

NOTICE OF FILING

Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
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File Number:	QUD190/2022
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v SUNSHINELOANS PTY LTD (ACN 092 821 960)
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos


Registrar

Important Information

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

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

Amended pursuant to the leave granted by Justice Derrington on 4 September 2023.

Signed:  Date: 4 September 2023
Scott Couper, Gadens



SECOND FURTHER AMENDED CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: QUEENSLAND
DIVISION: GENERAL

No. 190 of 2022

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

SUNSHINELOANS PTY LTD (ACN 092 821 960)

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. In this second further amended concise statement, **Credit Act** means the National Consumer Credit Protection Act 2009 (Cth), **Credit Code** means the *National Credit Code* at schedule 1 to the Credit Act and **Federal Court Act** means the *Federal Court of Australia Act 1976* (Cth).
2. SunshineLoans Pty Ltd (**Sunshine**) operates a business as a credit provider pursuant to small amount credit contracts (**SACCs**) regulated by the Credit Code. Sunshine has held an Australian Credit Licence (**ACL**) since 7 January 2011.
3. From 1 July 2016 to 2 November 2020 (the **Relevant Period**):
 - (a) Sunshine entered into 670,609 SACCs (the **Affected SACCs**) which provided for a fee described as an “Amendment Fee” or “rescheduled payment fee” of \$35.00 (**Amendment Fee**);
 - (b) Sunshine imposed on consumers an Amendment Fee on 12,693 occasions (the **Affected Consumers**);

Filed on behalf of:
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Australian Securities and Investments Commission,
Applicant
Scott Couper, Solicitor for the Applicant
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BRISBANE QLD 4000 Attention: Scott Couper

- (c) Consumers paid Sunshine the amount of the Amendment Fee on ~~8,376~~ 9,367 occasions;
 - (d) Sunshine received payment of ~~\$293,160.00~~ \$327,845.00 in Amendment Fees.
4. Section 23A(l)(b) of the Credit Code provides that a SACC must not impose a monetary liability on a debtor in respect of a fee or charge prohibited by the Credit Code.
5. Section 31 A(l) of the Credit Code provides that a SACC must not impose or provide for fees and charges if the fees and charges are not of a kind listed therein. Section 31A(1) lists those fees and charges as:
- (a) A permitted establishment fee;
 - (b) A fee or charge (a permitted monthly fee) that is payable on a monthly basis starting on the day the contract is entered into;
 - (c) A fee or charge that is payable in the event of a default in payment under the contract; and
 - (d) A government fee, charge of duty payable in relation to the contract.
6. During the Relevant Period, each of the Affected SACCs:
- (a) was in a standard form;
 - (b) obliged consumers, pursuant to its terms and conditions, to:
 - (i) “pay all the Applicable Charges shown in the Financial Table from the day you obtain the Amount of Credit until the balance on your account with us has been completely paid”; and
 - (ii) “make the repayments shown in the Financial Table subject to any other repayments arrangements or variations agreed between us from time to time”.
 - (c) provided in its Financial Table, under the heading “Other fees and charges which may be charged by us”, that Sunshine could charge the following fees:
 - (i) A fee described as a “failed payment fee” or “default fee” of \$35.00 (**Default Fee**); and

(ii) The Amendment Fee, described as an “Amendment Fee” or “rescheduled payment fee” of \$35.00.

(d) included, relevantly, the following (or materially similar) terms:

6 Default

6.1 You will be in default under this Consumer Credit Contract if: a. you do not make the repayments shown in the Financial Table, or such other repayments as agreed between us from time to time, on or before the days on which they are due;

or

d. you breach any variation of this Consumer Credit Contract as agreed between us or as imposed by a court, tribunal or dispute resolution agency.

