

## NOTICE OF FILING

### Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
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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



*Sia Lagos*

Registrar

### Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



## CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

No. of

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

### BSF SOLUTIONS PTY LTD (ACN 648 900 896) AND OTHERS LISTED IN THE SCHEDULE

Respondents

#### A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The Applicant (**ASIC**) alleges that the First Respondent (**BSF**) and the Second Respondent (**Cigno Australia**) established a lending business model designed to avoid the application of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**) and the *National Credit Code* (**Credit Code**) which provide protection for consumers from the charging of excessive fees. The model was established shortly after the Full Court held that an earlier model established by related parties was unlawful. Using the new model, BSF and Cigno Australia entered into agreements with more than 100,000 consumers who took out small loans totalling \$34 million and were charged fees in excess of \$70 million (as at 3 October 2023).
2. ASIC alleges that the model failed in its design, such that BSF and Cigno Australia engaged in “credit activity” and charged fees for such activity when neither held an Australian Credit Licence (**ACL**), resulting in contraventions of ss 29(1) and 32(1) of the Credit Act for which the Third Respondent (**Harrison**) and the Fourth Respondent (**Swanepoel**) are liable as accessories.

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Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Applicant
Prepared by (name of person/lawyer)	John Fogarty
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### **The No Upfront Charge Loan Model**

3. From about July 2022 to date (**Relevant Period**), BSF and Cigno Australia implemented a business model whereby Cigno Australia marketed small loans to consumers, processed loan applications and managed repayments, and BSF advanced those loans (**No Upfront Charge Loan Model**). Pursuant to a “Loan Management Facilitation Agreement” dated 20 July 2022 between BSF and Cigno Australia, BSF charged Cigno Australia an assessment fee of \$19.99 for the assessment and approval of each loan application that BSF received, irrespective of whether the application was approved.
4. As part of the No Upfront Charge Loan Model:
  - (a) BSF required consumers to enter into a “No Fee for Credit Loan Agreement” or a “No Upfront Charge Loan Agreement” (**Loan Agreement**); and
  - (b) Cigno Australia required consumers to enter into an “Account Keeping Agreement” (**Services Agreement**).
5. In the Relevant Period, BSF entered into 150,112 Loan Agreements with consumers, as part of the No Upfront Charge Loan Model, including with the consumers referred to in **Annexure A**, in respect of which BSF lent a total of \$34,709,015. Pursuant to each Loan Agreement: BSF agreed to lend the consumer the loan amount (**BSF Credit**); no application fees or interest charges were payable by the consumer; the consumer was required to repay the BSF Credit in instalments; and the only fee that the consumer was required to pay to BSF was a late payment fee of \$20.00, payable if the consumer defaulted on repaying the BSF Credit (**Late Payment Fee**).
6. Cigno Australia marketed the No Upfront Charge Loan Model through its website and provided the following services (those services being the **Cigno Australia Services**):
  - (a) processing loan applications for the BSF Credit, and providing consumers the proposed credit contracts with BSF after the applications were approved;
  - (b) receiving and processing loan repayments, either directly from consumers and/or by entering into agreements with direct debit providers to arrange for consumers’ accounts to be directly debited and paid to Cigno Australia, monitoring those payments and taking steps to recover debts from defaulting consumers;

- (c) monitoring repayments and defaults of the loans, including arranging changes to consumers' repayment schedules and notifying consumers about upcoming payments and defaults;
  - (d) sending account statements, reminders and other communications to consumers and receiving and responding to all consumer enquiries concerning the loans; and
  - (e) remitting to BSF funds received from consumers.
7. In the Relevant Period, Cigno Australia entered into 150,112 Services Agreements with 100,581 consumers including with the consumers referred to in **Annexure A**. Pursuant to each Services Agreement:
- (a) Cigno Australia agreed: to facilitate all communications between the consumer and BSF concerning the Loan Agreement; to provide management services concerning the consumer's Cigno Australia account; to process payments owed by the consumer to Cigno Australia and to BSF; and to facilitate all other services related to the Loan Agreement (cl 1.1);
  - (b) the consumer was required to pay an "Account Keeping Fee", payable weekly in advance (cll 3.1 to 3.3) (**Account Keeping Fee**), a "Default Fee" of \$67, if the consumer defaulted on loan repayments (cl 3.4) (**Default Fee**) and a "Change of Payment Schedule Fee" of \$15, if the consumer requested a change in his/her schedule of loan repayments (cl 3.6) (**Change of Payment Schedule Fee**); and
  - (c) Cigno Australia facilitated collection of all payments in intervals and amounts as set out in the Loan Agreement between the consumer and BSF (cl 5.1).
8. The Account Keeping Fee payable weekly until the final instalment repayment date under the Loan Agreement (described as the "Initial Period Finalisation Date" in the Services Agreement) was a variable fee calculated by reference to the BSF Credit, the term of the Loan Agreement and the number of instalments required to repay the BSF Credit. Pursuant to the Services Agreement, after the Initial Period Finalisation Date, the Account Keeping Fee reduced to \$5.95 per week (cl 3.7).
9. On or about 21 December 2022, BSF and Cigno Australia ceased entering into new agreements under the No Upfront Charge Loan Model. However, both BSF and Cigno

