HIGH COURT OF AUSTRALIA

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Form 27A—Appellant's submissions

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

SUNSHINELOANS PTY LTD (ACN 092 821 960)
Appellant

and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the internet.

.PART II: ISSUES

2 The primary judge having recused himself from the penalty hearing,[1] in consequence of the adverse credibility findings about the appellant's witnesses[2] in the liability decision,[3] did the Full Court err in not applying the apprehension of bias principle to uphold that decision? [4]

PART III: SECTION 78B NOTICE

3 No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

PART IV: DECISIONS BELOW

4 The judgment of the primary judge has not been reported. Its medium neutral citation is *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 3)* [2024] FCA 786.

5 The judgment of the Full Court of the Federal Court of Australia has been reported at (2025) 308 FCR 514. Its medium neutral citation is *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [2025] FCAFC 32.

PART V: FACTS

6 The appellant is a credit provider of, among other products, small amount credit contracts. Its business is regulated by both the *Credit Act* and the *National Credit Code*.[5]

7 The respondent (**ASIC**) brought proceedings against the appellant alleging contraventions of ss 23A(1), 24(1A)[6] and 31A(1) of the *National Credit Code* and s 47(1)(d) of the *Credit Act*. ASIC sought relief pursuant to ss 166, 167 and 177 of the *Credit Act* as well as s 21 of the *Federal Court of Australia Act 1976* (Cth), for

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[1] Application by ASIC pursuant to s 167 of the *National Consumer Credit Protection Act 2009* (Cth) (***Credit Act***).

[2] See Perram J at 520 [31]–[35] of *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514, [2025] FCAFC 32 (**FC Reasons**).

[3] See *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345 (**Liability Decision**) [126], which sets out the issues for determination in respect of the liability hearing.

[4] FC Reasons at 543[128] (Bromwich J), 544 [136]–[137] (Colvin J).

[5] The *National Credit Code* is contained in Schedule 1 to the *Credit Act*.

[6] The primary judge held in the Liability Decision that s 24(1A) of the *National Credit Code* was a civil penalty provision as defined by s 5 of the *Credit Act*, and within s 166 of the *Credit Act*.

declarations, injunctions and the payment of pecuniary penalties arising from the alleged contraventions. The primary judge determined that the trial of liability would proceed before the question of penalty.[7]

8 The primary judge found that the appellant had contravened ss 24(1A)(a) and (b) of the *National Credit Code*, and s 47(1)(d) of the *Credit Act*.[8]

9 In reaching his contravention conclusions, the primary judge dismissed the evidence of the witnesses for the appellant[9] and made the following findings and statements:

(a) that Mr Powe[10] was "not a witness who tried to give his evidence in an honest manner".[11]

(b) that Dan Simmons, the appellant's Chief Operations Manager, was "disingenuous",[12] and did not accept that he sought to give evidence honestly;[13]

(c) evidence given by Nicholas Bennetts, the appellant's Operations Manager, as being given "in a manner which suggested he had been schooled",[14] and as a "deliberate misconstruction" and disingenuous";[15]

(d) Mr Powe's evidence "to the effect that the fees were only charged upon a borrower's default sits uncomfortably with the above comments, and reveals the evidence given in [Mr Powe's] affidavit and during cross-examination to be unsatisfactory";[16]

(e) "Mr Powe adhered to the contention that despite the obvious agreement to vary the loan contract between Sunshine Loans and its customers for which the Amendment Fee was paid, no such agreement existed. He, too, gave evidence

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[7] See Appellant's Further Materials, page 4.

[8] Appellant's Further Materials, page 96. Section 47(1)(d) of the *Credit Act* is not a civil penalty provision.

[9] See FC Reasons at 520–522 [31]–[34] (Perram J).

[10] Mr Powe was and remains the only director of the appellant.

[11] Liability Decision at [304].

[12] *Ibid* at [252], [292].

[13] *Ibid* at [293].

[14] *Ibid* at [294].

[15] *Ibid* at [298]–[299].

