hong Kong;
>
> communicate supervisory expectations and guidance on compliance;
>
> obtain feedback on the proposed regulatory requirements; and
>
> develop and promote good practices in key areas including reserves management and stabilisation, governance, user protection, AML/CFT, data transparency, etc.

Stablecoin issuance within the sandbox will be limited in scope, with restrictions on the number of users, size of issuance and importantly will not involve retail or consumer funds during the early stages. In assessing applications to participate in the sandbox, the regulator will consider a range of factors including use case, stabilisation and user protection mechanisms, among others.

The latest initiative follows Hong Kong's public consultation on the regulatory framework for stablecoin issuers, commenced in late 2023, which sought views on a number of issues, including licensing requirements for stablecoin issuers.

Businesses with 'genuine interest' in stablecoin issuance are encouraged to apply to the sandbox. The list of approved participants will be publicly accessible here.

The sandbox proposal is a good example of a flexible regulatory tool designed to test innovative products under modified regulatory settings, enabling both regulators and participants to learn and adapt from user experience. A number of forward looking jurisdictions have recommended or are deploying sandboxes as a tool to prepare the groundwork for regulated digital assets products and services.

*Written by Kelly Kim and Steven Pettigrove*