7. Sunshine charged consumers a Default Fee in circumstances where a consumer was in default under their SACC because they failed to make a repayment on the scheduled due date for that repayment.
8. Sunshine charged consumers an Amendment Fee in circumstances where a consumer contacted Sunshine prior to the scheduled due date for that repayment and entered into an agreement with Sunshine to vary the SACC by deferring payment of that scheduled repayment (or part thereof).
9. Following the agreement to vary the terms of the SACC to defer a scheduled repayment (or part thereof), Sunshine:
 - (a) usually sent Affected Consumers a notice describing the details of the variation agreed; and
 - (b) usually charged the Affected Consumers the Amendment Fee on the day the agreement to vary the SACC was made.
10. Consumers who contacted Sunshine prior to agreeing with it to vary the SACC by deferring payment of a scheduled repayment (or part thereof) commonly did so in order to discuss the possibility of deferring a scheduled payment or entering into an alternative repayment arrangement.
11. The Amendment Fee was not a fee or charge of the kind listed at s31A(1)(a)-(d) of the Credit Code.

12. Specifically, as imposed by Sunshine, the Amendment Fee was a fee for the variation of a SACC by deferring payment of a scheduled repayment (or part thereof) and not a fee or charge payable in the event of a default in payment under the contract for the purposes of section 31A(1)(c) of the Credit Code.
13. By reason of the above, Sunshine has contravened sections 23A(1), 24(1A), and 31A(1) ~~and s31B~~ of the Credit Code, and by reason of it contravening those sections it has contravened s47(1)(d) of the Credit Act.
14. In the alternative, if the nature of the Amendment Fee is such that it is not a fee for the variation of a SACC but is a fee payable in the event of an anticipatory breach, then having regard to the terms and conditions of the SACCs, Sunshine had no contractual basis to charge the Amendment Fee in the circumstances in which it did, by reason of which Sunshine has contravened s24(1A)(b) of the Credit Code by requiring and accepting payment of an amount in respect of a monetary liability that was not imposed consistently with the Credit Code.
- ~~15. Many of the Affected Consumers were consumers who were in "hardship" for the purposes of sections 72 to 71 of the Credit Code.~~
16. In response to Notices issued by ASIC to Sunshine pursuant to section 266 of the Credit Act, Sunshine provided ASIC with documents in relation to the SACCs entered into with the 66 Example Consumers listed at Schedule 1 hereto. Those 66 Example Consumers (and their SACCs) are illustrative of the Affected SACCs and the 12,693 occasions that Affected Consumers were charged Amendment Fees during the Relevant Period.

B. THE RELIEF SOUGHT FROM THE COURT

17. The Applicant seeks the relief set out in the Originating Application, comprising:
 - (a) declarations pursuant to section 166 of the Credit Act and section 21 of the Federal Court Act that the Respondent has contravened sections 23A(1), 24(1A), and 31A(1) ~~and s31B~~ of the Credit Code and section 47(1)(d) of the Credit Act in respect of:
 - (i) the 670,609 SACCs Sunshine entered into which included the Amendment Fee;

- (ii) the 12,693 occasions that consumers were charged, ~~and the 9,367 occasions Sunshine received,~~ Amendment Fees between 1 July 2016 and 2 November 2020;
 - (iii) the 8,376 ~~9,367~~ occasions Sunshine received Amendment Fees between 1 July 2016 and 2 November 2020;
 - (iv) in the alternative to sub-paragraphs (ii) and (iii), the 61 occasions listed in respect of the Example Consumers listed at Schedule 1 hereof (save for those Consumers numbered 16, 18, 19, 27 and 32) who were charged the Amendment Fee between 1 July 2016 and 2 November 2020;
- (b) an order pursuant to section 167 of the Credit Act that the Respondent pay a pecuniary penalty in respect of contraventions of section 24(1A) of the Credit Code;
 - (c) an injunction pursuant to section 177(1) of the Credit Act restraining the Respondent from further contraventions of 23A(1), 24(1A), and 31A(1) ~~and s31B~~ of the Credit Code and section 47(1)(d) of the Credit Act;
 - (d) costs.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

