

## Article Information

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## Federal Court's decision flips Qoin but clarifies the regulatory perimeter

***Michael Bacina and Luke Higgins of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.***

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After first commencing a civil action against BPS Financial Pty Ltd (**BPS**) in October 2022, [ASIC has won a key liability hearing in the Federal Court of Australia](#) after Justice Downes [found that BPS engaged in unlicensed conduct when offering the "Qoin Wallet" to consumers](#), however the Court made an important rejection of ASIC's attempts to have an entire blockchain found to be part of a "financial product" under Australian law. Only the centralised wallet, called Qoin Wallet, was found to be a financial product, with the balance of a (not very) decentralised blockchain which processed transactions left out of the definition.

In delivering judgment, Her Honour found that BPS had contravened the Corporations Act as it did not hold an Australian Financial Services Licence (**AFSL**), nor was BPS authorised by an existing AFSL holder under a Corporate Authorised Representative (**CAR**) Agreement, to issue or provide financial advice regarding the Qoin Wallet.

The win is a first for the regulator, which has faced mixed outcomes in similar enforcement actions against [Finder.com](#) (where ASIC lost their attempt to have a centralised yield product labeled a debenture, but the matter is on appeal) and [Block Earner](#) (where ASIC lost in relation to a decentralised yield pass-through product but won against a centralised yield product) in recent times.

A key component of this case involved a detailed analysis to identify what the actual financial product in question comprised. Her Honour identified [at 47] that:

*"The Qoin Wallet component of the Qoin Wallet App has the function of both viewing the balance of Qoin for a wallet address recorded on the blockchain, and the payment facility (the function to send and receive Qoin and for the transaction to be recorded)."*

The Court noted that the Qoin blockchain only had 7 nodes (at [51]), several of which were owned and operated by entities associated with the Qoin project (nodes being electronic devices which host a copy of the entire Qoin blockchain and are responsible for validating transactions and propagating them across the network).

ASIC argued [at 106] that the Qoin Tokens, together with the Qoin Blockchain and the Qoin Wallet and a means of acquiring Qoin Tokens:

*"constituted a single scheme... for a substantial purpose of enabling consumers who choose to participate in it to make payments for goods and services otherwise than by the physical delivery of cash."*

The regulator leaned into the definition of "facility" under the *Corporations Act* as including the word "arrangement", with ASIC submitting that it is "not the mechanism of payment that is a facility, but rather the arrangement under which a (non-cash) payment may be made".

The Court, however, disagreed, saying that:

- simply because a product requires integration with another product, facility or thing does not mean the other thing is or forms part of the financial product [at 108];

- the system by which a facility operates “is not itself a financial product capable of being “issued” or “acquired” such that “dealing” in it may occur [at 109];
- the identification of the financial product should focus upon the point at which a person makes a financial investment, manages a financial risk or makes non-cash payments [at 109]; and
- from there the question to be asked is “what is the direct mechanism or thing which is allowing the person to perform this function?” [at 109].

From this the Court found the relevant financial product was in fact the Qoin Wallet itself, rather than the entire Qoin Facility (which comprised the Qoin Wallet App, the Qoin Wallet, the Qoin Blockchain, and the smart contracts necessary for the facility to function). This was despite the relatively centralised nature of the Qoin Facility with the entire Qoin Blockchain consisting of only seven nodes, many of which were operated by parties linked to the operators of the Qoin product.

Her Honour stated that the relevant “financial product” in the case was the arrangement between BPS and each consumer that allowed the consumers to make non-cash payments with the Qoin Wallet. Contrary to ASIC’s submissions, the Court found that the Qoin Blockchain itself was not the mechanism which allowed the users to make a non-cash payment.

While not mentioned in the decision, that is consistent with the submission of ASIC to the Australian Senate’s 2015 Digital Currency inquiry where [ASIC submitted that](#):

*“A digital currency, in and of itself, is not a financial product.”*

The Court found that one could not “deal” in the Qoin Blockchain (or other aspects of the Qoin Facility), which could be contrasted against the ability for BPS to “issue” Qoin Wallets. Her Honour found that this conclusion flowed naturally from the examples given of the actions that constitute making non-cash payments as identified in section 763D of the Corporations Act.

Accordingly, Her Honour concluded that since January 2020 (however excluding a 10-month period where BPS was an authorised representative of an AFSL holder), BPS had carried on a financial services business in issuing the Qoin Wallet as a financial product and that it had provided financial product advice in relation to that product without an AFSL, breaching sections 911A(1) and 911A(5B) of the Corporations Act.

The Court also found that BPS had made false, misleading or deceptive representations in relation to the Qoin crypto-asset token and the Qoin Wallet to approximately 80,000 customers. In particular, BPS had stated that:

- the Qoin token could be used to purchase goods and services from an increasing number of service providers and merchants when that was not actually the case; and
- the Qoin token had received official government approval as an Australian financial product despite not complying with such laws.

An unfortunate insult to injury following its comprehensive loss, [Qoin still also has a class-action lawsuit pending against it led by the consumers and businesses who allege they were misled by Qoin](#).

The Federal Court’s decision helps to reveal the shape of the Australian regulatory perimeter and in particular assist in reinforcing when a public blockchain could itself be a regulated object, and the sophistication in distinguishing the Qoin Wallet as the focal financial product from the underlying blockchain shows that the Australian Courts are adept at understanding the nuances of technology in applying existing laws.