

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v BSF Solutions Pty Ltd (Penalty) [2026] FCA 450

File number(s): NSD 1110 of 2023

Judgment of: **JACKMAN J**

Date of judgment: 17 April 2026

Catchwords: **CONSUMER LAW** – penalties for contraventions of the *National Consumer Credit Protection Act 2009* (Cth) – purpose of civil penalties and maximum penalties considered – whether court can consider obtaining and implementing legal advice to be a mitigating factor in determining penalty – where applicant tenders evidence of legal advice obtained by respondent – whether respondents’ contraventions were deliberate or reckless – where respondents sought legal advice and made necessary changes to trade legally according to that advice – where respondents failed to remediate consumers – appropriate penalties considered – penalties ordered

Legislation: *Corporations Act 2001* (Cth)  
*Financial Sector Reform Act 2022* (Cth)  
*National Consumer Credit Protection Act 2009* (Cth)

Cases cited: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157  
*Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450  
*Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 5)* [2021] FCA 1516; (2021) 397 ALR 208  
*Australian Competition and Consumer Commission v Bluescope Steel Ltd (No 6)* [2023] FCA 1029  
*Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; (2017) 258 FCR 312  
*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540  
*Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 3)* [2017] FCA

*Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCAFC 247

*Australian Competition and Consumer Commission v Murray Goulburn Co-operative Co Ltd* [2018] FCA 1964

*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25

*Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243

*Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80

*Australian Securities and Investments Commission v AGM Markets Pty Ltd (In Liq) (No 4)* [2020] FCA 1499; (2020) 148 ACSR 511

*Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2022] FCAFC 108; (2022) 293 FCR 330

*Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684; (2021) 153 ACSR 469

*Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2026] FCA 18

*Australian Securities and Investments Commission v BSF Solutions Pty Ltd (Liability)* [2024] FCA 553

*Australian Securities and Investments Commission v BSF Solutions Pty Ltd (Evidence Rulings)* [2026] FCA 195

*Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 292; (2010) 268 ALR 303

*Australian Securities and Investments Commission v HCF Life Insurance Company Pty Ltd (Penalty)* [2025] FCA 454

*Australian Securities and Investments Commission v National Australia Bank Ltd* [2025] FCA 947

*Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630; (2012) 205 FCR 120

*Australian Securities and Investments Commission v Teleloans Pty Ltd* [2015] FCA 648; (2015) 234 FCR 261

*Australian Securities and Investments Commission v Vanguard Investments Australia Ltd (No 2)* [2024] FCA 1086

*Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2024] FCA 578

*Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2025] FCAFC 58

*Australian Securities and Investments Commission v*

*Westpac Banking Corporation (No 3)* [2018] FCA 1701; (2018) 131 ACSR 585

*Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147

*BSF Solutions Pty Ltd v Australian Securities and Investments Commission* [2025] FCAFC 88

*Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538; (2020) 148 ACSR 247

*Cigno Pty Ltd v Australian Securities and Investments Commission* [2020] FCA 479

*Cigno Pty Ltd v Australian Securities and Investments Commission* [2021] FCAFC 115; (2020) 287 FCR 650

*Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482

*Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1

*Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; (2018) 260 FCR 68

*Giannarelli v Wraith (No 2)* [1991] HCA 2; (1991) 171 CLR 592

*Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (No 6)* [2007] NSWSC 124; (2007) 63 ACSR 1

*McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29; (2011) 202 IR 467

*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285

*R v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23; (2023) 280 CLR 170

*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249

*Trade Practices Commission v CSR Ltd* [1990] FCA 762

*viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 114

Date of hearing: 8 April 2026

Counsel for the Applicant: Mr L Livingston SC with Mr S Cleary

Solicitor for the Applicant: DLA Piper Australia

Counsel for the Respondents: Mr P D Crutchfield KC with Mr P Travis

Solicitor for the Respondents: Russells

# ORDERS

NSD 1110 of 2023

**BETWEEN:**            **AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION**  
Applicant

**AND:**                **BSF SOLUTIONS PTY LTD (ACN 648 900 896)**  
First Respondent

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

**MR BRENTON JAMES HARRISON** (and another named in the  
Schedule)  
Third Respondent

**ORDER MADE BY:**   **JACKMAN J**

**DATE OF ORDER:**   **17 APRIL 2026**

## THE COURT ORDERS THAT:

1. Pursuant to s 167(2) of the *National Consumer Credit Protection Act 2009* (Cth), each of the following pay to the Commonwealth of Australia a pecuniary penalty in the specified amount in respect of the contraventions referred to in the orders made on 24 May 2024 within 28 days of the date of this order:
  - (a) BSF Solutions Pty Ltd in the amount of \$3,000,000;
  - (b) Cigno Australia Pty Ltd in the amount of \$3,000,000;
  - (c) Brenton James Harrison in the amount of \$500,000; and
  - (d) Mark Swanepoel in the amount of \$500,000.
2. Unless the appropriate order as to costs is agreed between the parties:
  - (a) the respondents file and serve any affidavits and written submissions on the question of costs by 8 May 2026;
  - (b) the applicant file and serve any affidavits and written submissions on the question of costs by 29 May 2026; and
  - (c) the respondents file and serve any affidavits and written submissions on the question of costs in reply by 12 June 2026.

3. The Originating Application otherwise be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR JUDGMENT

**JACKMAN J:**

## Introduction

- 1 I gave judgment in these proceedings in relation to contravention on 24 May 2024: *Australian Securities and Investments Commission v BSF Solutions Pty Ltd (Liability)* [2024] FCA 553 (the **Liability Judgment**). On 10 July 2025, the Full Court dismissed an appeal: *BSF Solutions Pty Ltd v Australian Securities and Investments Commission* [2025] FCAFC 88. On 3 March 2026, I gave rulings on evidence in advance of the hearing in relation to penalty: *Australian Securities and Investments Commission v BSF Solutions Pty Ltd (Evidence Rulings)* [2026] FCA 195.
- 2 Defined terms used in these reasons bear the same meaning as in the Liability Judgment which, for convenience, I have reproduced in the glossary below:

<b>Term</b>	<b>Definition</b>
<b>ACL</b>	Australian Credit Licence pursuant to s 35 of the Credit Act
<b>ASIC</b>	Australian Securities and Investments Commission, being the plaintiff
<b>BHF Proceeding</b>	The Federal Court proceeding leading to the Full Court judgment in <i>Australian Securities and Investments Commission v BHF Solutions Pty Ltd</i> [2022] FCAFC 108; (2022) 293 FCR 330
<b>BHFS</b>	BHF Solutions Pty Ltd
<b>BSF</b>	BSF Solutions Pty Ltd, the first respondent
<b>Cigno</b>	Cigno Australia Pty Ltd, the second respondent
<b>Cigno Services</b>	The following Services: (a) processing loan applications for proposed credit contracts with BSF, and providing to consumers the proposed credit contracts with BSF after the applications were approved; (b) receiving and processing loan repayments, either directly from consumers or by entering into agreements with direct debit providers to arrange for consumers' accounts to be directly debited and paid to Cigno, 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.
<b>Cigno Fees</b>	Account Keeping Fee, Default Fee, and Change of Payment Schedule Fee as referred to in the Services Agreements
<b>Credit Act</b>	<i>National Consumer Credit Protection Act 2009</i> (Cth)
<b>Credit Code</b>	<i>National Credit Code</i> , being Schedule 1 to the Credit Act
<b>Loan Agreement</b>	The agreements entered into by consumers with BSF entitled "No

	Fee for Credit Loan Agreement” or “No Upfront Charge Loan Agreement”
<b>Loan Management Facilitation Agreement</b>	The agreement dated 20 July 2022 between BSF and Cigno bearing that name
<b>Mr Harrison</b>	Brenton James Harrison, the third respondent
<b>Mr Swanepoel</b>	Mark Swanepoel, the fourth respondent
<b>No Upfront Charge Loan Model</b>	The business model implemented during the Relevant Period whereby Cigno marketed small loans to consumers, processed loan applications and managed repayments, and BSF advanced those loans, as part of which: <ul style="list-style-type: none"> <li>(a) pursuant to the Loan Management Facilitation Agreement, BSF charged Cigno 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;</li> <li>(b) BSF required consumers to enter into a Loan Agreement; and</li> <li>(c) Cigno required consumers to enter into a Services Agreement</li> </ul>
<b>Relevant Period</b>	The period from July 2022 to 3 October 2023
<b>Services Agreements</b>	The agreements entered into by Cigno with consumers described as “Account Keeping Agreements”, of which Cigno entered into 150,112

3 ASIC now seeks pecuniary penalties pursuant to s 167(2) of the Credit Act, together with injunctions pursuant to s 177 of the Credit Act restraining Mr Harrison and Mr Swanepoel from engaging in credit activity, or being involved in a business engaged in credit activity.

### **Legal principles relating to civil penalties**

4 Section 167(2) of the Credit Act provides that:

If a declaration has been made under section 166 that the person has contravened the provision, the court may order the person to pay to the Commonwealth a pecuniary penalty that the court considers is appropriate (but not more than the amount specified in section 167A).

I made such declarations against each of BSF, Cigno, Mr Harrison and Mr Swanepoel in the Liability Judgment in relation to ss 29(1), 32(1) and 169(b) of the Credit Act.

5 Section 167(3) sets out certain matters that the Court must take into account in determining the pecuniary penalty, as follows:

In determining the pecuniary penalty, the court must take into account all relevant matters, including:

- (a) the nature and extent of the contravention; and
- (b) the nature and extent of any loss or damage suffered because of the contravention; and
- (c) the circumstances in which the contravention took place; and
- (d) whether the person has previously been found by a court (including a court in

a foreign country) to have engaged in similar conduct.

6 The purpose of a civil penalty regime is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the relevant Act by the deterrence, specific and general, of further contraventions: *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 (*Pattinson*) at [9], [15] and [31] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 (*ABCC*) at [87] (Keane, Nettle and Gordon JJ).

7 The specific and general deterrent effect is achieved by attempting “to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act”: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). In *ABCC* (at [116]), Keane, Nettle and Gordon JJ described that price as the “sting or burden” of the penalty.

8 The penalty “must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business” and “those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention”: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 (*Singtel*) at [62]–[63] (Keane CJ, Finn and Gilmour JJ).

9 A penalty is not to be fixed by reference to its proportionality to the seriousness of the contravening conduct, because that reflects an objective of retribution that has no place in a civil penalty regime. Rather, the Court should ensure that the penalty imposed is proportionate in the sense that it strikes a reasonable balance between deterrence and oppressive severity in the particular case: *Pattinson* at [10], [40]–[43] and [46].