[16] *Ibid* at [268].

in the manner of someone who had been schooled to advance a particular theory";[17]

(f) "Mr Powe accepted that, from time to time, customers who were unable to meet their originally agreed repayments would contact Sunshine Loans to see if they could come to some arrangement. He also agreed that Sunshine Loans was able to agree with a customer to defer a scheduled payment. However, in the maintenance of the theory which he sought to propound, his evidence became preposterous";[18] and

(g) "it is clear [Mr Powe] he gave his evidence in an attempt to avoid the conclusion that Sunshine Loans was charging fees otherwise than on a default, and in an attempted justification of its actions. Ultimately, his evidence was not credible in the face of objective evidence, and he was also not a witness who tried to give his evidence in an honest manner".[19]

10 Prior to the penalty hearing, the appellant filed and served further affidavits from Mr Powe, being evidence upon which the appellant seeks to rely on the question of the appropriate penalty. Before the penalty hearing proceeded, the appellant made application that the primary judge recuse himself from determining penalty.

11 The primary judge recused himself, having held that it "was rather obvious" that "it would be inappropriate for [him] to conduct the penalty hearing"[20] and made orders for the matter to be transferred to the National Operations Registrar for the purposes of reallocation to another judge of the Federal Court.[21]

12 ASIC sought and obtained leave to appeal to the Full Court. A majority (Bromwich and Colvin JJ, Perram J dissenting) overturned the primary judge's decision to recuse himself and remitted the penalty hearing back to the primary judge.

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[17] Liability Decision at [302].

[18] *Ibid* at [303].

[19] *Ibid* at [304].

[20] *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 3)* [2024] FCA 786 (**Recusal Decision**) at [5].

[21] Core Appeal Book, page 4.

PART VI: ARGUMENT

LEGAL PRINCIPLES

13 The apprehension of bias principle is a principle of "common law vigour"[22] that "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."[23]

14 Reliance upon the apprehension of bias principle demands:[24]

> "(1) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer".

15 The apprehension of bias principle entails a "double might" test,[25] and is an objective test of possibility, not probability.[26]

16 No formulaic approach can be taken to the articulation of the logical connection between the identified factor and the apprehended deviation.[27]

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[22] *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, [2019] HCA 50 (***CNY17***) at 86–87 [16] (Kiefel CJ and Gageler J); 97–98 [53]–[54] (Nettle and Gordon JJ). See also *QYFM v Minister of Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148, [2023] HCA 15 (***QYFM***) at 183 [107] (Edelman J), 237 [273] (Jagot J).

[23] *Charisteas v Charisteas* (2021) 273 CLR 289, [2021] HCA 29 (***Charisteas***) at 296–297 [11] (Court) quoting *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [2000] HCA 63 (***Ebner***) at 344–345 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ) and referring to *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, [2006] HCA 55 at 609 [110] (Kirby and Crennan J).

[24] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 163 [38] (Kiefel CJ and Gageler J). See also at 171 [67] (Gordon J). See also, *Ebner* (2000) 205 CLR 337; [2000] HCA 63 at 345 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *CNY17* (2019) 268 CLR 76, [2019] HCA 50 at 156–157 [21] (Kiefel CJ and Gageler J); *Charisteas* (2021) 273 CLR 289, [2021] HCA 29 at [11]; *Director of Public Prosecutions v Smith* (2024) 98 ALJR 1163, [2024] HCA 32 at 234 [92] (Gageler CJ, and Gleeson, Jagot and Beech-Jones JJ).

[25] *CNY17* (2019) 268 CLR 76, [2019] HCA 50 at [18] (Kiefel CJ and Gageler J).

[26] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 (at 163 [37] (Kiefel CJ and Gageler J), 171–172 [68]-[70] (Gordon J), 187 [118] (Edelman J).

[27] *Ebner* (2000) 205 CLR 337; [2000] HCA 63 at 360–361 [72] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 238 [275] (Jagot J).

17 The apprehension of bias principle embraces all variants of "the absence of impartiality"[28] and independence,[29] and may extend even beyond the categories of "[b]ias, whether actual or apprehended".[30] It is not prescriptive as to how a reasonable apprehension of bias may arise,[31] and depends on the totality of the circumstances.[32]

18 Foundational to the framework of the apprehension of bias principle is the fact that "impartiality is an indispensable aspect of the exercise of judicial power … and that "[bias] whether actual or apprehend connotes the absence of impartiality".[33] This framework forms part of the institutional architecture[34] that ensures "that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal."[35]

19 At the fulcrum of the apprehension of bias principle is the fair-minded lay observer (the **observer**). Framing the question of whether there exists an apprehension of bias by reference to the observer "is a deliberate and necessary construct which tethers the court's analysis to the ultimate purpose of maintaining public confidence in the impartiality of the judicial system".[36]

20 The observer is "a member of the public who is neither complacent nor unduly sensitive or suspicious",[37] and "is taken to be aware of the nature of the decision and the context in which it was made, and the circumstances leading to the decision."[38]

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[28] *Ebner* (2000) 205 CLR 337, [2000] HCA 63 at 348 [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ). It "gives effect to the requirement that justice should both be done and be seen to be done": *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 171 [68] (Gordon J) citing *Ebner* (2000) 205 CLR 337, [2000] HCA at 344 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[29] *Ebner* (2000) 205 CLR 337, [2000] HCA 63 at 358 [60] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 186 [114] (Edelman J).

