

## Innovate, But Don't Navigate Blind: Why Robust Legal Advice Is Non-Negotiable in Australia's Financial Services Landscape

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*Financial services companies are, by their very nature, adaptive and forward-thinking, frequently outpacing the regulators and the laws designed to safeguard consumers. From cryptocurrency platforms to digital payment facilities and novel lending products, Australian innovators consistently push beyond the boundaries of existing statutory frameworks. That entrepreneurial spirit is to be encouraged, but it must be matched by an equal commitment to understanding how those innovations sit within the current law.*

ASIC's enforcement posture under Deputy Chair Sarah Court (soon to be Chair on 1 June 2026) has sharpened considerably: the regulator has demonstrated a willingness to pursue test cases against companies operating novel financial products, and to do so even where the applicable law is genuinely complex and uncertain. In that environment, the question for every innovator is not merely whether a product is lawful, but whether, if a court ultimately finds otherwise, the company can invoke s 1317S of the *Corporations Act 2001* (Cth) to obtain relief from liability and civil penalties. That statutory shield is available only to those who have acted honestly and, critically, obtained and acted upon robust legal advice before going to market.

The recent case law makes the point starkly: obtaining competent legal advice can be the difference between a defensible position and a crippling penalty.

### **The Statutory Shield: Section 1317S of the Corporations Act**

Section 1317S of the *Corporations Act 2001* (Cth) provides a powerful, but often overlooked, statutory mechanism for relief from liability for contraventions of civil penalty provisions. Where eligible proceedings are brought against a person, the court may relieve that person wholly or partly from liability if the person has acted honestly, and if, having regard to all the circumstances, the person ought fairly to be excused for the contravention.

The provision operates not to remove the breach, but as a dispensing power excusing the contravener from the consequences that would otherwise follow.<sup>[1]</sup>

The inquiry under s 1317S involves three stages: first, whether the applicant acted honestly; second, whether, having regard to all the circumstances, the applicant ought fairly to be excused; and third, whether relief should be granted wholly or in part.<sup>[2]</sup>

The court must be positively satisfied that the applicant acted honestly, a mere absence of dishonesty is insufficient.<sup>[3]</sup>

Honesty in this context means conduct without deceit or conscious impropriety, without intent to gain an improper benefit, and without carelessness or imprudence so extreme as to demonstrate that no genuine attempt at all was made to comply with the relevant duties.<sup>[4]</sup>

### **Evidence of Honesty: The Block Earner Example**

The decision in *ASIC v Web3 Ventures Pty Ltd* (trading as Block Earner) [2024] FCA 578 is the paradigm case. Block Earner operated a cryptocurrency platform offering its “Earner” product, which the Federal Court at first instance found constituted an unregistered managed investment scheme and a financial investment facility, operated without an Australian Financial Services Licence (AFSL).<sup>[5]</sup> The contraventions found were serious.

However, at the penalty stage, Jackman J granted Block Earner complete relief from any pecuniary penalty under s 1317S. The reasoning is instructive. Block Earner had obtained legal advice from a leading law firm, before launching the Earner product, and genuinely concluded that there was no identified risk of breaching any laws or regulations. ASIC itself accepted that Block Earner acted without any deceit or conscious impropriety and without any intent to gain an improper benefit. The Court was satisfied that Block Earner made a genuine attempt to comply with the requirements of the Act.<sup>[6]</sup>

Jackman J articulated a powerful principle grounded in the rule of law: before engaging in conduct in an area where the law is complex or uncertain, a person who is acting responsibly will consult a competent lawyer to ascertain where he or she stands. A person who acts in that manner “is entitled, as a general matter, to be accorded the dignity of responsible self-direction and autonomy which the rule of law is designed to secure, even though a court may ultimately find that the law was breached, and should not be treated censoriously”. Block Earner made only a modest profit of \$21,309.60 from the product, no investor suffered any loss, and the widely publicised declarations of contravention were held to be more than adequate for general deterrence.<sup>[7]</sup>

On appeal, the Full Federal Court ultimately allowed Block Earner’s cross-appeal and dismissed ASIC’s proceeding entirely, finding that the Earner product was not a managed investment scheme or a financial investment facility. Jackman J’s s 1317S analysis nonetheless remains authoritative on the principles governing relief from liability, and his Honour’s reasoning about the significance of legal advice as evidence of honesty provides an enduring framework for companies navigating uncertain regulatory waters. However, the writer notes that an appeal by ASIC to the High Court of the matter was heard in March 2026, with the judgement ultimately reserved.