10 The maximum penalty is but one yardstick that ordinarily must be applied, among other factors: *Pattinson* at [53]–[54]. What is required is a “reasonable relationship between the theoretical maximum and the final penalty imposed”: *Pattinson* at [10]. That relationship is established where the maximum penalty does not exceed what is reasonably necessary for specific and general deterrence of future contraventions of a like kind by the contravener and by others: *Pattinson* at [10]. This may be established by reference to the circumstances of the contravener and the contravening conduct: *Pattinson* at [55]. The matters relevant to determining the

appropriate penalty go to the objective nature and seriousness of the contravening conduct, and the particular circumstances of the contravener, including the following non-exhaustive factors identified by French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 762 at [42], which overlap with the statutory factors set out above (described in *Pattinson* by the majority at [19] as not constituting a rigid catalogue of matters for attention):

- (a) the nature and extent of the contravening conduct;
- (b) the amount of loss or damage caused;
- (c) the circumstances in which the conduct took place;
- (d) the size of the contravening company;
- (e) the degree of power it has, as evidenced by its market share and ease of entry into the market;
- (f) the deliberateness of the contravention and the period over which it extended;
- (g) whether the contravention arose out of the conduct of senior management or at a lower level;
- (h) whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and
- (i) whether the company has shown a disposition to cooperate with the relevant regulator in relation to the contravention.

11 The Full Court has repeatedly emphasised that, although similar contraventions should incur similar penalties, the differing circumstances of individual cases mean that a penalty in one case cannot dictate the penalty in a later case. As a result, comparisons with previous penalties will rarely be useful: *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; (2018) 260 FCR 68 at [69] (Allsop CJ, Davies and Wigney JJ); *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 at 295-296 (Burchett, Carr and Kiefel JJ). The purpose of any comparison with other cases is consistent application of principle, not numerical consistency: *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29; (2011) 202 IR 467 at [23]–[25] (North, McKerracher and Jagot JJ).

12 Sections 167B to 167D of the Credit Act provide the relevant mechanism for the calculation of the applicable maximum. In cases where there are a large number of contraventions, the

theoretical maximum penalties may be so high as to become “practically meaningless”: *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd (No 2)* [2024] FCA 1086 at [110] (O’Bryan J); *Australian Securities and Investments Commission v National Australia Bank Ltd* [2025] FCA 947 (**NAB**) at [59] (Neskovcin J). Nevertheless, the theoretical maximum penalties are of some relevance in a general sense in that they highlight the seriousness of the conduct in question: *NAB* at [59]; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (In Liq) (No 4)* [2020] FCA 1499; (2020) 148 ACSR 511 at [38]–[40] (Beach J).

13 Multiple contraventions may be treated as one or more “courses of conduct” where there is an interrelationship between the legal and factual elements of each of the offences; see *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 (**Cahill**) at [39] (Middleton and Gordon JJ). Whether separate contraventions should be treated as a course of conduct is a factually specific inquiry having regard to the circumstances of the case: *Cahill* at [39] (Middleton and Gordon JJ).

14 The “course of conduct” principle is a “tool of analysis” which can, but need not, be used in any given case: *Cahill* at [39]–[42] (Middleton and Gordon JJ); *Singtel* at [53]; *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; (2017) 258 FCR 312 at [421]–[424] (Middleton, Beach and Moshinsky JJ); *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; (2018) 131 ACSR 585 (**Westpac No 3**) at [132] (Beach J); *Australian Competition and Consumer Commission v Murray Goulburn Co-operative Co Ltd* [2018] FCA 1964 at [29] (Beach J); *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243 (**Yazaki**) at [234]–[235] (Allsop CJ, Middleton and Robertson JJ).

15 Where the Court treats multiple contraventions as a single course of conduct, it does not follow that the maximum penalty for the course of conduct is limited to the maximum penalty for a single contravention, or that the Court must impose the cumulative total of each of the penalties: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at [15]–[16], [20] (Allsop CJ); *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 3)* [2017] FCA 1018 at [37] (Beach J); *Yazaki* at [234]–[235]. Rather, the course of conduct principle is a tool to assist the Court in arriving at the appropriate penalty for the contraventions, and the Court

retains its discretion to impose the penalty that best reflects the seriousness of the conduct taken as a whole.

16 In determining the appropriate penalty for multiple related contraventions, the Court will also have regard to the “totality” principle, as a final check of whether the cumulative total of the penalty is just and appropriate and not excessive having regard to the totality of the relevant contravening conduct: *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 at [272], [308] (Wigney J); *Westpac No 3* at [162]. The totality principle enables the Court to consider whether the final penalty is in proportion to the nature, quality and circumstances of the conduct involved. The Court may apply the principle to alter the final penalties to ensure that they are just and appropriate: *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538; (2020) 148 ACSR 247 at [69] (Beach J).

### Theoretical Maximum Penalty

17 ASIC has calculated the theoretical maximum penalties as follows, pursuant to s 167B(1)(a) and (2)(a) of the Credit Act:

Party	Section of the Credit Act	Number of contraventions	Penalty per contravention	Maximum penalty
BSF	Section 29(1)	150,112	\$11,100,000	\$1,666,243,200,000
	Section 32(1)	746,351		\$8,284,496,100,000
Cigno	Section 29(1)	No fewer than 150,112	\$11,100,000	\$1,666,243,200,000
	Section 32(1)	4,684,429		\$51,997,161,900,000
Mr Harrison	Section 29(1)	150,112	\$1,110,000	\$166,624,320,000
	Section 32(1)	746,351		\$828,449,610,000
Mr Swanepoel	Section 29(1)	No fewer than 150,112	\$1,110,000	\$166,624,320,000
	Section 32(1)	4,684,429		\$5,199,716,190,000

18 ASIC accepts that those amounts are higher than the amounts calculated by reference to the benefit derived and detriment avoided by the respondents, and amounts calculated by reference to the annual turnover and revenue of BSF and Cigno, for the purposes of the other alternatives provided for in s 167B of the Credit Act.

19 ASIC submits, and I accept, that the maximum penalty is not itself of assistance in this case in arriving at appropriate total penalties, although it does assist in understanding the seriousness with which Parliament views contraventions of ss 29(1) and 32(1) of the Credit Code.

20 For completeness, I note that the respondents take issue with the way in which ASIC's calculations included contraventions up to 24 May 2024 (being the date of the Liability Judgment when permanent injunctions were granted), rather than confining the calculations to the Relevant Period adopted in the declarations of contravention, namely July 2022 to 3 October 2023 (when the proceedings were commenced). I reject the respondents' submissions. The contraventions between 3 October 2023 and 24 May 2024 were consequential on the contraventions which occurred in the Relevant Period. The precondition to the making of a pecuniary penalty order under s 167(2) is merely that a declaration has been made under s 166 that the person has contravened the provision. That precondition was satisfied by the Liability Judgment.

### **Further Salient Facts**

21 ASIC submits that Mr Harrison and Mr Swanepoel have a long history of working together to establish lending models which seek to avoid the regulatory regime of the Credit Act and Credit Code, culminating in the Full Court's decision in the BHF Proceeding. I accept that the history of Mr Harrison and Mr Swanepoel operating lending models which were not designed to be (or were designed not to be) regulated by the legislative regime is relevant to the assessment of appropriate penalty, although it should be noted at the outset that there are elements of that history which favour the respondents. The history is also relevant to the inferences which can be drawn from the evidence tendered by ASIC itself concerning legal advice obtained by Mr Harrison and Mr Swanepoel (and the entities which they controlled) in relation to the No Upfront Charge Loan Model.

22 On about 1 July 2010, Teleloans Pty Ltd (**Teleloans**) and Finance & Loans Direct Pty Ltd (**FLD**) began operating a short-term lending model that relied on the short-term credit exemption under s 6(1) of the Credit Code (the **Short-Term Credit Model**). In 2014, ASIC commenced civil proceedings in the Federal Court challenging the Short-Term Credit Model's reliance on the short-term credit exemption (**Teleloans Proceeding**). On 30 June 2015, the Federal Court gave judgment in the Teleloans Proceeding, dismissing ASIC's application: *Australian Securities and Investments Commission v Teleloans Pty Ltd* [2015] FCA 648; (2015) 234 FCR 261 (**Teleloans**) (Logan J). ASIC did not appeal the decision.

23 Under the Short-Term Credit Model, Teleloans assisted consumers in accessing credit provided by FLD. In terms of the short-term credit exemption, the fees charged by FLD did not exceed 5% of the credit amount, and the term did not exceed 62 days: Annexure, being the Statement

of Agreed Facts, to the unreported decision in *Teleloans* at [19. b and d]. Teleloans had service agreements with consumers under which it charged service fees described as a Financial Supply Fee, and Account Keeping Fee, and other fees relating to optional services, as well as fees for collections and default: Annexure to *Teleloans* at [18]. The fees permitted under the small amount credit contract exceeded the cap in s 31A of the Credit Code that applied to regulated small-amount credit contracts: *Cigno Pty Ltd v Australian Securities and Investments Commission* [2020] FCA 479 at [10] (Stewart J).

24 In the Teleloans Proceeding, ASIC sought various declarations that the credit provided under the Short-Term Credit Model was not subject to the short-term credit exemption and that the Credit Code therefore applied to the provision of credit. ASIC contended that the “reality of the situation” was that an “arrangement” existed between FLD and Teleloans, and the amounts payable to them were each charges for the provision of credit: *Teleloans* at [31]. Justice Logan referred to the method of drafting of ss 5 and 6 of the Credit Code as bringing to mind Mr Winston Churchill’s description of Russia as “a riddle wrapped in a mystery inside an enigma”: *Teleloans* at [11]. His Honour concluded as follows (at [44]):

credit is provided only under the contract with FLD. There is no credit provided under the contract with Teleloans. The charges made under that contract are a fee for services provided by Teleloans to the would-be borrower. Those charges have no direct relationship with the loan which comes to be made by FLD under its separate contract with the borrower. In these circumstances, the Code is not applicable.

25 For completeness, it may be noted that Teleloans held an ACL in any event: Annexure to *Teleloans* at [2.d]. Mr Harrison was the sole director of Teleloans and Mr Ryan Swanepoel (Mr Swanepoel’s brother) was a director of FLD.

26 By 2016, Teleloans and FLD ceased operating the Short-Term Credit Model, but Cigno Pty Ltd and Gold-Silver Standard Finance Pty Ltd (**GSSF**) established a substantially similar model: *Cigno Pty Ltd v Australian Securities and Investments Commission* [2020] FCA 479 at [11]. Mr Swanepoel was the sole director of Cigno Pty Ltd, and his father, Mr Jan Swanepoel, was the sole director of GSSF.

27 On 12 September 2019, ASIC issued a Product Intervention Order (**PIO**) with the title *ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2019/917* (2019) (the **2019 PIO**). The 2019 PIO prohibited short-term credit lending where the credit provider and its associate charged fees above those permitted in s 6(1) of the Credit Code. Prior to issuing the 2019 PIO, ASIC had issued a consultation paper (CP 316) with the draft legislative

instrument, and Cigno Pty Ltd and GSSF made submissions opposing the issue of the 2019 PIO. When the 2019 PIO came into force, Cigno Pty Ltd and GSSF ceased operating the Short-Term Credit Model, which had been operated until then in a manner which the *Teleloans* decision had found to be lawful.

