What can be considered a “charge” when providing credit under the National Credit Code?

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In Australian Securities and Investments Commission v BHF Solutions Pty Ltd [2022] FCAFC 108 (“**ASIC v BHFS**”), the Full Court of the Federal Court of Australia considered the statutory interpretation of “charge that is or may be made for providing the credit” in Schedule 1 of the National Consumer Credit Protection Act 2009 (Cth) (“**the Credit Code**”) in the context of a short-term credit arrangement involving multiple contracts.

Background

The circumstances leading to *ASIC v BHFS* is that BHF Solutions Pty Ltd (“**BHFS**”) and Cigno Pty Ltd (“**Cigno**”) entered into a contract where:

1. BHFS would advance loans to its customers; and
2. Cigno would market loans to consumers, process loan applications and manage collections from the customers.

BHFS entered into a contract with a customer (“**the Loan Agreement**”) which required BHFS to provide a loan to the customer in return of a $15 fee payable to BHFS for each advance of funds, with a maximum fee of $120 in any 12-month period.

Cigno entered into a contract with the same customer (“**the Services Agreement**”) which required Cigno to facilitate all enquiries, manage payments and all other services in related to the loan provided by BHFS in return for the following charges:

1. a “Financial Supply Fee”;
2. an “Account Keeping Fee”; and
3. a “Change of Payment Schedule Fee” in the event a change is requested to payment obligations under the loan.

In particular, *ASIC v BHFS* concerned 3 personal loans advanced by BHFS to Ms Morrow, which Cigno arranged. The central issue that arose in these proceedings was, in respect of the loan to Ms Morrow and BHFS’ business more generally, whether the Credit Code was applicable to credit provided by BHFS.

The Legislative Framework

The Australian Securities and Investments Commission (“**ASIC**”) alleged that, in breach of s 29

of the National Consumer Credit Protection Act 2009 (Cth) ("**the NCCP Act**"), both BHFS and Cigno were engaged in credit activity by reason of being a credit provider, or exercising the rights of a credit provider, without an Australian credit licence. Section 29(1) of the NCCP Act provides that:

"A person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity."

The term 'credit activity' is defined in s 6(1) which provides that a person engages in a credit activity if:

"(a) the person is a credit provider under a credit contract; or

(b) the person carries on a business of providing credit, being credit the provision of which the National Credit Code applies to; or

(c) the person performs the obligations, or exercises the rights, of a credit provider in relation to a credit contract or proposed credit contract (whether the person does so as the credit provider or on behalf of the credit provider); …"

and

'the person provides a credit service'.

Sections 5 and 6 of the Credit Code define the circumstances in which the Code applies to the provision of credit. In particular, s 5(1)(c) provides that:

"This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:

…

(c) a charge is or may be made for providing the credit; …"

The Legal Agreements

ASIC alleged that the loans provided by BHFS, both to Ms Morrow and as part of its lending business conducted with Cigno, constituted a provision of credit under a contract.

BHFS sought to rely on s 6(5) of the *National Credit Code* to contend that BHFS did not provide credit to which the *Credit Code* applied as the contract was *"…a continuing credit contract" where "the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided".*

Regulation 51 of the *National Consumer Credit Protection Regulations* 2020 (Cth) stipulates that the maximum charge for the purpose of s 6(5) of the Credit Code, in the case of a continuing credit contract in the first 12 months, is $200.

BHFS and Cigno contended that s 6(5) of the Credit Code is applicable because the only charge that is or may be made for providing the credit under the Loan Agreement is the BHFS fee of $15. ASIC contended that s 6(5) is not applicable as the Cigno Fees, i.e. the Financial Supply Fee, Account Keeping Fee and Change of Payment Fee, are also charges that are made for providing the credit under the Loan Agreement. Accordingly, on aggregate, the total fees charged by BHFS and Cigno for all 3 loans to Ms Leah Morrow exceeded $200.

The Decision of the Full Court of the Federal Court of Australia

The Full Court allowed ASIC's appeal, taking into consideration the statutory purpose of the *Credit Code* for the construction of s 5 and 6 of the *Credit Code*.

The Full Court found it appropriate to characterise the *Credit Code* as a remedial legislation with the overarching purpose of "protect[ing] consumers from unscrupulous and unfair lending practices". Hence, BHFS and Cigno's construction of "charge … made for providing the credit" (i.e. whether the charge is legal consideration for the provision of credit) was found to be narrow. The Full Court's preferred approach was substance over form, and construed "charge … made for providing the credit" as a charge made in exchange for, on account of or by reason of the provision of credit.

The Full Court held that the following relevant facts provided sufficient basis to conclude that the Financial Supply Fee was a charge made in accordance with BHFS providing credit:

1. the services provided by Cigno were all anterior to and directed to the provision of credit by BHFS;
2. the services provided by Cigno were not an end and only had value if the application was approved by BHFS and credit is provided;
3. the Financial Supply Fee was not charged unless credit was provided by BHFS; and
4. the Financial Supply Fee was calculated as a percentage of the loan amount provided by BHFS.

Having regard to the commercial substance of the arrangements, the Full Court held that the Financial Supply Fee was imposed on account of or by reason of the provision of credit by BHFS and, in a practical commercial sense, was imposed in exchange for that credit. Given this finding, the Full Court found it unnecessary to decide whether the Account Keeping Fee or the Change in Payment Schedule Fee were charges made for providing credit within the meaning of s 6(5).

Consequently, the Full Court held that BHFS was a credit provider under a credit contract within the meaning of item 1(a) of s 6(1) of the *Credit Code* and BHFS carried on the business of providing credit within the meaning of item 1(b) of s 6(1) of the *Credit Code*. The Full Court

dismissed ASIC's argument that Cigno was acting as an agent of BHFS and remitted the question of whether Cigno engaged in a credit activity item 1(b) or item 2 of s 6(1) of the *Credit Code* to the trial judge for determination.

The Full Court allowed the appeal with costs.

The decision is a potent reminder that the Credit Code can apply in circumstances that businesses may not have expected. The Credit Code places a higher administrative burden on businesses.

If you would like to consider how the *Credit Code* may impact your business, or if you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact Aritree Barua at aritreeb@matthewsfolbigg.com.au or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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