Australia continued to charge fees, and to receive payments, pursuant to the Loan Agreements and the Services Agreements, respectively, in the Relevant Period.

10. Neither BSF nor Cigno Australia held an ACL in the Relevant Period.

### **Harrison and Swanepoel**

11. In the Relevant Period, Harrison was the sole director of BSF, had an indirect ownership interest in it, managed its business, was responsible for its day-to-day significant decisions, exercised control over its systems and processes and designed and implemented the No Upfront Charge Loan Model on behalf of BSF, including by approving the terms of the Loan Agreement.
12. In the Relevant Period, Swanepoel was the sole director of Cigno Australia, had an indirect ownership interest in it, managed its business, was responsible for its day-to-day significant decisions, exercised control over its systems and processes and designed and implemented the No Upfront Charge Loan Model on behalf of Cigno Australia, including by approving the terms of the Services Agreement.

### **The BHF Proceeding**

13. The Respondents implemented the No Upfront Charge Loan Model shortly after the decision of the Full Court in *ASIC v BHF Solutions Pty Ltd* (2022) 293 FCR 330, [2022] FCAFC 108 (**BHF Proceeding**) on 27 June 2022.
14. The BHF Proceeding concerned lending arrangements:
- (a) devised by the respondents in that proceeding, BHF Solutions Pty Ltd (also a credit provider of which Harrison was the sole director) and Cigno Pty Ltd (also a company of which Swanepoel was the sole director);
  - (b) the essential structure of which was an arrangement that Cigno Pty Ltd would market loans to consumers, process loan applications and manage collections, while BHF Solutions Pty Ltd would advance the loans to consumers; and
  - (c) where Cigno Pty Ltd charged consumers fees including a “Financial Supply Fee” pursuant to the agreement it entered into with consumers, being a fee charged for services which included services of a similar kind to the Cigno Australia Services,

which fee was held, for the purposes of s 5(1)(c) of the Credit Code, to be a “charge [that] is or may be made for providing the credit” by BHF Solutions Pty Ltd.

## **B. THE RELIEF SOUGHT FROM THE COURT**

15. ASIC seeks the relief set out in the Originating Application which includes declarations, pecuniary penalties and injunctions against the Respondents.

## **C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

16. The BSF Credit was credit to which the Credit Code applied because, for the purposes of s 5(1) of the Credit Code: the debtors were natural persons (s 5(1)(a)), the BSF Credit was provided wholly or predominantly for personal, domestic or household purposes (s 5(1)(b)), the Account Keeping Fee and/or the Change of Payment Schedule Fee was “a charge [that] is or may be made for providing the” BSF Credit (s 5(1)(c)), and BSF provided the BSF Credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to its business in this jurisdiction (s 5(1)(d)).
17. In relation to each Loan Agreement entered into in the Relevant Period, BSF engaged in the “credit activity” of: being a credit provider under a credit contract for the purposes of Item 1(a) of s 6(1) of the Credit Act, and/or carrying on a business of providing credit for the purposes of Item 1(b) of s 6(1) of the Credit Act, and/or performing the obligations, or exercising the rights, of a credit provider in relation to a credit contract or proposed credit contract for the purposes of Item 1(c) of s 6(1) of the Credit Act.
18. BSF demanded, received and/or accepted the Late Payment Fee for engaging in the “credit activity” of carrying on a business of providing credit for the purposes of Item 1(b) of s 6(1) of the Credit Act, and/or performing the obligations, or exercising the rights, of a credit provider in relation to a credit contract for the purposes of Item 1(c) of s 6(1) of the Credit Act.
19. In relation to each Services Agreement it entered into in the Relevant Period, Cigno Australia engaged in the “credit activity” of: exercising the rights of a credit provider by providing the Cigno Australia Services in relation to a credit contract or a proposed credit contract, on behalf of the credit provider (BSF), for the purposes of Item 1(c) of s 6(1) of the Credit Act, and/or providing a “credit service” (as defined in s 7) by providing “credit