28 On 20 September 2019, Cigno Pty Ltd filed an application in the Federal Court seeking judicial review of the 2019 PIO. The application was refused: *Cigno Pty Ltd v Australian Securities and Investments Commission* [2020] FCA 479 (Stewart J). That decision was upheld on appeal: *Cigno Pty Ltd v Australian Securities and Investments Commission* [2021] FCAFC 115; (2020) 287 FCR 650.

29 On 1 July 2019, about two months before the 2019 PIO came into effect, BHFS and Cigno Pty Ltd entered into a Loan Management Facilitation Agreement, and BHFS commenced offering credit “to consumers on terms formulated to fall within the s 6(1) exemption to the application of the Code”, which was the subsection of the Code considered by Logan J in *Teleloans: Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684; (2021) 153 ACSR 469 (**BHFS Trial Decision**) at [12] (Halley J). Shortly afterwards, BHFS changed its business model to advance credit to consumers “on terms formulated to fall within the s 6(5) exception to the application of the Code” (**Continuing Credit Model**): BHFS Trial Decision at [13]. This change to the business model, from the Short-Term Credit Model to the Continuing Credit Model, was necessary to comply with the 2019 PIO: BHFS Trial Decision at [13].

30 On 29 September 2020, ASIC commenced civil proceedings in the Federal Court challenging the Continuing Credit Model: Liability Judgment at [96]. Despite the change in model, Halley J did not consider that the facts in the BHF proceeding could be relevantly distinguished from the facts considered by Logan J in *Teleloans*: BHFS Trial Decision at [105]. Justice Halley observed that there was a distinction between the s 6(1) exemption pertaining to credit fees and charges *under* a contract, and the s 6(5) exemption which concerns charges for *providing* the credit: BHFS Trial Decision at [45]–[48], [135]. As indicated above, the Short-Term Credit Model had been formulated to comply with the s 6(1) exemption to the application of the Credit Code, whereas the Continuing Credit Model was formulated to comply with the s 6(5) exemption. Accordingly, it would be sufficient in the BHF Proceeding to establish that the Credit Code applied if it could be established that the charges made by Cigno Pty Ltd were charges for the provision of credit: BHFS Trial Decision at [135].

31 On 23 June 2021, Halley J held that the fees charged by Cigno Pty Ltd were “in exchange for, or the *quid pro quo* for, providing the services” pursuant to the services agreement, and “not for the provision of credit”: BHFS Trial Decision at [135]–[162]. Accordingly, Halley J dismissed ASIC’s application. For a period of more than a decade after the commencement of the Short-Term Credit Model, that model and later the Continuing Credit Model were thus found by the Federal Court to be lawful lending models.

32 On this occasion, however, ASIC appealed. On 27 June 2022, the Full Court gave judgment in the BHF Proceeding, reversing Halley J’s decision with respect to the Financial Supply Fee, and holding that the Continuing Credit Model does not fall within the s 6(5) exemption from the Credit Code: *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2022] FCAFC 108; (2022) 293 FCR 330. I referred to the salient aspects of the Full Court’s reasoning in the Liability Judgment at [97]–[106]. In sum, the Full Court held that the Financial Supply Fee was a charge that was made for providing credit by BHFS as a matter of commercial substance and in a practical commercial sense: see especially [182]–[184] (O’Bryan J, with whom Besanko and Lee JJ agreed). ASIC has not put any submission to the effect that the respondents to the BHF Proceeding did not immediately comply with the Full Court’s decision.

33 On 13 July 2022, ASIC issued two PIOs:

- (a) *ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2022/647 (Short Term Credit PIO)* and;
- (b) *ASIC Corporations (Product Intervention Order – Continuing Credit Contracts) Instrument 2022/648 (Continuing Credit PIO)* (collectively, the **2022 PIOs**).

34 Before issuing the 2022 PIOs, on 9 July 2020, ASIC issued a consultation paper (CP 330) with the draft legislative instruments. Both Cigno Pty Ltd and BHFS made submissions in which they opposed the proposed PIOs. Those submissions referred to expert economic reports commissioned by Cigno Pty Ltd, consumer survey data (both internally gathered as well as independently obtained), internal policies aimed at avoiding or addressing financial hardship, and an offer by Cigno Pty Ltd to work with ASIC by providing information and assistance, including a tour of Cigno Pty Ltd’s business.

35 At the hearing in relation to the question of contravention in these proceedings, ASIC tendered without limitation the Swan Group Holdings Pty Ltd Directors’ Report dated 30 November 2022 (**Swan Directors’ Report**) (CB 2/916–7) which stated that (as I recorded at [164] of the

Liability Judgment), in relation to matters subsequent to the end of the financial year, on 14 July 2022, ASIC made the 2022 PIOs and then stated:

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].

36 That evidence was relevant to the hearing in relation to contravention, because it was relied on by ASIC in contending that Mr Harrison and Mr Swanepoel were liable as accessories to the contraventions of the Credit Code by BSF and Cigno. As I recorded at [148] of the Liability Judgment, among the particulars as to what ASIC alleged were the design and implementation steps which it says Mr Harrison took in relation to the No Upfront Charge Loan Model was the allegation that Mr Harrison:

obtained legal advice from Piper Alderman on behalf of BSF (and in conjunction with Cigno Australia), and made changes to its business model, as referred to in the Financial Statement of Swan Group Holdings Pty Ltd for financial year 2022 ...

Similarly, in relation to the particulars as to what ASIC alleged were the design and implementation steps which it says Mr Swanepoel took in relation to the No Upfront Charge Loan Model was the allegation that Mr Swanepoel:

obtained legal advice from Piper Alderman on behalf of Cigno Australia (and in conjunction with BSF), and made changes to its business model, as referred to in the Financial Statement of Swan Group Holdings Pty Ltd for financial year 2022 ...

37 ASIC confirmed at the hearing in relation to penalty that it maintains those particulars. ASIC also accepted that it is open to me to find that the legal advice from Piper Alderman was obtained by Mr Harrison both personally and on behalf of BSF, and by Mr Swanepoel both personally and on behalf of Cigno. I make those findings, on the basis that they are established either directly or by inference from the Swan Directors' Report, even though they go beyond the strict terms of what was disclosed in the Swan Directors' Report. Those findings are consistent with the integrated and collaborative nature of the business model that was put in place by Mr Harrison and Mr Swanepoel, and also consistent with the contentions advanced by ASIC in the particulars to which I have referred above. I note that Piper Alderman were the solicitors for Cigno Pty Ltd in the judicial review proceedings decided by Stewart J on 15 April 2020, and in the appeal from that decision decided on 29 June 2021, and were the solicitors for BHFS in the BHF Proceeding decided by Halley J on 23 June 2021, and in the appeal from that decision decided on 27 June 2022.

- 38 The respondents have maintained a claim for legal professional privilege in relation to documents recording the advice by Piper Alderman, and have not tendered any such documents in these proceedings. I do not draw any adverse inference against the respondents from their decision not to disclose the legal advice which they obtained, consistently with *Giannarelli v Wraith (No 2)* [1991] HCA 2; (1991) 171 CLR 592 at 605 (McHugh J); *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (No 6)* [2007] NSWSC 124; (2007) 63 ACSR 1 at [168] (McDougall J); and JD Heydon, *Cross on Evidence* (14<sup>th</sup> Australian Edition, 2024) at [25040]. ASIC did not put any submission to the contrary.
- 39 What inferences, if any, can be drawn from the sentence extracted above from the Swan Directors' Report in the context of the evidence as a whole? In the first place, it is reasonable, if not obvious, to infer that the request for legal advice from Piper Alderman was for advice as to what changes to the business model (being the Continuing Credit Model) were necessary in order both to trade legally and to comply with the 2022 PIOs. The request for advice may well have extended beyond that particular question, but the evidence does not permit me to draw any further inferences as to the advice requested. I infer that that request for advice was made because the respondents genuinely regarded the relevant law as complex and uncertain, and because they genuinely intended to act lawfully. The respondents undoubtedly regarded Piper Alderman as competent to give that advice. As to the factual instructions provided to Piper Alderman, as they were the solicitors who had acted in the recent proceedings (including the appeal in the BHF Proceeding decided on 27 June 2022), Piper Alderman would have had full knowledge of the Continuing Credit Model, in terms of its constituent contractual documents as well as the way in which it was represented to consumers. As the Full Court noted in the BHF Proceeding at [25], the agreed facts included the content of the websites of BHFS and Cigno respectively. The evidence does not permit me to draw any inference as to whether the respondents themselves proposed alternative models, or relied on Piper Alderman's professional skill and judgment to propose changes, or some combination of the two.
- 40 Most importantly, I infer that the changes which were actually made to the respondents' business model were those which Piper Alderman advised were "necessary" both to trade legally and to comply with the 2022 PIOs. In its ordinary and natural meaning, the statement in the Swan Directors' Report as to "any necessary changes" is inextricably linked to the legal advice obtained from Piper Alderman. Although ASIC submitted that the reference to "any necessary changes" may have been a reference to what Cigno decided itself was necessary without Piper Alderman having said so, that strikes me as inherently improbable, as there

would be little (if any) practical point in seeking Piper Alderman’s advice if Cigno had been able independently to determine what changes were necessary. Further, the matter called for considerable legal skill and judgment, particularly in light of the Full Court’s disagreement with the primary judge on the application of the Credit Code in the BHF Proceeding. Accordingly, I infer that in July 2022, before the No Upfront Charge Loan Model was implemented, Piper Alderman advised the respondents that the changes to their business model embodied in the No Upfront Charge Loan Model were necessary changes for the respondents both to trade legally and to comply with the 2022 IPOs. Further, I infer that the respondents relied on that advice in implementing the No Upfront Charge Loan Model. I also find that the respondents’ reliance was reasonable, and caused the respondents to believe honestly and reasonably that the No Upfront Charge Loan Model enabled them to trade lawfully and to comply with the 2022 IPOs.

41 I am not able to infer from the direct evidence what (if any) further advice Piper Alderman may have given. It is conceivable that Piper Alderman gave advice as to other options available for changes to the respondents’ business model. It is conceivable that Piper Alderman gave advice not only on what changes were “necessary” but also on what additional changes might be considered “desirable”. It is conceivable that 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; for example, expressed in terms of whether that model was more likely than not to be found to be lawful, or whether there was a strong likelihood or even practical certainty of the model being found to be lawful. The evidence simply does not enable inferences to be drawn on those matters.

42 ASIC drew my attention to the notices to admit which it issued to BSF and Cigno on 12 March 2024 concerning the request for legal advice from Piper Alderman (Supp CB11/8020–8), and the notices of dispute sent by BSF and Cigno on 26 March 2024 (Supp CB 11/8032–5). I do not attach any significance to the stance then taken by BSF and Cigno, despite the fact that some of the facts which ASIC sought to be admitted are consistent with the findings and inferences which I have made in these reasons. I regard the stance then taken by BSF and Cigno as essentially tactical. The respondents are entitled to change their stance on the matters raised by the notices to admit in light of my subsequent findings as to the accessory liability of Mr Harrison and Mr Swanepoel, which appears to have been the issue with which ASIC was concerned in issuing the notices to admit at the time, as disclosed by ASIC’s particulars of 27 October 2023.

