

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged: Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
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File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v BSF SOLUTIONS PTY LTD (ACN 648 900 896) & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: To Be Advised
Time and date for hearing: To Be Advised
Place: To Be Advised



Sia Lagos

Registrar

Important Information

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Form 122
Rules 36.01(1)(b); 36.01(1)(c)



Notice of appeal

No. of

Federal Court of Australia
District Registry: New South Wales
Division: General

On appeal from the Federal Court

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Appellant

BSF SOLUTIONS PTY LTD (ACN 648 900 896) and others named in the schedule

Respondents

To the Respondents

The Appellant appeals from the judgment as set out in this notice of appeal.

Time and date for hearing:

Place: Federal Court of Australia, Queens Square, Level 17, Law Courts Building, Queen Square NSW 2000

Date: 14 May 2026

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Signed by an officer acting with the authority
of the District Registrar

The Appellant appeals from the whole of the judgment of the Federal Court given on 17 April 2026 at Sydney, New South Wales in proceeding NSD 1110 of 2023: *Australian Securities and Investments Commission v BSF Solutions Pty Ltd (Penalty)* [2026] FCA 450 (PJ).

Filed on behalf of (name & role of party) Australian Securities and Investments Commission, Appellant

Prepared by (name of person/lawyer) John Fogarty

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Grounds of appeal

The Legal Advice

1. Jackman J (**Primary Judge**) erred by fixing penalties against each of the Respondents that were lower than the penalties that would otherwise have been appropriate, because of the Respondents having obtained legal advice (PJ[48]), in circumstances where that legal advice was not before the Court, his Honour did not know what the terms of that advice were or what instructions were provided to the legal advisors, and the Respondents did not give any evidence about the content of that advice.

Particulars

- (a) On 27 June 2022, the Full Court of the Federal Court gave judgment in *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2022] FCAFC 108; (2022) 293 FCR 330 (**BHF Proceeding**) in which it found that a loan model operated by related parties to the Respondents was caught by the National Credit Code (**Credit Code**) which is Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**).
- (b) On 13 July 2022, the Appellant (**ASIC**) issued two Product Intervention Orders dealing with Short Term Credit and Continuing Credit Contracts (PJ[33]).
- (c) In July 2022, the Respondents implemented the No Upfront Charge Loan Model which was the subject of the proceedings before the Primary Judge.
- (d) In evidence before the Primary Judge was the directors' report of Swan Group Holdings Pty Ltd dated 30 November 2022 (**Swan Directors' Report**). The Fourth Respondent (**Swanepoel**) was the sole director of Swan Group Holdings Pty Ltd (PJ[80(a)]). The Swan Directors' Report stated that "Cigno Australia Pty Ltd took legal advice from Piper Alderman Solicitors and in conjunction with BSF Solutions Pty Ltd, made any necessary changes to its business model to both trade legally and comply with the ASIC Product Intervention Order[s]" (PJ[35]).
- (e) The Respondents maintained a claim for legal professional privilege in relation to documents recording the legal advice by Piper Alderman (**legal advice**), and did not tender any such documents (PJ[38]), or give any evidence about the content of that legal advice or what instructions were given to Piper Alderman.



- (f) The Primary Judge did not know:
- (i) whether, and if so in what ways and to what extent, the legal advice was qualified;
 - (ii) what questions the legal advice addressed;
 - (iii) what factual assumptions or factual instructions Piper Alderman relied on for the purpose of providing the legal advice and whether the No Upfront Charge Loan Model was designed and implemented consistently with those assumptions or instructions;
 - (iv) whether the legal advice addressed numerous models for the Respondents to consider, each with differing levels of risk of non-compliance and, if so, which model the Respondents chose and what the risk-appetite of the Respondents was to the risk of contravention presented by the various models;
 - (v) whether the legal advice addressed numerous models for the Respondents to consider, with varying levels of projected profitability and risk, and whether the Respondents chose a model with a greater risk of non-compliance as a trade-off for greater profitability;
 - (vi) whether, in relation to the model the Respondents ultimately implemented, the legal advice was that the model was likely to be non-compliant (with the Respondents then implementing the model notwithstanding that advice);
 - (vii) whether the Respondents relied on the legal advice in implementing the No Upfront Charge Loan Model.
- (g) The Primary Judge accepted that it was conceivable that:
- (i) Piper Alderman gave advice as to other options available for changes to the Respondents' business model (PJ[41]);
 - (ii) Piper Alderman gave advice in relation to the level of risk that a court might find that the No Upfront Charge Loan Model contravened the Credit Code (PJ[41]);
 - (iii) the Respondents had "a consciousness of a substantial risk of a finding of unlawfulness being made" (PJ[104]).