assistance” (as defined in s 8) and/or by “act[ing] as an intermediary” (as defined in s 9), for the purposes of Item 2 of s 6(1).

20. Cigno Australia demanded, received and/or accepted the Account Keeping Fee and/or the Default Fee and/or the Change of Payment Schedule Fee for engaging in the “credit activity” described in paragraph 19 above.
21. By reason of the matters described in paragraphs 16 to 20 above, each of BSF and Cigno Australia engaged in “credit activity” and demanded, received and/or accepted fees for engaging in “credit activity” in contravention of ss 29(1) and 32(1), respectively, of the Credit Act.
22. By reason of the matters described in paragraphs 11 to 13 above:
  - (a) Harrison was, within the meaning of s 5(1) of the Credit Act, “involved in” BSF’s contraventions of ss 29(1) and 32(1) described in paragraphs 17, 18 and 21 above; and
  - (b) Swanepoel was, within the meaning of s 5(1) of the Credit Act, “involved in” Cigno Australia’s contraventions of ss 29(1) and 32(1) described in paragraphs 19 to 21 above.

#### **D. THE ALLEGED HARM SUFFERED**

23. By designing and implementing a business model which purported to avoid regulation under the Credit Act and the Credit Code, the Respondents denied to consumers who received BSF Credit the protections to which they were entitled, including restrictions on fees that could be charged on Small Amount Credit Contracts. As a result, 100,581 consumers entered into credit agreements under which they collectively borrowed a total of \$34,709,015 from an unlicensed lender and in respect of which they were charged fees by unlicensed operators totalling (as at 3 October 2023) in excess of \$63,426,811.85 by Cigno Australia (comprising Account Keeping Fees of \$33,961,220.31, Default Fees of \$24,682,034.55 and Change of Payment Schedule Fees of \$4,783,557) and \$6,588,660 by BSF. As set out in Annexure A, the Respondents charged some affected consumers fees of more than 600% of their loan amount.

This Concise Statement was prepared by Mr L.T. Livingston SC and Mr S.J. Cleary of Counsel.

**Certificate of lawyer**

I, John Fogarty, certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the statement.

Date:

A handwritten signature in black ink, appearing to read 'Jwf', is written over the date field.

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Signed by John Fogarty  
Solicitor for the Applicant