43 On 21 December 2022, BSF and Cigno ceased entering into new agreements under the No Upfront Charge Loan Model due to the risk of non-compliance with the new anti-avoidance amendments to the Credit Act, following the enactment of the *Financial Sector Reform Act 2022* (Cth). On 22 December 2022, BSF applied for relief from ASIC under the new s 323D(1) of the Credit Act, and confirmed that, pending ASIC’s determination of the application, BSF had ceased to provide the relevant product, effective from 21 December 2022 (in the sense of not entering into new contracts). BSF and Cigno did, however, continue to charge and collect fees under pre-existing contracts.

### The Significance of Piper Alderman’s Advice

44 In *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2024] FCA 578 (*Web3 Ventures*), I considered the significance of a party in contravention of a civil penalty provision having obtained favourable legal advice in the context of whether that party should fairly be excused under s 1317S of the *Corporations Act 2001* (Cth) (the **Corporations Act**), so as to relieve the party from liability for contravention of a civil penalty provision. In doing so, I said the following:

38 This issue raises a deeper question concerning the rule of law, being the state of affairs in which a legal system is legally in good shape. Among the desiderata of the rule of law are that the rules of the legal system are promulgated and clear. These qualities of predictability in the legal system, among others, generate what Professor Lon L Fuller described in *The Morality of Law* (Yale University Press, rev ed, 1969) as “a relatively stable reciprocity of expectations between lawgiver and subject” (p 209). The lawgiver expects that subjects will comply with the laws that have been previously announced to them, and the subjects expect to be able to go about their lives by way of self-directed conduct in the knowledge that they are the laws which will be applied: see to similar effect Professor John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980), pp 272–3. These are, of course, matters of degree, and I have already referred to the views of Commonwealth government bodies as to the lack of clarity and predictability in the law applicable to the present case. Importantly, Professor Finnis says of the promulgation of laws that it is “not fully achieved by printing ever so many legible official copies of enactments, decisions, forms and precedents; it requires also the existence of a professional class of lawyers whose business it is to know their way around the books, and who are available without undue difficulty and expense to advise anybody who wants to know where he stands”: *Natural Law and Natural Rights*, p 271. Before engaging in conduct in an area where the law is complex or otherwise uncertain, a person who is acting responsibly will consult a member of that professional class of lawyers to ascertain where he or she stands. As Lord Diplock asked rhetorically of the local council accused of negligence and other wrongs in *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 171: “What more could the council be reasonably expected to do than to obtain the advice of qualified solicitors whose competence they had no reason to doubt?” A person who acts in that

manner in obtaining the advice of a competent lawyer 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.

39 Accordingly, subject to the circumstances of the particular case, a person who perceives there to be legal uncertainty in a proposed course of conduct, who then obtains legal advice from a person who is qualified to give it competently, and who then genuinely concludes that there is no identified risk of breaching the law, ought fairly to be excused from liability for a civil pecuniary penalty for later engaging in that conduct and thereby breaching the law, at least in circumstances where the person does not thereby derive a substantial profit or cause substantial harm. It is not necessary in the present case to consider other scenarios, such as where legal advice leads the person to conclude that the conduct is probably lawful but that the question is relatively finely balanced and carries a substantial risk of contravention, or where the person derives a substantial profit or causes substantial harm by virtue of the contravention. It should also be noted that I am not dealing here with the issue whether the law was contravened (as to which a belief that the conduct would not contravene the law is no defence), but whether in all the circumstances the defendant ought fairly to be excused for the contravention.

40 This reasoning must be read consistently with the Full Court’s statement in *Flight Centre* at [63] that “It is misconceived to extrapolate from [Kiefel J’s judgment in *Australasian Meat Industry Employees’ Union v Australia Meat Holdings Pty Ltd* [1998] FCA 664; (1998) 82 IR 76], as *Flight Centre* does in its submissions, a proposition that if one reasonably misunderstands one’s liability position in circumstances that give rise to a civil penalty, one should be relieved of the penalty or one should receive a light penalty.” As I have sought to make clear in the preceding paragraph, the particular circumstances of the case remain paramount.

41 It is also worth clarifying that the general proposition set out in paragraph 39 will not be applicable merely because the defendant asserts that it concluded, after receiving competent legal advice, that there was no identified risk of breaching the law. The more unreasonable the conclusion, the more will be required from the defendant: see *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2021] UKSC 40; [2023] AC 101 at [118] (Lord Burrows). In the present case, Mr Karaboga’s evidence of his conclusion was unchallenged and does not appear to be unreasonable.

...

62 In my view, the Contraventions should be regarded as the result of Block Earner adopting a reasonably arguable, but erroneous, belief that the Earner product complied with the Act, after having obtained external legal advice from a leading law firm. It is well established that an honest and reasonable belief may, in the particular circumstances of the case, be a relevant mitigating or ameliorating factor in determining whether or not a penalty is to be imposed and, if so, the extent of the penalty: see *Flight Centre* at [31] and [63]–[64]; *Australian Competition and Consumer Commission v Lactalis Australia Pty Ltd (No 2)* [2023] FCA 839 at [18]–[20] (Derrington J).

45 On appeal, the Full Federal Court found that there had not been a contravention of a civil penalty provision: *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd*

[2025] FCAFC 58. However, their Honours referred at [140] to the significance which I had attached to the alleged contravener having obtained legal advice about the product in question, including the fact that the party did not produce a copy of the advice and was silent about the substance of it (for reasons concerning how the question had arisen in the particular context of the case). Their Honours then said the following at [141]:

A defendant who seeks to contend either that they should be relieved from liability to pay a pecuniary penalty for contraventions of the Act, or that a penalty should be fixed in an amount lower than [sic] 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. Nothing his Honour said in the penalty judgment should be read as suggesting otherwise.

46 In the ordinary case, it is the party accused of contravention which would be the party leading evidence concerning legal advice, as had occurred in *Web3 Ventures*. In the present case, however, it is ASIC which itself led that evidence. It did so because of a perceived advantage to its case on accessory liability, although the evidence was tendered without limitation. That is a very unusual feature of this case. The Full Federal Court in the appeal from *Web3 Ventures* does not give any indication of having contemplated such a scenario in referring to what “ordinarily” would be required. Moreover, it could not reasonably be supposed that the Full Court contemplated as an ordinary case the present circumstances (as discussed below), in which ASIC not only led evidence of the respondents requesting and obtaining legal advice on the lawfulness of their proposed conduct, but also submitted in seeking penalties that the respondents did not attempt to comply with the relevant law.

47 In *Australian Securities and Investments Commission v HCF Life Insurance Company Pty Ltd (Penalty)* [2025] FCA 454, the issue of the significance of legal advice arose in the context of the assessment of an appropriate penalty. The relevant legal advice was the subject of agreed facts between the parties, with the result that the case fell within what might be regarded as the ordinary case, as referred to by the Full Federal Court in the appeal from *Web3 Ventures*. The agreed facts provided evidence about what advice the party in contravention had in fact received: [69]. I said the following at [70]:

ASIC submits, and I accept, that the relevance and weight to be attributed to the obtaining, by the contravener, of legal advice will necessarily depend upon all of the circumstances of the case, including the nature of the contravention and the nature of the advice obtained, and including the degree of certainty or qualification with which it is expressed. There is no inflexible rule: *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; (2018) 260 FCR 68 at [64] (Allsop CJ, Davies and Wigney JJ).

48 In the present case, the inferences which I have been able to draw do not extend to any inference in relation to the degree of certainty or qualification with which Piper Alderman’s advice was expressed. In my view, in the circumstances of this case, particularly having regard to the lack of evidence of the precise terms of Piper Alderman’s advice, the evidence of that advice does not wholly exonerate the respondents from liability to pay a pecuniary penalty. However, I regard the evidence concerning that advice as having significance in reducing the amount of the penalty which would otherwise have been appropriate. That evidence is directly relevant to ASIC’s submissions concerning what it alleges was deliberate or reckless conduct on the part of the respondents, even going so far as to submit that in providing credit pursuant to the No Upfront Charge Loan Model, the respondents “did not attempt to comply with the Credit Code” (ASIC’s written submissions at [109]). As I discuss below, I reject those submissions, for reasons which include my findings concerning the respondents’ request for advice from Piper Alderman in July 2022, and the effect of, and reliance on, that advice, to the extent that I have been able to infer those matters. The respondents’ conduct must be viewed in light of the circumstances that:

- (a) the respondents consulted lawyers of unquestioned competence and integrity as to how they needed to change their business model in order to trade lawfully in light of the adverse judgment of the Full Federal Court in the BHF Proceeding and the 2022 PIOs, noting that the lawyers in question were the same lawyers who had acted in that ultimately unsuccessful litigation;
- (b) the respondents received advice that certain changes were necessary in order to trade lawfully and to comply with the 2022 IPOs;
- (c) the respondents made those changes in honest and reasonable reliance on the advice they had sought; and
- (d) the respondents thus honestly and reasonably believed that, having made the necessary changes as advised by their lawyers, they were trading lawfully and in compliance with the 2022 PIOs.

### **Mandatory and other relevant considerations**

#### *Nature and extent of the contravening conduct (s 167(3)(a) of the Credit Act)*

49 Dealing first with s 29(1) of the Credit Act, it is common ground that BSF contravened s 29(1) on 150,112 occasions from July 2022 to 21 December 2022. That is a substantial number of contraventions over a relatively short period of time. It is also common ground that Cigno

contravened s 29(1) on no fewer than 150,112 occasions by processing loan applications for that number of credit contracts consumers entered into with BSF in the same period. It is not possible to quantify the number of additional occasions Cigno contravened s 29(1) by performing services falling within the scope of s 29(1) in the period July 2022 to 24 May 2024, when the Liability Judgment was delivered.

50 It is not in dispute that the licensing regime under the Credit Act is essential to the effective operation and regulation of the consumer credit marketplace in Australia, and the respondents properly accept that the prohibition in s 29(1) is essential to that matter.

51 ASIC submits that a contravention of s 29(1) is analogous in significant respects to the failure of a financial service provider to obtain a financial services licence pursuant to s 911A of the Corporations Act. So much may be accepted. However, ASIC relies in that context on *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630; (2012) 205 FCR 120 at [42], in which Besanko J referred to the public interest in the Court expressing its disapproval of corporate behaviour which exhibited an “open disregard” for the requirements of the Corporations Act, and referred to the importance which the licensing regime has in ensuring honesty and competency on the part of those providing financial services. In my view, the present case does not involve “open disregard” for the requirements of the Credit Act; rather, as I have found above, the respondents obtained legal advice as to the necessary changes to their business model in order to trade legally and comply with the 2022 PIOs and, as a result, honestly and reasonably believed that they were acting lawfully in designing and implementing the No Upfront Charge Loan Model. Further, when the anti-avoidance regime under the Credit Act (ss 323A–323D) came into operation on 13 December 2022, the respondents sought an exemption from ASIC under s 323D and decided not to enter into any new contracts after 21 December 2022 until ASIC had determined their application: Liability Judgment at [158]; CB 8/5337–5351. I note in addition that it is no part of ASIC’s case that the respondents acted dishonestly in providing credit to consumers.