[30] *Ebner* (2000) 205 CLR 337, [2000] HCA 63 at 348 [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[31] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 171–172 [68]–[70] (Gordon J), 187 [118] (Edelman J); *Ebner* (2000) 205 CLR 337, [2000] HCA 63 at 350 [32] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[32] *CNY17* (2019) 268 CLR 76, [2019] HCA 50 at [20] (Kiefel CJ and Gageler J).

[33] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 159–160 [26] (Kiefel CJ and Gageler J).

[34] *Ebner* (2000) 205 CLR 337, [2000] HCA 63 at 363–364 [84] (Gaudron J).

[35] *Commonwealth of Australia v Yunupingu* (2025) 421 ALR 604, [2025] HCA 6 at 656 [193] (Gordon J).

[36] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 165 [45] (Kiefel CJ and Gageler J). See also at 172 [71] (Gordon J) and 238 [275] and 245 [297] (Jagot J).

[37] *CNY17* (2019) 268 CLR 76, [2019] HCA 50 at [19] (Kiefel CJ and Gageler J) quoting *Johnson v Johnson* (2000) 201 CLR 488 at 509 [53] (Kirby J).

[38] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 172–173 [72] (Gordon J) citing *Isbester v Knox City Council* (2015) 255 CLR 135 (***Isbester***) at 146 [23] (Kiefel, Bell, Keane and Nettle JJ), citing *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 459 [68]; *CNY17* (2019) 268 CLR 76 at 99 [58] (Nettle and Gordon JJ).

21 The observer who understands that adverse credibility findings have been made about a party by a judge might reasonably fear that the same judge who has to make a further finding about that party, taking into account that party's evidence, may be unable to achieve the requisite degree of impartiality on the second occasion.

22 In *Livesey v New South Wales Bar Association*,[39] this Court held that:

> It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in **a previous case**, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact.

23 In *British American Tobacco Australia Services Ltd v Laurie*,[40] which also concerned findings made in a separate proceeding from the one in which the apprehension of bias was then alleged, the majority held that "the observer is not presumed to reject the possibility of pre-judgment."[41] The majority went on to conclude that:[42]

> Whenever a judge is asked to try an issue which he or she has previously determined, **whether in the same proceedings or in different proceedings**, and whether between the same parties or different parties, the judge will be aware that different evidence may be led at the later trial. Judge Curtis's express acknowledgment of that circumstance does not remove the impression created by reading the judgment that the clear views there stated might influence his determination of the same issue in the Laurie proceedings. Allsop P's conclusion was correct. In addition to the possibility of the evidentiary position changing, a reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, **he did express himself in terms indicating extreme scepticism** about BATAS's denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. In the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the court **might not move its mind from the position reached on one set of materials even if different materials were presented at the trial** – that is, bring an

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[39] (1983) 151 CLR 288 at 300 (emphasis added).

[40] (2011) 242 CLR 283, [2011] HCA 2.

[41] *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [2011] HCA 2 at 333 [144] (Heydon, Kiefel and Bell JJ) citing *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 299 (Mason, Murphy, Brennan, Deane and Dawson JJ).

[42] *Ibid* at 333 [145] (Heydon, Kiefel and Bell JJ) (emphasis added).

impartial mind to the issues relating to the fraud finding. Johnson v Johnson (227) is distinguishable.