- (h) The operation of the relevant provisions of the Credit Act and Credit Code depended not only on the form of the contractual documents, but also on the substance and practical operation of the business model as it came to be implemented in fact.
 - (i) The potential consequences for the Respondents for contraventions of provisions of the Credit Act and Credit Code were serious.
 - (j) It is usual that legal advices provided in regulatory matters are qualified when there is scope for disagreement and the consequences of non-compliance are serious.
 - (k) The Primary Judge erred in failing to apply, and in erroneously distinguishing, the Full Court's statement of principle in *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2025] FCAFC 58 at [141], namely that a defendant who seeks to contend that a penalty should be fixed in a lower amount than it otherwise would be, because they had received relevant legal advice, would ordinarily need to give evidence about what advice they had in fact received.
 - (l) The Primary Judge erred in failing to recognise that, although ASIC had relied upon the Swan Directors' Report during the liability phase as one particular supporting the allegation that the Third Respondent (**Harrison**) and Swanepoel had designed and implemented the No Upfront Charge Loan Model, ASIC had never alleged that the purpose of any of the Respondents in obtaining legal advice was to trade legally and to comply with the ASIC Product Intervention Orders, as asserted in the Swan Directors' Report.
2. The Primary Judge erred in failing to find that the Respondents did not attempt to comply with the Credit Code (PJ[46], [48], [69], [70]).

Particulars

- (a) The Credit Act and the Credit Code provide a clear framework for credit providers which offer small short-term credit contracts to operate lawfully, that is they can either:
 - (i) impose fees, charges and interest charges consistently with the maximum caps set out in the short term credit exemption in s 6(1) of the Credit Code and be exempt from the requirement to hold an Australian Credit Licence (**ACL**); or



- (ii) obtain an ACL and impose fees and charges below the limits prescribed by s 31A of the Credit Code.
- (b) The prohibitions which the Primary Judge found the Respondents contravened were those imposed by ss 29(1) and 32(1) of the Credit Act, which prohibited the conduct described therein without holding an ACL, which neither BSF nor Cigno held.
- (c) Had BSF or Cigno held an ACL, they would have been regulated credit providers, and would not have contravened ss 29(1) and 32(1) in respect of their design and implementation of the No Upfront Charge Loan Model (albeit they would have contravened other provisions of the Credit Code including by reason of the excessive fees and charges imposed).
- (d) Irrespective of whether or not the Respondents held an ACL (and whether or not they contravened ss 29(1) and 32(1)) it was open to them to design and implement a loan model that limited the fees and charges they imposed pursuant to that model such that those fees and charges fell below the limits prescribed by s 31A of the Credit Code.
- (e) The Respondents did not do so. Rather, as the Primary Judge found, the Respondents intended to charge consumers fees and charges in excess of those applicable if the model were regulated by the Credit Act and Credit Code (PJ[61]), and customers of BSF and Cigno generally paid substantially higher amounts than would have been charged by regulated credit providers who complied with s 31A of the Credit Code (PJ[60]).
- (f) Accordingly, irrespective of whether or not the Respondents held an ACL (and whether or not they contravened ss 29(1) and 32(1)), they did not attempt to comply with the requirements in the Credit Code, including by limiting the fees and charges that they imposed for the provision of credit pursuant to the No Upfront Charge Loan Model to amounts that were below the limits prescribed by s 31A of the Credit Code.
3. The Primary Judge erred in finding that the Respondents made changes to their business model in honest and reasonable reliance on the legal advice (PJ[40], [48(c)], [51], [72], [85], [104], [113]).

Particulars

- (a) The Respondents did not put the legal advice into evidence.



- (b) BSF and Cigno had, for the purposes of the liability hearing, in Notices of Dispute dated 26 March 2024 in response to Notices to Admit issued by ASIC dated 12 March 2024 (PJ[42]), disputed matters related to the legal advice including that Harrison and Swanepoel were notified of a request for legal advice, that legal advice was provided to Harrison and Swanepoel, and that Harrison and Swanepoel took account of the legal advice in making decisions about the form of the business model.
- (c) The Respondents did not give evidence about the content of the legal advice, did not plead or give evidence about having relied on the legal advice, and did not expose themselves to cross-examination by ASIC in relation to any reliance on that legal advice, including whether or not any reliance was honest and/or reasonable.
- (d) The Primary Judge accepted that it was conceivable that the Respondents had “a consciousness of a substantial risk of a finding of unlawfulness being made” (PJ[104]).
- (e) The Primary Judge erred in inferring (PJ[39]) that the Respondents genuinely intended to act lawfully and in drawing the inferences as to reliance and as to the Respondents’ state of mind at PJ[39], [40], [48], [51], [72], [85], [96], [104] and [113].