52 ASIC submits that the respondents made a “calculated decision to seek to operate the No Upfront Charge Loan Model outside the regulatory framework in the Credit Act and Credit Code” (ASIC’s written submissions at [75]). It is not in dispute that the design and implementation of the No Upfront Charge Loan Model were intended to operate beyond the statutory framework. However, in my view, it is not appropriate to refer to that decision as having been a “calculated” one in the absence of knowledge of the precise terms of Piper

Alderman’s advice, and in particular what that advice may (or may not) have said about the level of risk which the respondents would be undertaking.

53 ASIC submits, and I accept, that the respondents’ decision to operate that model denied consumers important protections under the Credit Act and Credit Code. In relation to the No Upfront Charge Loan Model, those protections included limits on the fees and charges that can be imposed for the provision of credit. Generally, there is a cap of 48% which limits the annual percentage rate that can be charged on consumer credit contracts: s 32A of the Credit Code. However, the legislation recognises the legitimate role of small, short-term loans in the Australian economy and makes specific provision for “small amount credit contracts” (SACCs), being credit contracts with a credit limit of \$2,000 or less and a term of between 16 days and 1 year. In the case of SACCs, it is unnecessary for the credit provider to use an annual percentage rate for the purpose of calculating and charging interest charges, and there are limits on the type and amount of fees that can be charged, as set out in s 31A of the Credit Code.

54 Pursuant to the No Upfront Charge Loan Model, the amount of the fees imposed in respect of the credit provided by BSF was very substantially in excess of that permitted for SACCs by the Credit Code. That is illustrated in Annexure A to ASIC’s Amended Concise Statement, which sets out for each of the 16 consumers adopted as examples the maximum permitted fees under the Credit Act as stipulated in s 31A of the Credit Code under a SACC of the same value and term if regulated by the Credit Act, and contrasts that with the much larger amounts charged by BSF and Cigno. I note that the respondents sought to diminish the significance of that contrast by providing figures purporting to show what could be charged in the event of a default in payment under a SACC pursuant to s 39B of the Credit Code, but the respondents’ analysis proceeded on a misreading of s 39B. The respondents proceeded on the basis that s 39B permits the SACC provider to charge total fees in an amount equal to twice the adjusted credit amount in relation to the contract, where the consumer has defaulted on repayments; however, in fact s 39B only permits the SACC provider to recover from the consumer a total amount by way of principal and fees of no more than twice the adjusted credit amount.

55 Further protections for the consumer where the credit provider holds an ACL follow from the requirement for licensees to:

- (a) have an internal dispute resolution procedure available for consumers to seek to resolve disputes with the credit provider, which must comply with standards and requirements made or approved by ASIC (s 47(1)(h) of the Credit Act);

- (b) be a member of an external dispute resolution scheme approved by ASIC (to which customers can take, as an alternative to court, any disputes they may have with the credit provider for that dispute to be resolved by the scheme), that scheme being the Australian Financial Complaints Authority (AFCA) scheme (s 47(1)(i) of the Credit Act); and
- (c) engage in “responsible lending conduct” as required by Chapter 3 of the Credit Act, including by making reasonable inquiries about the consumer’s requirements and objectives in relation to the consumer credit, making reasonable inquiries about the consumer’s financial situation and taking reasonable steps to verify the consumer’s financial situation (ss 128(d) and 130(1)).

56 The respondents submit by way of mitigation that the contracts between BSF and consumers contained a dispute resolution clause. I do not attach significance to that matter, given that only two consumers out of about 100,000 customers entered into Loan Agreements with BSF without having been referred to BSF by Cigno, such that almost all customers dealt with Cigno: Liability Judgment at [72]. Further, BSF did not have the internal infrastructure to collect the principal amounts owed by customers who dealt with Cigno (Liability Judgment at [82]) and thus probably lacked the internal resources to deal with disputes. The respondents also rely on a substantially identical clause in the Services Agreements between Cigno and consumers, and Cigno’s maintenance of an Internal Dispute Resolution department that was guided by a Complaints and Dispute Resolution Policy. However, the evidence adduced by ASIC shows that, of the 96 complaints made by consumers to ASIC about the impugned conduct of the respondents, 26 of them stated that they were “unable to contact” Cigno about their complaints: Supp CB 4/2978 and 5/3737–9. The evidence also includes the observations of an experienced community legal centre specialist to the effect that Cigno did not operate a dedicated internal dispute resolution department and was not a member of AFCA, with the result that Cigno did not respond to complaints within the usual timeframes and did not provide the same level of dispute resolution as she had experienced when dealing with regulated credit providers: affidavit of Ms Kelly of 22 August 2025 at [26]. The respondents also referred by way of mitigation to the total number of occasions and amounts when Cigno cancelled fees, but I do not place significance on that matter given that the fees should not have been charged in the first place, and there is a lack of evidence of the circumstances of cancellation.

57 I also take into account further protections provided by the Credit Code including:

- (a) a requirement that lenders give to debtors, prior to entry into the credit contract, a pre-contractual statement setting out certain matters and an information statement of the debtor's statutory rights and obligations (s 16(1) of the Credit Code);
- (b) a means by which borrowers can apply to change their obligations under the credit contract in the event they fall into financial hardship (ss 72–74 of the Credit Code); and
- (c) a means by which debtors, mortgagors or guarantors can apply to a court to reopen unjust transactions (s 76 of the Credit Code).

58 As to the contraventions of s 32(1) concerning the prohibition on charging fees for unlicensed credit activities, ASIC submits, and I accept, that BSF contravened the provision on 746,351 occasions and Cigno contravened the provision on 4,684,429 occasions. As ASIC submits, those figures represent a very significant number of contraventions over the period from July 2022 to 24 May 2024. I do not regard the fact that the Account Keeping Fee and the Change of Scheduled Fee included a component of the cost of providing administrative services, as well as being charges for credit, as a matter of any particular significance. The prohibition on demanding, receiving or accepting any fees, charges or other amounts for credit activity when not holding an ACL reinforces the importance of the licensing regime under the Credit Act.

*Nature and extent of any loss or damage suffered (s 167(3)(b) of the Credit Act)*

59 ASIC submits, and I accept, that consumers suffered significant loss as a result of the respondents' contraventions. The contraventions of s 29(1) meant that borrowers entered into agreements with BSF and Cigno that should never have been entered into, and the contraventions of s 32(1) meant that borrowers who entered into agreements with BSF and Cigno were charged fees they ought not to have been charged. BSF and Cigno have not repaid those fees to consumers. Rather, BSF and Cigno have depleted the balance of their respective bank accounts, such that those accounts contain relatively little money. In the case of BSF, the aggregate closing bank account balance on 24 May 2024 was \$53,099.59, and in the case of Cigno, the corresponding figure was \$627.77: affidavit of Ms Rana of 22 August 2025 at [24].

60 ASIC submits, and I accept, that the amounts that BSF and Cigno unlawfully charged consumers are indicative of the loss suffered by those consumers, namely:

- (a) in relation to BSF, Late Payment Fees of \$9,330,300.22; and

(b) in relation to Cigno, \$84,179,675.12 comprising Account Keeping Fees (\$42,777,159.35), Default Fees (\$35,852,916.41) and Change of Payment Schedule Fees (\$5,549,599.36).

The respondents submit that, if the No Upfront Charge Loan Model had not been available to extend credit to consumers, some unknown number of consumers might have sought credit from another unregulated or regulated credit provider, and in the case of a regulated SACC provider, those consumers may well have been charged the maximum permitted amounts. Even taking that argument at its highest, it appears to me that the customers of BSF and Cigno have generally paid substantially higher amounts than would have been charged by regulated credit providers. The respondents also rely on consumer survey data which Cigno deployed in its submission to ASIC in response to Consultation Paper 330, in which 92% of those surveyed answered “Yes” to the question “Given your situation at the time, do you believe Cigno’s assistance was of overall benefit to you?” (Supp CB 5/3603). There is no evidence of the size of the survey pool or the method of the survey, and accordingly I do not attach significant weight to that evidence.

*Circumstances in which the contraventions took place (s 167(3)(c) of the Credit Act)*

61 ASIC submits, and I accept, that 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 the Credit Code. ASIC also submits that the establishment of the No Upfront Charge Loan Model with its particular features was “deliberate”. In one sense, that is true, in that the model which the respondents designed and implemented was intentional, and not accidental, and 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. However, ASIC appears to use the adjective “deliberate” in the additional sense that the respondents were not attempting to comply with the provisions of the Credit Act and Credit Code (ASIC’s written submissions at [86] and [109]). I reject that submission, as it is directly inconsistent with the findings that I have made about the legal advice which the respondents requested and obtained.

62 As the respondents submit, the conduct should also be viewed against the background of the Short-Term Credit Model which was held to be lawful in *Teleloans*, and also that the Continuing Credit Model had been held to be lawful at first instance in the BHF Proceeding. Thus, although ASIC is correct in submitting that Mr Harrison and Mr Swanepoel “have a long

history of working together to establish lending models which seek to avoid the regulatory regime” (ASIC’s written submissions at [92]), their conduct had been upheld as lawful for a period of over a decade by reason of two first instance decisions of this Court. ASIC also refers to Cigno Pty Ltd’s and GSSF’s opposition to the 2019 PIO, followed by proceedings for judicial review of the 2019 PIO, and the opposition by both Cigno Pty Ltd and BHFS to the proposed 2022 PIOs. I do not regard that stance as warranting any criticism, and I regard it as entirely legitimate advocacy. While it does demonstrate knowledge of the regulatory regime on the part of those entities (and of Mr Harrison and Mr Swanepoel as their directors, except that the director of GSSF was Mr Swanepoel’s father: Supp CB 4/2964), it does not establish that the respondents were able to determine the lawfulness or otherwise of the No Upfront Charge Loan Model without independent advice by qualified lawyers. ASIC also refer to evidence that Mr Harrison had been appointed as Responsible Manager for two entities which held ACLs (namely Teleloans from 21 February 2011 to 13 March 2018 and Australian Seniors Advantage Group Pty Ltd from 9 August 2017 to 21 September 2020), and that Mr Swanepoel had been appointed as Responsible Manager for RYMAJE Pty Ltd which held an ACL from 11 March 2011 to 2 May 2019. ASIC submits that the history of operating unregulated lending models and serving as Responsible Managers for ACL holders supports a finding that Mr Harrison and Mr Swanepoel were “intimately aware of the regulatory obligations on credit providers operating within the payday lending industry” (ASIC’s written submissions at [96]). While I accept that Mr Harrison and Mr Swanepoel were familiar in general terms with those regulatory obligations, I regard them as lay people who required the advice of qualified lawyers in order to know where they stood in relation to the lawfulness of their conduct or proposed conduct.