GROUND 3: THE MAJORITY'S CATEGORICAL REJECTION OF THE POSSIBILITY OF A LOGICAL CONNECTION

24 The majority of the Full Court considered this case to fall within a *category* in which "the judge is permitted or required to have regard to, and apply, findings made at an earlier stage of the proceedings".[43] Justice Bromwich distinguished such proceedings from separate proceedings, and separate determinations in the same proceeding.[44] His Honour reasoned that where the judge is permitted or required to have regard to earlier findings "a logical connection between findings made at the earlier stage of the proceedings and the feared impartiality at the later stage *cannot be established* merely on the basis that the judge has determined facts in dispute, or had regard to evidence which is not led at the penalty hearing".[45]

25 Justice Bromwich determined that "a fair-minded lay observer *could not find*, on the basis only of an earlier credit finding or determination of a live factual issue, that a judge might not be able to bring an impartial mind to the later stage of the proceeding".[46]

26 Justice Colvin, who agreed with Bromwich J,[47] reasoned that "a fair-minded lay observer will know that the second hearing is not to be conducted as a separate and fresh adjudication unaffected by what has occurred in the first hearing".[48] His Honour determined that "the due performance by a judge during the first hearing could not found a basis for recusal from conducting the second hearing (any more than it would during a trial. The making of credibility findings as to the testimony of a witness, even if firmly expressed, is an example of the due performance of the judicial function".[49] His Honour added: "that an adverse view may be formed in the first hearing as to the credibility of a witness … *will not give rise to reasonable apprehension of bias*" because the observer will be aware of the particular nature of successive hearings.[50]

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[43] FC Reasons at 537 [100] (Bromwich J), with whom Colvin J agreed at [136] and [137].
[44] *Ibid* at 535 [87] (Bromwich J).
[45] *Ibid* at 537 [100] (Bromwich J) (emphasis added).
[46] *Ibid* at 537–538 [101] (Bromwich J) (emphasis added).
[47] *Ibid* at 544 [136]–[137] (Colvin J).
[48] *Ibid* at 546 [148] (Colvin J).
[49] *Ibid* at 546–547 [149] (Colvin J). See also at 547 [150]–[153] (Colvin J).
[50] *Ibid* at 547 [152] (Colvin J) (emphasis added).

27 However, it is not safe to determine the issue of apprehended bias by reasoning as to the "category of [the] case". [51] In *Ebner*, the Court expressly rejected the submission that apprehension of bias will be presumed in a particular category of case. [52] Here, the majority determined that in this category of case before them, an apprehension of bias cannot arise. That reasoning disclaims a role for the observer, contrary to *Ebner*.

28 The majority also erred by aligning the observer with the court as the court carries out the function of determining the later stages of a proceeding.[53] By assuming the observer to know the detail of the court's case management processes; the majority wrongly took into account only the court's view, not "the court's view of the public's view".[54]

29 Finally, as set out further below when addressing the second limb of the *Ebner* analysis, the majority erred in dismissing not just the actual logical connection between the primary judge's credibility findings as it arose in this case; but even the possibility of such a logical connection arising.

GROUNDS 1, 2 AND 4

The first limb

30 The factor which it is said might lead the primary judge to resolve the appropriate penalty other than on its legal and factual merits is the fact that, in the final determination of the issues in respect of the liability hearing, the primary judge was actually persuaded, and made "extreme[ly] sceptic[al]" [55] findings of fact, as to the lack of credibility of as the appellant's witnesses, and the evidence they gave at the liability hearing. The primary judge expressed "extreme scepticism"[56] about Mr Powe's willingness to give honest evidence:

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[51] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 163 [39] (Kiefel CJ and Gageler J) referring to *Ebner* (2000) 205 CLR 337 at 348–351 [24]–[37]. See also at [295] (Jagot J).

[52] *Ebner* (2000) 205 CLR 337 at 348–351 [24]–[37] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[53] See *Charisteas* (2021) 273 CLR 289, [2021] HCA at 299–300 [21] (Court).

[54] *Webb v The Queen* (1994) 181 CLR 41, [1994] HCA 30 at 52 (Mason CJ and McHugh J) cited in *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 165 [45] (Kiefel CJ and Gageler J) and *CNY17* (2019) 268 CLR 76, [2019] HCA 50 at [21] (Kiefel CJ and Gageler J).

[55] *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, [2011] HCA 2 at 333 [145] (Heydon, Kiefel and Bell JJ).

[56] *Ibid* at 333 [145] (Heydon, Kiefel and Bell JJ).