**Schedule**

No: of

Federal Court of Australia  
District Registry: Sydney  
Division: General

**Respondents**

Second Respondent

**CIGNO AUSTRALIA PTY LTD (ACN 648 971 626)**

Third Respondent

**BRENTON JAMES HARRISON**

Fourth Respondent

**MARK SWANEPOEL**

**Annexure A to Concise Statement dated 3 October 2023**

1	2	3	4	5	6	7	8	9	10	11
Consumer No.	Loan number	Loan amount	Loan date <sup>1</sup>	Initial Loan Period	Initial Loan Period end date	Total Account Keeping Fees payable in Initial Loan Period <sup>2</sup>	Comparable maximum permitted fees under Credit Act <sup>3</sup> in Initial Loan Period	Total fees charged by Cigno at Status Date <sup>4</sup>	Total Late Payment Fees charged by BSF at Status Date	Total fees charged by BSF and Cigno and percentage of Loan amount at Status Date
1.	5420574	\$250	23 November 2022	57 days	19 January 2023	\$248.08	\$70	\$760.53 as at 18 August 2023 (date of latest account statement held by ASIC), comprising: <ul style="list-style-type: none"> <li>• Account Keeping Fee: \$432.53</li> <li>• Change of Payment Schedule Fee: \$60</li> <li>• Default Fee: \$268</li> </ul>	\$80	\$840.53 (336.2% of Loan amount)
2.	5456178	\$150	11 November 2022	38 days	19 December 2022	\$161.22	\$42	\$1,278.72 (contract finalised on 21 July 2023), comprising: <ul style="list-style-type: none"> <li>• Account Keeping Fee: \$339.72</li> <li>• Change of Payment Schedule Fee: \$135</li> <li>• Default Fee: \$804</li> </ul>	\$190	\$1,468.72 (979.1% of Loan amount).  Between 22 April 2023 and 21 July 2023, discretionary fee reductions of \$1,165.72 applied leaving fee balance of \$303.
3.	5435816	\$250	24 October 2022	18 days	11 November 2022	\$118.35	\$60	\$754.45 (contract finalised on 20 March 2023), comprising: <ul style="list-style-type: none"> <li>• Account Keeping Fee: \$225.45</li> <li>• Change of Payment Schedule Fee: \$60</li> <li>• Default Fee: \$469</li> </ul>	\$120	\$874.45 (349.8% of Loan amount)  Between 18 January 2023 and 20 March 2023, discretionary fee reductions of \$501.45 applied leaving fee balance of \$373.
4.	5300057	\$250	9 August 2022	41 days	19 September 2022	\$236.22	\$70	\$1,429.27 (contract finalised on 10 April 2023), comprising: <ul style="list-style-type: none"> <li>• Account Keeping Fee: \$349.27</li> <li>• Change of Payment Schedule Fee: \$75</li> <li>• Default Fee: \$1,005</li> </ul>	\$290	\$1,719.27 (687.7% of Loan amount).  Between 19 September 2022 and 10 April 2023, discretionary fee reductions of \$1,490.58 applied leaving fee balance of \$228.69.
5.	5362162	\$250	15 September 2022	62 days	16 November 2022	\$279.09	\$80	\$891.64 (contract finalised on 18 July 2023), comprising: <ul style="list-style-type: none"> <li>• Account Keeping Fee: \$332.64</li> <li>• Change of Payment Schedule Fee: \$90</li> <li>• Default Fee: \$469</li> </ul>	\$170	\$1,061.64 (424.7% of Loan amount).  Between 26 October 2022 and 18 July 2023, discretionary fee reductions of \$808.64 applied leaving fee balance of \$253.

<sup>1</sup> Date that the consumer signed both the Loan Agreement and the Services Agreement (the **Agreements**).

<sup>2</sup> Total Account Keeping Fees payable under the Services Agreement assuming that the consumer makes all repayments as scheduled under the Agreements.

<sup>3</sup> The maximum total 'permitted establishment fee' and 'permitted monthly fee' to be charged under a Small Amount Credit Contract of the same value and length regulated by the Credit Act, assuming that the consumer makes all repayments as scheduled under the Agreements (excluding government fees, charges or duties, and any other fees) (see s31A of the Credit Code).

<sup>4</sup> The 'Status Date' is the date at which the contract was finalised (i.e. all repayments were made by the consumer), or the date of the latest available account statement held by ASIC.