### **Ignoring Advice Backfires: The Cautionary Tales**

Contrast Block Earner’s outcome with those cases where companies or their directors failed to obtain, or failed to act upon, proper legal advice. In *ASIC v Cassimatis (No 8)* [2016] FCA 1023, the directors of Storm Financial were found to have contravened s 180(1) of the *Corporations Act* by exercising their powers in a way which caused inappropriate financial advice to be given to vulnerable retail clients, retirees and near-retirees with limited assets, who were advised to adopt a high-risk “double gearing” strategy.<sup>[8]</sup>

The directors had not obtained independent legal advice on the appropriateness of their model, and the comfort they derived from the absence of complaints by insurers, lenders, and compliance consultants was found to be limited, particularly given that none of those parties had the same depth of knowledge about the application of the Storm model to vulnerable clients as the directors themselves.<sup>[9]</sup>

Similarly, in *ASIC v BPS Financial Pty Ltd* [2024] FCA 457, BPS (the operator of the Qoin digital currency facility) was found to have contravened s 911A of the *Corporations Act* by carrying on a financial services business without an AFSL for most of the relevant period.[\[10\]](#)

Although BPS had arranged authorised representative agreements with AFSL holders, the Federal Court found those arrangements did not bring BPS within the statutory exemptions for substantial periods.[\[11\]](#) On appeal, the Full Court upheld that BPS had contravened s 911A even during the period it was purportedly acting as an authorised representative of PNI.[\[12\]](#)

Notably, whilst BPS's website had stated that "pursuant to expert legal advice Qoin is fully compliant with Australian financial services laws," the Court found this was merely a statement of opinion, not a defence to the underlying contraventions.[\[13\]](#)

The lesson is plain: obtaining legal advice and then publicly claiming compliance does not, of itself, remedy a structural failure to comply with the law. The advice must support the course of conduct adopted.

### **The ASIC Posture: Scepticism by Default**

In-house counsel and risk and regulation officers should appreciate that ASIC's enforcement posture reflects a deliberate regulatory philosophy. Under the leadership of the Deputy Chair of ASIC, it has signalled that it will approach novel financial products with a healthy degree of scepticism, scrutinising whether they fall within existing regulatory frameworks regardless of how they are labelled or marketed.

Companies which engage with the regulator without first obtaining and following independent legal advice risk being selected as the vehicle for the next test case, not out of any regulatory hostility, but because ASIC understandably prioritises enforcement where it perceives a lack of genuine diligence.

The Block Earner penalty decision itself records ASIC's submission that granting relief from liability might convey an impression to promoters that they need not rigorously evaluate whether their offerings are regulated financial products, a submission that Jackman J rejected, precisely because Block Earner had done the responsible thing in obtaining competent legal advice.[\[14\]](#)

The message from the courts and the regulator is aligned: launching a product or engaging with a regulator before first arming yourself with robust legal advice is a high-risk strategy. The complexity and technical nature of the financial product definitions in the *Corporations Act*, makes it imperative that innovators work with experienced and well-regarded legal counsel who can advise not only on how a product sits within the current statutory framework, but on how a regulator is likely to view it.

### **The Practical Imperative**

For C-suite individuals, in-house counsel, and risk managers operating in the financial services sector, the path forward is clear. **Engage experienced legal counsel at the product design phase, not merely before launch, and certainly not only once a regulator has raised concerns.** Involving lawyers early in the design process allows potential conflicts with consumer protection laws, managed investment scheme definitions, and AFSL requirements to be identified and addressed before significant time and capital are invested in building a product that may need to be fundamentally restructured. Too often, companies treat legal review as a

final compliance gate rather than an integral part of product development; the result is costly redesigns, delayed launches, and weakened regulatory positions.

Beyond design, obtain formal legal advice before launching any novel product and document your reliance on that advice and the conclusions you reached in your enterprise risk management frameworks. If the law is genuinely uncertain, and in many areas of financial product regulation it is, **ensure your company's position is informed, genuine, and based upon the advice of competent lawyers**. Section 1317S is a powerful shield, but it is only available to those who have acted honestly and responsibly.

The companies that will thrive in Australia's regulatory environment are those that pair innovation with rigorous legal diligence from concept through to market, not those that hope the regulator will not come knocking.

*Piper Alderman are experienced in advising financial services companies on product classification, AFSL requirements, and regulatory risk. For further information, please contact **McKenzie Moore**, Partner.*

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[1] *ASIC v Healey (No 2)* [2011] FCA 1003; (2011) 196 FCR 430 at [86].

[2] *ASIC v Web3 Ventures Pty Ltd (Penalty)* [2024] FCA 578 at [6]; *Ibid* at [84].

[3] *ASIC v Healey (No 2)* [2011] FCA 1003 at [87].

[4] *ASIC v Web3 Ventures Pty Ltd (Penalty)* [2024] FCA 578 at [7]; *Hall v Poolman* [2007] NSWSC 1330; (2007) 215 FLR 243 at [325].

[5] *ASIC v Web3 Ventures Pty Ltd* [2024] FCA 64 at [1]-[3].

[6] *ASIC v Web3 Ventures Pty Ltd (Penalty)* [2024] FCA 578 at [8]-[12].

[7] *Ibid* at [15]-[16], [38]-[39] and [43]-[47].

[8] *ASIC v Cassimatis (No 8)* [2016] FCA 1023; (2016) 336 ALR 209; upheld on appeal in *Cassimatis v ASIC* [2020] FCAFC 52.

[9] *ASIC v Cassimatis (No 8)* [2016] FCA 1023 at [700]-[730].

[10] *ASIC v BPS Financial Pty Ltd* [2024] FCA 457 at [205], [408].

[11] *Ibid* at [156]-[204].

[12] *ASIC v BPS Financial Pty Ltd* [2025] FCAFC 74 at [1]-[9].

[13] *ASIC v BPS Financial Pty Ltd* [2024] FCA 457 at [398]-[406].

[14] *ASIC v Web3 Ventures Pty Ltd (Penalty)* [2024] FCA 578 at [34]-[36].