- 18. By operation of subsection 5(1) of the Credit Act and sections 4, 5, and 204 of the Credit Code, the contracts entered into by Sunshine with consumers during the Relevant Period were SACCs, and Sunshine was a credit provider, for the purposes of the Credit Code.
- 19. Subsection 31A(1) of the Credit Code prohibits a SACC from imposing or providing for fees and charges if the fees and charges are not of the kind set out in subsections 31A(1)(a)-(d) of the Credit Code.
- ~~20. Subsection 31B prohibits a credit provider from requiring or accepting payment by a debtor of a fee or charge in relation to a SACC unless the fee or charge is a fee or charge that may be imposed or provided by the SACC under s31A or a fee or charge prescribed by the regulations.~~

21. The Amendment Fee is neither a fee and charge of the kind set out in subsections 31A(1)(a)-(d) of the Credit Code, nor a fee or charge prescribed by the regulations.
22. Subsection 23A(1)(b) of the Credit Code prohibits a SACC from imposing a monetary liability on the debtor in respect of a fee or charge prohibited by the Credit Code. By imposing the liability for the Amendment Fee, the SACCs entered into between Sunshine and the Affected Consumers contravened subsection 23A(1)(b).
23. Subsection 24(1A)(a) of the Credit Code prohibits a credit provider from entering into a small amount credit contract on terms imposing a momentary liability prohibited by subsection 23A(1). By entering into SACCs with consumers (including the Affected Consumers) during the Relevant Period that imposed a monetary liability for the Amendment Fee, Sunshine contravened subsection 24(1A)(a) of the Credit Code.
24. Subsection 24(1A)(b) of the Credit Code prohibits a credit provider from requiring or accepting payment of an amount in respect of a monetary liability that cannot be imposed consistently with the Credit Code. By requiring and/or accepting payment for the Amendment Fee in relation to the Affected Consumers Sunshine contravened subsection 24(1A)(b) of the Credit Code.
25. Subsection 24(1A) of the Credit Code is a civil penalty provision.
26. Subsection 47(1)(d) of the Credit Act provides that the holder of an ACL must comply with the credit legislation. By contravening ~~section 31B and~~ subsections 24(1A)(a) and (b), Sunshine failed to comply with subsection 47(1)(d) of the Credit Act.
27. By section 166 of the Credit Act, within 6 years of a person contravening a civil penalty provision ASIC may apply to the court for a declaration that a person contravened the provision and the Court may make declarations if it is satisfied the person has contravened the provision.
28. Accordingly, ASIC seeks declarations in relation to:
 - (a) the 670,609 SACCs Sunshine entered into which provided for the Amendment Fee;
 - (b) the 12,693 occasions that consumers were charged Amendment Fees; and

(c) the ~~8,376~~ ~~9,367~~ occasions Sunshine received, Amendment Fees

between 1 July 2016 and 2 November 2020.

29. By section 167 of the Credit Act, within 6 years of a person contravening a civil penalty provision, ASIC may apply to the Court for an order that the person pay the Commonwealth a pecuniary penalty and if the Court makes a declaration under section 166 that a person contravened a civil penalty provision the court may order that the person pay the Commonwealth a pecuniary penalty.
30. Accordingly, the Court may order Sunshine to pay a civil penalty in relation to the contraventions by Sunshine of the Credit Code set out above, within 6 years of the date of this application.
31. By section 177(1) of the Credit Act, the Court may grant injunctions in relation to contraventions of the Credit Act and Credit Code against the Respondent.

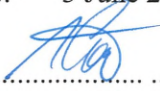
D. THE ALLEGED HARM SUFFERED

32. During the Relevant Period, the total dollar amount in Amendment Fees collected was ~~\$293,160.00~~ ~~\$327,845.00~~. Sunshine was not entitled to charge, and collect, those fees.
- ~~33. Many of the Affected Consumers were consumers who were in "hardship" for the purposes of sections 72 to 74 of the Credit Code.~~
34. Further, by charging, and collecting, fees to which it was not entitled, Sunshine failed in its obligation to comply with section 47(1)(d) of the Credit Act.