**Annexure A to Concise Statement dated 3 October 2023**

1	2	3	4	5	6	7	8	9	10	11
Consumer No.	Loan number	Loan amount	Loan date <sup>1</sup>	Initial Loan Period	Initial Loan Period end date	Total Account Keeping Fees payable in Initial Loan Period <sup>2</sup>	Comparable maximum permitted fees under Credit Act <sup>3</sup> in Initial Loan Period	Total fees charged by Cigno at Status Date <sup>4</sup>	Total Late Payment Fees charged by BSF at Status Date	Total fees charged by BSF and Cigno and percentage of Loan amount at Status Date
6.	3706749	\$90	20 July 2022	70 days	28 September 2022	\$149.00	\$28.80	\$263.60 (contract finalised on 23 November 2022), comprising: <ul style="list-style-type: none"> <li>Account Keeping Fee: \$196.60</li> <li>Change of Payment Schedule Fee: N/A</li> <li>Default Fee: \$67</li> </ul>	\$20	\$283.60 (315.1% of Loan amount)
7.	5307768	\$200	15 August 2022	71 days	25 October 2022	\$242.50	\$64	\$531.25 as at 16 January 2023 (date of latest account statement held by ASIC), comprising: <ul style="list-style-type: none"> <li>Account Keeping Fee: \$218.25</li> <li>Change of Payment Schedule Fee: \$45</li> <li>Default Fee: \$268</li> </ul>	\$50	\$581.25 (290.6% of Loan amount)
8.	5325093	\$250	24 August 2022	64 days	27 October 2022	\$279.09	\$80	\$561.08 as at 16 January 2023 (date of latest account statement held by ASIC), comprising: <ul style="list-style-type: none"> <li>Account Keeping Fee: \$248.08</li> <li>Change of Payment Schedule Fee: \$45</li> <li>Default Fee: \$268</li> </ul>	\$50	\$611.08 (244.4% of Loan amount)
9.	5340724	\$250	2 September 2022	67 days	8 November 2022	\$285.00	\$80	\$551 as at 16 January 2023 (date of latest account statement held by ASIC), comprising: <ul style="list-style-type: none"> <li>Account Keeping Fee: \$171</li> <li>Change of Payment Schedule Fee: \$45</li> <li>Default Fee: \$335</li> </ul>	\$70	\$621.00 (248.4% of Loan amount)
10.	5390289	\$230	30 September 2022	43 days	12 November 2022	\$221.22	\$64.40	\$540.17 as at 1 December 2022 (date of latest account statement held to ASIC), comprising: <ul style="list-style-type: none"> <li>Account Keeping Fee: \$227.17</li> <li>Change of Payment Schedule Fee: \$45</li> <li>Default Fee: \$268</li> </ul>	\$50	\$590.17 (256.6% of Loan amount).  On 1 December 2022, fee reduction of \$92 applied leaving fee balance of \$498.17.
11.	5467035	\$250	10 November 2022	70 days	19 January 2023	\$285.00	\$80	\$285 (contract finalised on 16 January 2023), comprising: <ul style="list-style-type: none"> <li>Account Keeping Fee: \$285</li> <li>Change of Payment Schedule Fee: N/A</li> <li>Default Fee: N/A</li> </ul>	N/A	\$535 (214% of Loan amount).  On 16 January 2023, discretionary fee reduction of \$49 applied leaving fee balance of \$486.
12.	3944380	\$250	20 July 2022	70 days	28 September 2022	\$285.00	\$80	\$568.50 (contract finalised on 9 December 2022), comprising: <ul style="list-style-type: none"> <li>Account Keeping Fee: \$344.50</li> <li>Change of Payment Schedule Fee: \$90</li> </ul>	\$60	\$628.50 (251.4% of Loan amount).  On 10 November 2022 and 7 December 2022, discretionary

**Annexure A to Concise Statement dated 3 October 2023**

1	2	3	4	5	6	7	8	9	10	11
Consumer No.	Loan number	Loan amount	Loan date <sup>1</sup>	Initial Loan Period	Initial Loan Period end date	Total Account Keeping Fees payable in Initial Loan Period <sup>2</sup>	Comparable maximum permitted fees under Credit Act <sup>3</sup> in Initial Loan Period	Total fees charged by Cigno at Status Date <sup>4</sup>	Total Late Payment Fees charged by BSF at Status Date	Total fees charged by BSF and Cigno and percentage of Loan amount at Status Date
								<ul style="list-style-type: none"> <li>Default Fee: \$134</li> </ul>		fee reductions in the sum of \$97.50 applied leaving fee balance of \$530.50.
13.	5263622	\$250	20 July 2022	64 days	22 September 2022	\$279.09	\$80	\$612.07 as at 16 January 2023 (date of latest account statement held by ASIC), comprising: <ul style="list-style-type: none"> <li>Account Keeping Fee: \$217.07</li> <li>Change of Payment Schedule Fee: \$60</li> <li>Default Fee: \$335</li> </ul>	\$60	\$672.07 (268.8% of Loan amount)
14.	5293240	\$250	9 August 2022	66 days	14 October 2022	\$285.00	\$80	\$665 (contract finalised on 14 October 2022), comprising: <ul style="list-style-type: none"> <li>Account Keeping Fee: \$285</li> <li>Change of Payment Schedule Fee: \$45</li> <li>Default Fee: \$335</li> </ul>	\$70	\$735 (294% of Loan amount).  On 2 September 2022, discretionary fee reduction of \$87 applied leaving fee balance of \$648.
15.	5296516	\$250	11 August 2022	49 days	29 September 2022	\$242.13	\$70	Incomplete data	Incomplete data	Incomplete data
16.	5303654	\$250	11 August 2022	34 days	14 September 2022	\$230.25	\$70	Incomplete data	Incomplete data	Incomplete data