Benefit obtained from the contravening conduct

4. The Primary Judge erred in deciding that BSF's and Cigno's “net profit” was the measure of benefits obtained by the Respondents from the contraventions (PJ[86]).
5. The Primary Judge erred, when considering the benefit obtained by the Respondents from the contraventions, by failing to have proper regard to the unlawful fees charged by BSF and Cigno.

Particulars

- (a) BSF charged consumers \$9,330,300.22 (PJ[60]).
- (b) Cigno charged consumers \$84,179,675.12 (PJ[60]).
- (c) The said fees were unlawful in that BSF and Cigno were prohibited from charging them in their entirety.



(d) The Primary Judge acknowledged that the unlawful fees charged by BSF and Cigno were indicative of the loss suffered by their consumers (PJ[60]).

6. The Primary Judge erred, when considering the benefit obtained by the Respondents from the contraventions, by failing to have proper regard to the funds paid by BSF and Cigno, under the control of Harrison and Swanepoel respectively, to the accounts of entities related to Harrison and Swanepoel respectively.

Particulars

(a) Harrison, as sole director of BSF, caused or permitted BSF to pay:

(i) \$3,840,975 to BHF Solutions Pty Ltd (**BHFS**) in respect of which Harrison was the sole director, and the shares in BHFS were held by BJH Group Holdings Pty Ltd, of which Harrison was the sole director and the shares in which were owned by B.J. Harrison Investments Pty Ltd. Harrison was the sole director of B.J. Harrison Investments Pty Ltd, which was the trustee of the B.J. Harrison Investment Trust, a discretionary trust (PJ[79(a)]);

(ii) \$4,715,117 to BJH Group Holdings Pty Ltd (PJ[79(b)]).

(b) BSF benefited by receiving and having available to it for distribution, the unlawful fees it charged consumers, which it used to pay the amounts described in the above subparagraph to the entities described therein.

(c) The beneficiaries of the B.J. Harrison Investment Trust were persons and entities associated with Harrison.

(d) Harrison benefited (i) by having, and exercising, effective control over the funds derived from the unlawful fees BSF charged consumers; and/or (ii) by reason that entities associated with him had access to, and received from, the unlawful fees BSF charged consumers, funds that were available for distribution to persons and entities associated with him.

(e) Swanepoel, as sole director of Cigno, caused or permitted Cigno to pay:

(i) \$37,467,230 to Swan Management Services Pty Ltd and/or Swan Group Holdings Pty Ltd. In relation to Swan Management Services Pty Ltd, Swanepoel was the sole director and secretary until 26 January 2024. Its shares were held by Swan Group Holdings Pty Ltd (of which Swanepoel was sole director until 26 January 2024), the shares in which were held by Swan



Group Holdings Family Pty Ltd (of which Swanepoel was the sole director until 26 January 2024). Swan Group Holdings Family Pty Ltd was the trustee of the Swan Group Holdings Discretionary Trust. On 26 January 2024, Swanepoel's brother (Ryan Swanepoel) became sole director of Swan Management Services Pty Ltd, Swan Group Holdings Pty Ltd and Swan Group Holdings Family Pty Ltd. Swanepoel held one of three issued shares in Swan Group Holdings Family Pty Ltd (PJ[80(a)]);

- (ii) \$14,507,738 was paid to Pyramid Capital Pty Ltd, the shares in which were held by Swan Group Holdings Family Pty Ltd (PJ[80(b)]).
- (f) Cigno benefited by receiving and having available to it for distribution, the unlawful fees it charged consumers, which it used to pay the amounts described in the above subparagraph to the entities described therein.
- (g) The three "named beneficiaries" of the Swan Group Holdings Discretionary Trust were Swanepoel and two family members.
- (h) Swanepoel benefited (i) by having, and exercising, effective control over the funds derived from the unlawful fees Cigno charged consumers; and/or (ii) by reason that entities associated with him had access to, and received from, the unlawful fees Cigno charged consumers, funds that were available for distribution to persons and entities associated with him.

Deterrence

- 7. The Primary Judge erred by imposing penalties that were manifestly inadequate to achieve the objectives of general and specific deterrence in circumstances where he made each of the findings set out in the below Particulars.

Particulars

- (a) BSF contravened s 29(1) of the Credit Act on 150,112 occasions and Cigno contravened s 29(1) on no fewer than 150,112 occasions from July 2022 to 21 December 2022 (PJ[49]).
- (b) BSF contravened s 32(1) of the Credit Act on 746,351 occasions and Cigno contravened s 32(1) on 4,684,429 occasions (PJ[58]).