Certificate of lawyer

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

Date: ~~3 June 2022~~ ~~7 February 2023~~ ~~24 July 2023~~ 4 September 2023



 Signed by Scott Couper, Gadens Lawyers
 Solicitor for the Applicant~~Plaintiff~~

This Second Further Amended Concise Statement was prepared by Mr Matthew Brady of King's Counsel and Mr S.J. Cleary of Counsel

SCHEDULE 1

Table of Example Credit Contracts

No.	Sunshine Contract Reference Number	Date of Contract	Date Amendment Fee Charged
1	38047-14	20 February 2018	5 June 2018
2	8725-21	16 April 2018	5 June 2018
3	56446-4	26 May 2017	6 June 2017
4	70149-11	18 November 2019	3 February 2020
5	114395-5	1 November 2018	1 February 2019
6	250481-2	18 November 2019	3 February 2020
7	257639-1	28 October 2019	3 February 2020
8	226985-2	2 June 2020	3 August 2020
9	262290-3	10 August 2020	1 September 2020 & 21 September 2020
10	286861-1	1 June 2020	5 August 2020
11	99010-1	3 April 2017	6 June 2017
12	85204-3	11 April 2017	5 June 2017
13	223340-6	7 May 2020	3 August 2020
14	129582-1	25 September 2017	2 February 2018
15	290849-1	29 June 2020	1 September 2020
16	61226-2	24 May 2016	8 June 2016
17	174633-3	26 October 2018	1 February 2019
18	8325-28	25 January 2016	2 February 2016
19	32716-4	18 May 2016	9 June 2016 & 15 June 2016
20	163348-2	14 May 2018	5 June 2018
21	209596-1	13 November 2018	1 February 2019
22	138004-10	24 July 2020	2 September 2020
23	102151-5	25 January 2018	1 February 2018
24	99695-1	7 April 2017	6 June 2017
25	51127-7	16 December 2016	1 February 2017
26	58069-3	3 January 2017	1 February 2017
27	16358-2	17 May 2016	6 June 2016

No.	Sunshine Contract Reference Number	Date of Contract	Date Amendment Fee Charged
28	75944-5	21 December 2017	1 February 2018
29	48606-8	25 January 2017	1 February 2017K
30	208761-1	6 November 2018	1 February 2019
31	295255-1	29 July 2020	1 September 2020
32	30263-8	22 January 2016	1 February 2016
33	290515-1	26 June 2020	4 August 2020
34	58561-13	26 April 2019	30 May 2019 & 5 June 2019 & 31 July 2019
35	51268-18	23 May 2019	5 June 2019 & 8 August 2019
36	21951-33	11 May 2018	5 June 2018
37	41459-16	12 January 2018	1 February 2018
38	247978-2	11 November 2019	3 February 2020
39	213399-3	8 May 2019	5 June 2019
40	63047-13	9 September 2020	5 October 2020
41	186172-10	3 August 2020	5 August 2020
42	238944-3	7 August 2020	7 September 2020
43	103423-6	11 August 2020	5 October 2020
44	298604-1	19 August 2020	7 September 2020
45	247744-7	11 September 2020	5 October 2020
46	161168-3	21 August 2020	7 September 2020
47	296270-1	5 August 2020	6 October 2020
48	223991-6	17 August 2020	5 October 2020
49	260544-2	22 Julv 2020	7 September 2020
50	222216-3	17 September 2019	8 October 2019
51	134389-8	1 February 2020	7 April 2020
52	69230-19	27 September 2019	8 October 2019
53	165680-6	11 October 2019	4 November 2019
54	208813-2	11 Julv 2019	8 October 2019
55	189838-7	27 January 2020	6 April 2020
56	257309-3	14 March 2020	7 April 2020
57	239291-4	20 February 2020	6 April 2020

No.	Sunshine Contract Reference Number	Date of Contract	Date Amendment Fee Charged
58	153312-10	21 February 2020	7 April 2020
59	240259-2	10 October 2019	4 November 2019
60	243091-2	20 July 2019	8 October 2019
61	224284-4	30 September 2019	4 November 2019
62	64452-14	20 September 2019	4 November 2019
63	250936-1	27 August 2019	4 November 2019
64	241557-3	30 June 2020	7 September 2020
65	213466-2	19 September 2019	8 October 2019
66	102496-5	1 April 2019	7 May 2019 & 5 June 2019