63 ASIC also relies on what it contends was Mr Harrison’s and Mr Swanepoel’s knowledge of the vulnerability of their consumers. I referred to much of the content of Cigno’s websites in the Liability Judgment at [39]–[43], which contains references to short term cash loans, emergency cash, payday loans, bad-credit loans, Centrelink loans and loans for unemployed people (among others). ASIC also relies on the submission made by Cigno Pty Ltd in response to ASIC’s Consultation Paper 316, in which it opposed the 2019 PIO, and referred to its short-term lending model assisting customers in circumstances where few, and perhaps no, other credit providers were willing to assist them (at [6]). In a later undated submission made by Cigno Pty Ltd in response to ASIC’s Consultation Paper 330, which Cigno Pty Ltd opposed, Cigno Pty Ltd wrote (at [7.5]):

Notwithstanding the fact that Cigno does not target a group of consumers, it is reasonable to assume that the services offered by Cigno do attract consumers that could be described as “vulnerable”. This, however, is not unique to Cigno’s customers. There are many financial products that are marketed to consumers that could be described as “vulnerable” including Small Amount Credit Contracts. Nonetheless, ASIC’s focus should not be to foreclose options to such people. Rather, ASIC should simply be concerned that: (a) the prospective consumers are adequately informed about the terms of the product and the impact of their decision to enter into the contract; and (b) the consumer’s potential vulnerability is not unfairly exploited.

Cigno Pty Ltd then argued in relation to consumers in the finance sector who were suffering from financial instability or hardship that “the issue is not whether such consumers exist, the issue is whether there is an adequate assessment procedure in place to assess the consumers’ capacity to make the repayments without sustaining hardship” (at [7.6]).

64 I accept that 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. However, I also accept that the matters to which I have referred in Cigno Pty Ltd’s response to ASIC’s Consultation Paper 330 (at [7.5] and [7.6]) genuinely represented Cigno Pty Ltd’s opinion, being an opinion which may legitimately be held. ASIC expressly refrained from submitting that there was anything insincere in what Cigno Pty Ltd wrote in [7.5] of that response.

65 ASIC also relies on the circumstances in which the No Upfront Charge Loan Model ceased, which ASIC attributes to a combination of the investigations which it had conducted by way of statutory notices beginning on 11 August 2024 to Cigno and BSF, and the commencement of the Credit Act’s anti-avoidance provisions (ss 323A–323D) on 13 December 2022. While the statutory notices and investigations by ASIC may have played some role in that decision by way of background matters, in my view the real or effective cause of the decision not to enter into new contracts for the No Upfront Charge Loan Model after 21 December 2022 was the commencement of the anti-avoidance provisions about a week earlier, as the relevant letter from BSF on 22 December 2022 expressly stated (CB 8/5337 at 5351). ASIC is correct to point out that, while BSF ceased to provide new loans from 21 December 2022, neither it nor Cigno ceased engaging in credit activity and continued to charge fees pursuant to those credit contracts until the Liability Judgment was delivered.

66 ASIC also submits that by establishing the No Upfront Charge Loan Model, the respondents sought to gain an advantage over their competitors who complied with the regulatory regime, and that licensed providers of consumer credit who complied with the legislative framework

lost the opportunity lawfully to provide credit to those consumers to whom the respondents supplied loans. I accept that some loss of opportunity to those other credit providers who operated lawfully is likely to have occurred. However, this is impossible to quantify, as ASIC accepts.

*Whether the person has previously been found by a Court to have engaged in similar conduct (s 167(3)(d) of the Credit Act)*

67 Strictly speaking, s 167(3)(d) is concerned with whether “the person”, being the person who is the subject of a finding of contravention, has previously been found by a court (including a court in a foreign country) to have engaged in similar conduct. However, none of BSF, Cigno, Mr Harrison or Mr Swanepoel has previously been found by a court to have engaged in similar conduct, as ASIC accepts. In the BHF Proceeding, Cigno Pty Ltd and BHFS were found to have contravened ss 29(1) and 32(1) of the Credit Act, and although Mr Swanepoel and Mr Harrison were sole directors of those companies respectively at the relevant time, they were not parties to the BHF Proceeding and no finding was made that they engaged in any contraventions.

68 ASIC submits, and I accept, that the conduct which was the subject of the BHF Proceeding was substantially similar to the No Upfront Charge Loan Model, and that even if s 167(3)(d) does not strictly apply, it remains a relevant consideration in the circumstances of this case that the Full Court found that the conduct which was the subject of the BHF Proceeding was unlawful only about three weeks before the respondents implemented the No Upfront Charge Loan Model. The respondents’ decision to implement that model, however, must be seen in the light of all the circumstances, including their request for, and obtaining of, legal advice on the necessary changes to be made to the model which had just been found to be unlawful.

*Were the contraventions the result of deliberate or reckless conduct?*

69 ASIC submits that the respondents deliberately established the No Upfront Charge Loan Model with its particular features, in the context of the requirements in the Credit Act applying to loans of the kind provided pursuant to the model, in the context of the recent decision in the BHF Proceeding, and in circumstances where ASIC alleges the respondents were “intimately familiar with the relevant regulatory requirements” (ASIC’s written submissions at [109]). ASIC submits that the respondents knew that avoiding the regulatory requirements would be more profitable for them, including by exposing consumers to disproportionate fees and charges which would not be permissible under a licensed model governed by the Credit Act

and Credit Code. ASIC then submits that, in providing credit pursuant to the No Upfront Charge Loan Model, the respondents “did not attempt to comply with the Credit Code” (ASIC’s written submissions at [109]). ASIC submits that the respondents “knowingly courted the risk of the model being found, contrary to their design, to have been regulated by the Credit Act”.

70 As I have indicated above, I reject the submission that the respondents did not attempt to comply with the Credit Code. Indeed, ASIC’s submission in that regard is contradicted directly by the evidence which ASIC itself tendered (without limitation) concerning the request for and obtaining of legal advice on that very matter. I accept that the design and implementation of the No Upfront Charge Loan Model was deliberate, in the sense of being intentional rather than accidental conduct, and I also accept that the respondents perceived that that 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. I do not make a finding that the respondents knowingly courted the risk of the model being found to have been regulated by the Credit Act, given that there is no evidence before me as to what advice (if any) was given by Piper Alderman as to the degree of any such risk. As indicated above, it is wrong in principle to draw adverse inferences from a claim for legal professional privilege, and ASIC does not contend otherwise.

71 As Jagot, Yates and Bromwich JJ said in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 at [131]:

If a contravention does not involve any state of mind then it is for the party asserting any particular state of mind (be it a deliberate flouting of the law, recklessness, wilful blindness, “courting the risk”, negligence or innocence or any other characterisation of state of mind) to prove its assertion. If, in the event, neither party discharges its onus to establish any particular state of mind in relation to the contraventions, the Court determines penalty on no more than the fact of the proscribed nature of the conduct .... However, if any degree of awareness of the actual or potential unlawfulness of the conduct is proved then, all other things being equal, the contravention is necessarily more serious. Such awareness may be able to be inferred from the very nature of the conduct or representations constituting the conduct. However, absence of such proof does not establish a mitigatory state of mind .... It means only that the neutral state of mind required for liability has not been disturbed for the purposes of penalty. If a contravening party wishes to go beyond the neutral statutory state of mind for liability and positively assert a lack of consciousness of the character of the conduct for the purposes of penalty, that is a circumstance of mitigation which the contravening party must prove.

72 In the present case, ASIC contends for particular states of mind in terms of deliberate or reckless conduct, or “knowingly courting the risk” of unlawfulness. In my view, ASIC has failed to discharge its onus to establish deliberate or reckless conduct, or knowingly courting the risk of unlawfulness. To the extent that the respondents submit that they acted honestly,

albeit mistakenly, in designing and establishing the No Upfront Charge Loan Model (respondents' written submissions at [108]), I regard them as having discharged their onus of doing so by relying on the evidence as to their request for, and obtaining of, legal advice from Piper Alderman.

*Benefits Obtained by the Respondents from the Contraventions*

73 In dealing with this topic, I have included dollar figures and for the most part ignored figures for cents. Thus there are some minor rounding errors.

74 It is common ground that BSF and Cigno received a combined total of \$93,509,975 between July 2022 and 24 May 2024 (being the date of the Liability Judgment) from the No Upfront Charge Loan Model, as follows:

- (a) in the case of BSF, Late Payment Fees of \$9,330,300;
- (b) in the case of Cigno, a total of \$84,179,675 comprising:
  - (i) Account Keeping Fees of \$42,777,159;
  - (ii) Default Fees of \$35,852,916; and
  - (iii) Change of Payment Schedule Fees of \$5,549,599.

75 The analysis conducted by Ms Rana, a financial investigator at ASIC, establishes that BSF and Cigno collected \$91,063,633 from the payment system operators, Zepto and Ezidebit, and from sources categorised by Ms Rana as "Potential Repayment from Borrowers".

76 The financial statements for BSF and Cigno, which ASIC tendered without limitation, and did not challenge or criticise, establish the following when one combines the profit and loss statements for the year ending 30 July 2023 and for the period 1 July 2023 to 24 May 2024:

- (a) in relation to BFS (Supp CB7/5269 and 5278; Supp CB 8/5295 and 5298):

Trading Income	\$16,451,750
Cost of Sales: Bad Debts	\$10,320,853
Management Service Expenses	\$1,560,875
Operating Expenses	\$2,390,644
Gross Profit	\$4,570,020
Net Profit	\$2,179,376

(b) in relation to Cigno (Supp CB 11/7812 and 7815):

Trading Income	\$85,342,307
Cost of Sales (comprising bad debts, customer assessment and collection costs, and allowances for expected credit losses)	\$71,500,711
Operating expenses	\$12,302,357
Gross profit	\$13,841,596
Net profit	\$1,543,468

77 With one exception, those are the figures put forward by the respondents in their written submissions. The exception is the net profit figure for Cigno, which the respondents submit was a net loss of \$2,518,199.63. However, if one adds the net loss of \$4,167,704.62 for the year ended 30 June 2023 (Supp CB 11/7815) to the net profit of \$5,711,172.88 for the period 1 July 2023 to 24 May 2024 (Supp CB 11/7812), the total is a net profit of \$1,543,468.26.

78 ASIC also relies on Ms Rana's analysis of payments made by BSF and Cigno to entities related to Mr Harrison and Mr Swanepoel respectively.

79 In relation to payments by BSF, Ms Rana establishes that:

(a) \$3,840,975 was paid to BHFS (of which Mr Harrison was the sole director). The shares in BHFS were beneficially held by BJH Group Holdings Pty Ltd, of which Mr Harrison was the sole director and the shares in which were owned by B.J. Harrison Investments Pty Ltd (but not beneficially). Mr 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 of which Mr Harrison was the appointor with power to remove and replace the trustee (Supp CB 11/8043 at 8054).

(b) \$4,715,117 was paid to BJH Group Holdings Pty Ltd.