- (c) Consumers suffered significant loss as a result of the Respondents' contraventions, and BSF and Cigno charged consumers fees they ought not to have been charged (PJ[59]).
- (d) BSF and Cigno have not repaid those fees to consumers, but rather have depleted the balance of their respective bank accounts, such that those accounts contained relatively little money (PJ[59]).
- (e) The Respondents made no attempt to remediate any consumers any amounts, despite the scale and excessiveness of the fees which were found to have been unlawfully charged, the likely vulnerable financial position of many consumers who were charged the unlawful fees, and the apparent dissipation of funds by BSF and Cigno (PJ[101]).
- (f) The failure to remediate consumers is a significant factor in the assessment of the appropriate penalty (PJ[101]).
- (g) The amounts that BSF and Cigno unlawfully charged consumers were indicative of the loss suffered by those consumers being, in relation to BSF, \$9,330,300.22, and, in relation to Cigno, \$84,179,675.12 (PJ[60]).
- (h) As a result of the contraventions by BSF and Cigno, customers of BSF and Cigno generally paid substantially higher amounts than would have been charged by regulated credit providers (PJ[60]).
- (i) The contraventions occurred because the Respondents designed and implemented a high-fee generating payday lending business model purporting to operate outside the regulatory regime of the Credit Act and Credit Code (PJ[61]).
- (j) The Respondents were aware that a significant proportion of their consumers were likely to be suffering from some form of financial hardship, and expected that the services they were offering may be attractive to such people (PJ[64]).
- (k) The contraventions had the consequence of some loss of opportunity to other credit providers who operated lawfully (PJ[66]).
- (l) The Respondents perceived that their business model would be more profitable than if they limited the fees and charges to the amounts permitted by the Credit Code for licensed credit activity (PJ[70]).



- (m) BSF and Cigno avoided detriment as a result of their implementation of the ~~No~~ ★
Upfront Charge Loan Model, being principally the cost of holding an ACL (PJ[70]).
- (n) Whether or not BSF and Cigno are likely to have the financial capacity to pay a pecuniary penalty is not a matter upon which the Court should place any weight (PJ[93]).
- (o) There was a realistic possibility of Harrison and Swanepoel engaging in conduct in the future that contravenes the Credit Act and Credit Code (PJ[102]).
- (p) The Respondents have shown no remorse (PJ[103]).
- (q) The Primary Judge otherwise failed to have regard to, or to explain why his Honour departed from, the submissions of both parties as to the appropriate penalties to impose.

Injunctive Relief

8. The Primary Judge erred, as a consequence of one or more of the errors described in Grounds 1 to 7 above, in failing to grant the injunctive relief sought by ASIC against Harrison and Swanepoel.

Orders sought

1. The appeal be allowed.
2. Orders 1 and 3 made on 17 April 2026 be set aside.
3. In place of those orders, the Court order:
 - (a) pursuant to s 167(2) of the *National Consumer Credit Protection Act 2009* (Cth) the Respondents pay the following pecuniary penalties or such other amounts as the Court sees fit:
 - (i) the First Respondent pay a pecuniary penalty of \$12 million;
 - (ii) the Second Respondent pay a pecuniary penalty of \$105 million;
 - (iii) the Third Respondent pay a pecuniary penalty of \$10.4 million;
 - (iv) the Fourth Respondent pay a pecuniary penalty of \$21.7 million;
 - (b) pursuant to s 177 of the *National Consumer Credit Protection Act 2009* (Cth) that the Third and Fourth Respondents be permanently restrained from carrying on, or



from controlling, causing or permitting any entity to carry on, any business engaging in credit activity, or being involved in the carrying on by another person of any business engaging in credit activity, or alternatively be restrained for a period that the Court sees fit.

4. The Respondents pay the Appellant's costs of the appeal and its costs of the proceedings below.
5. Such further orders as the Court sees fit.

Appellant's address

The Appellant's address for service is:

Place: DLA Piper Australia, Level 14, 80 Collins Street, Melbourne VIC 3000

Email: john.fogarty@dlapiper.com

The Appellant's address is: Level 5, 100 Market Street, Sydney NSW 2000

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 14 May 2026

A handwritten signature in black ink, appearing to read 'Jwf'.

Signed by John Fogarty
DLA Piper Australia
Lawyer for the Appellant



Schedule

No. of

Federal Court of Australia
District Registry: New South Wales
Division: General

Respondents

Second Respondent: **CIGNO AUSTRALIA PTY LTD (ACN 648 971 626)**
Third Respondent: **BRENTON JAMES HARRISON**
Fourth Respondent: **MARK SWANEPOEL**

Date: 14 May 2026