80 In relation to payments by Cigno, Ms Rana establishes that:

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

Swanepoel was the sole director until 26 January 2024), but not beneficially. Swan Group Holdings Family Pty Ltd was the trustee of the Swan Group Holdings Discretionary Trust, a discretionary trust of which Mr Swanepoel was one of many discretionary objects, but the appointor (with power to remove and replace the trustee) was his father, Mr Jan Swanepoel (Supp CB 11/8057 at 8073–4). On 26 January 2024, Mr Swanepoel’s brother, Ryan, became sole director of Swan Management Services Pty Ltd, Swan Group Holdings Pty Ltd and Swan Group Holdings Family Pty Ltd. For completeness, I note that Mr Swanepoel held one of three issued shares in Swan Group Holdings Family Pty Ltd, but given that its role appears to have been to act as trustee of a discretionary trust, no particular commercial significance attaches to that shareholding.

- (b) \$14,507,738 was paid to Pyramid Capital Pty Ltd. Mr Swanepoel was not a director of that company at any time after 30 May 2019. The shares in Pyramid Capital Pty Ltd were held by Swan Group Holdings Family Pty Ltd, but not beneficially.

81 Given that the net profit of BFS from the No Upfront Charge Loan Model was \$2,179,376, how could it have made payments to BHFS of \$3,840,975 and to BJH Group Holdings Pty Ltd of \$4,715,117? Unfortunately, neither ASIC nor the respondents explored the question in their written or oral submissions, nor, so far as I can tell from the 29 volumes comprising the two court books, by way of evidence. There are several possible explanations, which may conceivably have operated in combination. One partial explanation may have been the payment of dividends. Another may have been payments for business services rendered to BSF, whether pursuant to contracts or non-contractual requests. Yet another possibility is that the payments were in fact loans. The balance sheets for BSF as at 30 June 2023 and 24 May 2024 (Supp CB 7/5270 and 5279) do not disclose loans to related entities (although there was a loan of \$5,357.01 to Jai Rose Cook as at 24 May 2024). Ms Rana’s analysis shows that a loan of \$200,000 was made by BSF to Mr Harrison (CB 9/5783 and 5800; Supp CB 1/299), but it appears to have been repaid (as Supp CB 1/326 shows \$200,000 for this loan as “incoming” to BSF). It is possible that other loans were made by BSF to the relevant companies, and repaid by the balance date (possibly by other entities at the borrower’s request), with the result that they are not shown in the balance sheet. The evidence does not permit an explanation or explanations to be given with any degree of confidence.

82 Similarly, given that the net profit of Cigno from the No Upfront Charge Loan Model was \$1,543,468, how could it have made payments to Swan Management Services Pty Ltd and/or

Swan Group Holdings Pty Ltd of \$37,467,230, and to Pyramid Capital Pty Ltd of \$14,507,738? Again, the parties did not explore that question. The balance sheet for Cigno as at 30 June 2023 (Supp CB 11/7816) includes net receivables of \$48,750,000 as a non-current asset, and the balance sheet for Cigno as at 24 May 2024 (Supp CB 11/7813) includes net receivables of \$58,715,000 as a non-current asset. In light of the classification of those amounts as “non-current” assets (ie the working life of which until the asset is realised in cash is expected to be more than 12 months), and in light of the rounded nature of those figures, they may well have been (or included) loans. However, the very brief description given to them in the balance sheets of Cigno does not enable a finding to be made with any confidence. As with BSF, the explanation may also lie in part in the payment of dividends or in the payment of business expenses for services rendered.

83 There was considerable debate before me as to the appropriate measure of the benefit obtained by contraveners to be adopted in the assessment of penalty. The short answer is that there is no fixed or general rule, and the answer will vary according to the circumstances of the case. The answer does not depend on the concept of benefit used in statutory formulas for the determination of the maximum penalty, which leave ample scope for a contravener to prove its “net benefit” or even its loss, the relevance of which can be calibrated by the court in the context of all the other factors to be considered in determining a proportionate penalty: *R v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23; (2023) 280 CLR 170 at [53] (Kiefel CJ, Gageler, Gordon, Stewart, Gleeson and Jagot JJ); applied to the civil penalty provisions of s 1317G of the Corporations Act in *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2026] FCA 18 at [79]–[81] (Downes J). The intention or the potential to profit from the contravening conduct is relevant to the assessment of the penalty, irrespective of whether any actual profit was made, such that the higher the intended benefit, the higher the penalty required for deterrence: *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; (2017) 258 FCR 312 at [467] (Middleton, Beach and Moshinsky JJ).

84 Further, there will be cases in which the claims of deterrence (both general and specific) are so strong as to warrant a penalty that would upset any calculation constrained by profitability: *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 at [162] (Yates, Abraham and Cheeseman JJ). As their Honours said at [162], those engaged in trade or commerce should be deterred from conducting themselves according to the cynical cost-benefit calculus where the risk of the penalty is weighed against the profits (in the sense of the wide

array of benefits flowing to the contravener) to be made from the contravention, citing *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [62]–[64] (Keane CJ, Finn and Gilmour JJ). The point is well illustrated by the reasoning in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 5)* [2021] FCA 1516; (2021) 397 ALR 208. In the circumstances of that case, Bromwich J held that the penalty needed to be a strong signal that it will exceed the “gross benefit” of the conduct with no deduction for the costs of obtaining that benefit: at [20]. The operations of the contravener (**AIPE**) in that case had “huge profitability”, reflecting the fact that “the delivery of education services to most of the consumers who enrolled was never seriously in contemplation”, which made it clear that “a high level of immorality stood behind the deliberate and protracted unconscionable conduct of a highly predatory nature”: at [20]. Bromwich J said at [19(d)]:

Any penalty must address the potential judgment call a company may make that conduct would not be detected, or if detected would only incur a penalty in respect of the wrongfully gained benefits. The penalty should be more than a mere disgorging of profit, otherwise it may be thought to be worth the risk given the difficulties in detection and successful litigation.

85 The present case is clearly distinguishable. There was no difficulty in ASIC detecting the conduct in question, as it was publicly available, and followed very shortly after ASIC’s successful appeal in the BHF Proceeding, which raised similar issues. BSF and Cigno’s profit margins were nowhere near the 70% net profit margin of AIPE, as found by Bromwich J at [19(c)]. BSF and Cigno were conducting a genuine business in which services were provided to consumers as represented and promised. Moreover, as I have found in relation to the advice by Piper Alderman, the respondents in the present case genuinely intended to conduct a lawful business model, and honestly and reasonably believed that they were doing so.

86 In my view, it is appropriate in the circumstances of the present case to focus on net profit as the measure of benefits obtained by the respondents from the contraventions. In the case of BFS, that is the total net profit of \$2,179,376. In the case of Cigno, that is the total net profit of \$1,543,468.

87 In relation to Mr Harrison, the ultimate holding company of BFS until 25 May 2023 was B.J. Harrison Investments Pty Ltd, and on that date the ultimate holding company became BJH Group Holdings Pty Ltd (CB 2/791 and 793). As Mr Harrison controlled both those companies as sole director, and the former was the trustee of a discretionary trust of which Mr Harrison was the appointor, it is appropriate to regard BFS’s net profit as having been available to Mr

Harrison as director, to decide whether to leave the net profit in BFS's hands, or to declare a dividend (or a combination of those options), and if a dividend were declared whether to apply the proceeds for the benefit of one or more discretionary objects of the B.J. Harrison Investment Trust. There is no evidence that Mr Harrison benefited personally from any such transactions.

88 In relation to Mr Swanepoel, the ultimate holding company of Cigno was Swan Group Holdings Family Pty Ltd until 14 November 2023, and then became Swan Group Holdings Pty Ltd (CB 2/797–8). Those companies were both controlled by Mr Swanepoel as sole director until 26 January 2024. Although the appointor of the Swan Group Holdings Discretionary Trust was Mr Swanepoel's father, I regard it as appropriate to regard Cigno's net profit as available to Mr Swanepoel to decide whether to leave the net profit in Cigno's hands, or to declare a dividend (or a combination of those), and, if a dividend were declared, then until 26 January 2024 whether to apply the proceeds for the benefit of one or more discretionary objects of the Swan Group Holdings Discretionary Trust. There is no evidence that Mr Swanepoel benefited personally from any such transactions.

89 In addition, ASIC submits, and I accept, that BSF and Cigno have avoided detriment as a result of their implementation of the No Upfront Charge Loan Model, being principally the cost of holding an ACL, which ASIC has estimated to be approximately \$186,000 each in the period July 2022 to 24 May 2024 (ASIC's written submissions at [36]).

*Seniority of individuals responsible for the contraventions*

90 As ASIC submits, the sole directors and secretaries of BSF and Cigno, being Mr Harrison and Mr Swanepoel respectively, were responsible for the contraventions by BSF and Cigno. I have made findings as to their involvement in designing and implementing the No Upfront Charge Loan Model in the Liability Judgment: at [157]–[159] (in respect of Mr Harrison) and [163]–[166] (in respect of Mr Swanepoel). However, it was also Mr Harrison and Mr Swanepoel who engaged Piper Alderman, both on their own behalf and also on behalf of BSF and Cigno, to provide legal advice as to the necessary changes to the business model to be made to comply with the law following the Full Court's decision in the BHF Proceeding. Further, it was Mr Harrison and Mr Swanepoel who decided to cease entering into new contracts pending ASIC's decision on the application for an exemption from the anti-avoidance regime which commenced operation on 13 December 2022.

*Capacity to pay*

91 As to BSF, it was a small company with only two employees apart from Mr Harrison: Liability Judgment at [82]. I have referred above to BSF's financial performance during the operation of the No Upfront Charge Loan Model. In terms of BSF's financial position following delivery of the Liability Judgment, it is common ground that BSF's aggregate closing bank balance as at 24 May 2024 was \$53,099.59, and its net assets as at 21 July 2025 were recorded as \$14,788.16.

92 As to Cigno, it was a small company with only one employee, apart from Mr Swanepoel. I have referred above to Cigno's financial performance during the operation of the No Upfront Charge Loan Model. It is common ground that as at 24 May 2024, Cigno's aggregate closing bank account balance was \$627.77, and its net assets as at 21 July 2025 were recorded as \$122,855.21.

93 It is common ground that any incapacity on the part of BSF and Cigno to pay a penalty should not result in the Court reducing the penalty below the amount necessary to secure general deterrence. ASIC submits, and I accept, that in the circumstances of these proceedings, 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. A penalty is not oppressive merely because it is beyond the respondent's capacity to pay; a penalty is oppressive when it is greater than is necessary to achieve the object of deterrence: *Australian Competition and Consumer Commission v Bluescope Steel Ltd (No 6)* [2023] FCA 1029 at [143] (O'Bryan J).

94 As to Mr Harrison and Mr Swanepoel, there is very little evidence as to their personal financial positions. There is evidence that Mr Swanepoel owns a property (with Ryan and Jessica Swanepoel) in Robina in Queensland (Supp CB 5/4065). There is also evidence that on 24 April 2025, a company in which Mr Swanepoel held one third of the shares (with Ryan and Jessica Swanepoel), namely Swanepoel Boerdery Pty Ltd, sold a property in Bonogin in Queensland for \$7 million (Supp CB 5/4068). ASIC submits, and I accept, that the incapacity of a contravener to pay a penalty, including the possibility of insolvency, must not have the effect of reducing the penalty below the amount necessary to secure general deterrence: *Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCAFC 247 at [11] (Heerey, Finkelstein and Allsop JJ).

### *Consumer harm*

95 I have referred above to the loss and harm to consumers associated with the respondents' design and implementation of the No Upfront Charge Loan Model. As ASIC submits, that harm encompasses:

- (a) the harm associated with charging consumers fees very substantially more than those permitted under the statutory regime regulating SACCs in the Credit Code;
- (b) the harm associated with consumers not having access to the range of rights and protections provided by the Credit Act and Credit Code;
- (c) the failure to provide effective and accessible internal dispute resolution options to consumers; and
- (d) the inability of consumers to have access to AFCA.

### *Corporate culture of compliance*

96 I have referred above to the history of Mr Harrison and Mr Swanepoel in designing and implementing models for the provision of credit with the intention of operating outside the ambit of the Credit Act and Credit Code. I have also made findings concerning the respondents' genuine intention to comply with the law, as evidenced by the legal advice which they sought from Piper Alderman after the Full Court decision in the BHF Proceeding. ASIC submits that, even following the Liability Judgment on 24 May 2024, the respondents demonstrated a corporate culture incompatible with compliance in relation to two issues.

97 The first concerned correspondence sent by Cigno to at least one consumer that was misleading as to the reasons for closing that consumer's account on 30 May 2024. ASIC criticises the correspondence for not stating all the reasons for, and terms of, the final injunctive relief granted on 24 May 2024, and also envisaging the consumer being able to reapply for another loan from Cigno despite the final injunctive relief. Those criticisms are well made, but the evidence does not indicate whether this was anything more than an isolated occurrence.

98 The second matter concerns the respondents' failure to comply with the adverse publicity orders made by the Court on 21 June 2024, in that 1,256 customers were sent an email in terms of Annexure D to the orders whereas they should have been sent the email which was Annexure C to the orders. The mistake was discovered in the course of finalising Cigno's evidence as to compliance with the adverse publicity orders. The unintended error arose because of a mistake by an external consultant who failed to follow Cigno's express instructions, which has been

fully explained and an apology given: affidavit of Mr Hussein of 6 August 2024. I do not regard the matter as reflecting adversely on any of the respondents, including Cigno which had engaged the external consultant in question. The error was not attributable to the instructions delivered by Cigno as to what was required to be sent, and upon discovering the compliance issue, Cigno's solicitors notified ASIC and Cigno promptly took steps to remedy the errors. Accordingly, I do not regard the error as reflecting a culture of non-compliance.

*Cooperation with the regulator*

99 As ASIC submits, the respondents have contested these proceedings and made no admissions in relation to material facts or issues in dispute. Further, as ASIC submits and the respondents do not appear to contest, during the course of its investigation prior to commencing these proceedings:

- (a) BSF and Cigno were frequently late in providing documents and information in response to statutory notices;
- (b) Mr Swanepoel (in a statutory examination on 30 May 2023) refused to provide ASIC with information about Cigno's bank accounts; and
- (c) Cigno did not comply with a statutory notice to provide ASIC with information about Cigno's bank accounts.

100 It is common ground, which I accept, that the respondents in the present case should receive no discount for cooperation with the regulator. ASIC correctly does not submit that the fact that the respondents contested the proceedings should lead to a greater penalty than would otherwise be imposed, consistently with *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 292; (2010) 268 ALR 303 at [23]–[27] (Goldberg J).

*Whether the respondents disgorged any profit or benefit received as a result of the contravention, or made reparation of consumers*

101 ASIC submits, and I accept, that the respondents have made no attempt to remediate any consumers any amounts. That is despite the scale and excessiveness of the fees which have been 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. The respondents rely on the conduct of BSF having discounted Late Payment Fees by 50% on at least 96,961 occasions between 27 June 2023 and 24 May 2024, and Cigno's

cancellation of at least \$1,637,003 in fees during the same period. However, as indicated above, there is a lack of evidence as to the particular circumstances of that discounting and cancellation. I accept that the failure to remediate consumers is a significant factor in the assessment of the appropriate penalty.

*Whether the respondents are likely to engage in further contraventions*

102 ASIC accepts that there is no evidence of BSF and Cigno having any current intention to recommence their operations, and the respondents have asserted that they have no interest in engaging in further consumer credit activity (although no undertaking to that effect has been proffered). ASIC submits that, in the absence of a significant penalty against Mr Harrison and Mr Swanepoel, there is a real prospect of them engaging in conduct in the future that contravenes the Credit Act and the Credit Code. I accept that there is a realistic possibility of that occurring at some time in the future, although I do not think it realistic to think that Mr Harrison and Mr Swanepoel would engage in further credit-related activity without first taking legal advice from suitably qualified lawyers and proceeding only where they genuinely believe that they can do so in compliance with the law.

**Overall assessment**

103 In terms of specific deterrence, ASIC submits that the respondents were prepared to embark on the No Upfront Charge Loan Model, despite Mr Harrison and Mr Swanepoel's previous, and materially similar, model being found to be unlawful a little more than three weeks earlier. As ASIC submits, they have shown no remorse and have made no effort to remediate any consumers any of the fees they unlawfully collected.

104 In the respondents' favour, however, I have found that they acted honestly and reasonably in believing that, having made the necessary changes as advised by their lawyers, they were trading lawfully and in compliance with the 2022 PIOs. That might conceivably have involved a consciousness of a substantial risk of a finding of unlawfulness being made, but I am unable to say whether they were conscious of that, or what (if any) advice they were given as to the level of risk. Nonetheless, the penalties imposed on the respondents should be fixed at a sufficiently high amount so as to deter them from future contravening conduct, and there should thus be a sufficient sting or burden in the penalty imposed. In my view, the penalty should at least involve disgorgement of the benefits obtained in terms of net profit by BSF and Cigno, as well as reflecting the detriment avoided by not spending money to hold and maintain an ACL.

105 In terms of general deterrence, the penalty ought to be one which acts as an effective deterrent to other participants in the consumer credit market against not complying with the obligations under the Credit Act and Credit Code. The penalty imposed on the respondents should send a message to large and small lenders in the consumer credit industry that contravention of the legislation which is designed to protect consumers will have costly consequences. The statutory framework regulating SACCs is intentionally restrictive, given the nature of the market and the risks of exploitation of, and harm to, consumers of such products.

106 I do not regard it as appropriate to award separate penalties in relation to each of ss 29(1) and 32(1). As ASIC submits, the contraventions of both provisions are interrelated, in that both categories of contravention are products of the respondents' decision to design and implement the No Upfront Charge Loan Model with its specific features (ASIC's written submissions at [155]). If I had to award separate penalties in relation to the contraventions of ss 29(1) and 32(1), I would simply allocate 50% of the total penalties to each of those provisions. ASIC submits that the assessment of penalty should focus on the benefits derived by each of the respondents, and the financial detriments avoided. While I agree with that proposition as a matter of general principle, as indicated above, in my view the appropriate measure of benefit in relation to BSF and Cigno is the amount of net profit which each of those companies earned from the No Upfront Charge Loan Model.

107 In my view, the appropriate penalty to be paid by each of BSF and Cigno is \$3 million. That is significantly in excess of what I regard as the appropriate measure of the benefit obtained and detriment avoided by reason of the contraventions.

108 In relation to Mr Harrison and Mr Swanepoel, as indicated above, there is no evidence of financial benefit obtained personally by either of them. Their conduct was both collaborative and integrated, and I do not think there is a material difference between them in terms of culpability or in the need for specific and general deterrence. In my view, the appropriate penalty to be awarded against each of them is \$500,000.

### **Further injunctive relief**

109 In addition to the injunction which I granted on 24 May 2024, pursuant to paras 14 and 16 of the Originating Application filed by ASIC on 3 October 2023, ASIC seeks the following wider injunctive relief:

14. An injunction restraining Harrison 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, for a period that the Court sees fit.

16. An order restraining Swanepoel 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, for a period that the Court sees fit.

110 ASIC clarified in its final address that the term “credit activity” was intended to refer to the definition in s 6 of the Credit Act, and thus the injunctions would necessarily apply only to credit activity in Australia.

111 The injunctions sought are very wide. They would for example restrain Mr Harrison and Mr Swanepoel from being employed by (or from being a consultant to) a licensed credit provider whose business is undoubtedly lawful. The proposed restraint on them “permitting” any entity to carry on any business engaging in credit activity, even in circumstances where they do not control the entity in question, would require them to do the impossible.

112 ASIC submits that the following factors, derived from *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80, are relevant to the injunctions which they seek:

- (a) the nature of the conduct;
- (b) deliberateness of conduct;
- (c) gravity of misconduct;
- (d) consumer loss;
- (e) any attempts to remedy the contraventions;
- (f) previous contraventions;
- (g) likelihood of engaging in similar contravening conduct in future; and
- (h) contrition and remorse.


113 Those matters have been discussed in detail above, and I will not repeat that analysis. In short, I accept that the contraventions are serious, and have occasioned loss and harm to consumers in substantial amounts, and that there have been no attempts to remedy the contraventions or to express contrition and remorse. While those matters favour the grant of the injunctions, I am not persuaded that those injunctions are appropriate in the present case. While Mr Harrison and Mr Swanepoel undoubtedly intended to avoid the operation of the Credit Act and Credit Code, they were seeking to do so in a manner which they honestly and reasonably believed to be

lawful, having sought and obtained legal advice on that question. The legal questions in issue were not straightforward, and indeed the trial judge in the BHF Proceeding had found (just as the trial judge in *Teleloans* had found) that Mr Harrison and Mr Swanepoel had implemented a lawful credit model. Mr Harrison and Mr Swanepoel acted properly in seeking legal advice on changes which had to be made to that model after the Full Court found it to have been unlawful in the BHF Proceeding, and the evidence indicates that they followed the advice they were given by lawyers of unquestioned competence and integrity. In those circumstances, I do not regard injunctions of the width proposed by ASIC to be justified. I raised with ASIC the question whether some qualification might be made to the injunctions sought according to whether Mr Harrison and Mr Swanepoel first obtained legal advice as to the lawfulness of any proposed credit activity and then followed that advice, but ASIC rejected any such qualification. I understand ASIC's position to be that the injunctions are sought on an all-or-nothing basis. Accordingly, I refuse the application for the wider injunctions against Mr Harrison and Mr Swanepoel.

### Costs

114 I have not heard the parties on costs. My preliminary and tentative view is that ASIC is entitled to an order for costs against the respondents in relation to the penalty stage of the proceedings. If that position is agreed then I will make orders in chambers to that effect. If there is a dispute as to costs, or if a special order as to costs is sought, then I have set a timetable for the filing and service of any written submissions and affidavits, and I anticipate deciding the question on the papers.

I certify that the preceding one hundred and fourteen (114) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 17 April 2026

## **SCHEDULE OF PARTIES**

**NSD 1110 of 2023**

### **Respondents**

Fourth Respondent: MR MARK SWANEPOEL