(a) "He, too, gave evidence in the manner of someone who had been schooled to advance a particular theory";[57]

(b) "However, in the maintenance of the theory which he sought to propound, his evidence became preposterous";[58] and

(c) "Ultimately, … he was also not a witness who tried to give his evidence in an honest manner".[59]

31 The primary judge's credibility findings are unusual. The common approach of tribunals of fact "in respect of disputes of fact" is just to determine the substantive disputes of fact "upon the evidence as a whole, both direct and circumstantial, without expressing a conclusion that witnesses whose evidence was not accepted were not honest witnesses."[60] It is yet a step further to conclude that the appellant's witnesses gave evidence in the manner of someone "*who had been schooled*". That finding evidences the primary judge's conclusion that the witnesses' evidence was lacking in honesty for the purpose of "advanc[ing] a particular theory".[61] The observer will understand the primary judge's conclusion that the appellant's witnesses did not tell the truth in the witness box.

2 - What is the question that the judge at the penalty hearing will be required to determine whose proper resolution the factor might affect?

32 At the penalty hearing the primary judge will be required to determine the appropriate penalty that flows from "intuitive and instinctive synthesis" [62] of the relevant factors (sometimes referred to in shorthand as the French factors).[63] That assessment will involve the primary judge's consideration of the evidence of Mr Powe, including his assessment

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[57] Liability Decision at [302].

[58] *Ibid* at [303].

[59] *Ibid* at [304].

[60] *McCormack v Federal Commissioner of Taxation* (1978) 143 CLR 284 at 313 (Jacobs J). Perram J noted in dissent at [35], "[t]he primary judge could have reached the conclusions he reached about the evidence of Mr Powe in more moderate language".

[61] Liability Decision at [302].

[62] *Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd (No 2)* [2021] FCA 102 at [25] (Abraham J) citing *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* (2015) 327 ALR 540, [2015] FCA 330 at [8] and *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277, [2012] FCAFC 190 at [145].

[63] *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450, [2024] HCA 13 at [18]-[19] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson CJ) citing *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,152-52,153 (French J); *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College) (in administration) (No 6)* [2025] FCA 542 at [75] (Stewart J).

of whether it is credible and what weight, if any, should be given to it. In determining that question, the judge is neither "permitted [nor] required to … **apply**, findings made at an earlier stage of the proceedings"[64] as to the appropriate weight to be given to earlier adduced evidence. The findings that the primary judge made as to the appropriate weight to be given to the evidence that Mr Powe gave at the liability hearing are not determinative of, and may (depending on the evidence adduced at the penalty hearing, and the assessment of the judge to hear the penalty hearing) have limited relevance to the appropriate weight to be given to the evidence that Mr Powe is to give at the penalty hearing.

33 That intuitive and instinctive synthesis will of course involve *"consideration of the aspects of the liability judgment that gave rise to Sunshine Loans' recusal application"*.[65] The penalty hearing will also require the primary judge to take into account (as a possibly relevant consideration when determining the appropriate penalty[66]) the fact that Mr Powe did not "give his evidence in an honest manner," when giving evidence about the contravention.[67] All of this will be understood by the observer – the "proxy for reasonable members of the public at large reflecting contemporary values and judgments"[68]

34 The fact that the earlier adverse findings might be relevant at the penalty hearing is separate to whether the observer can reasonably apprehend the requisite logical connection. Indeed, the relevance of the earlier adverse findings to the penalty hearing is one of the issues that must itself be determined afresh and impartially by the primary judge at the penalty hearing. It is to be determined by reference to the complete set of evidence as it is adduced in the penalty hearing. "Deciding at one point in time versus another is not intrinsically faulty unless the assumption is that prejudgment is based upon incomplete or inaccurate information."[69]

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[64] FC Reasons at 537 [100] (Bromwich J), with whom Colvin J agreed at 544 [136] and [137].

[65] *Ibid* at 526–527 [59] (Bromwich J).

[66] *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450, [2024] HCA 13 at 460–461 [18]–[19] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson CJ) citing *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,152-52,153 (French J).

[67] Liability Decision at [304].

[68] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 238 [275] (Jagot J).

[69] Judith Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges", (1988) 61 *Southern California Law Review* 1877, 1885.

35 The observer knows that the primary judge made the credibility findings, and reached a state of actual persuasion[70] before the whole of the evidence will have been adduced at the penalty hearing. This understanding provides a logical connection in the way set out below.

The second and third limbs of *Ebner*

1 – What is the apprehended deviation from deciding that question?

36 The observer might reasonably apprehend that the primary judge might, by reason of having made the adverse credibility findings,[71] experience an intellectual inertia or be subjected to a subconscious influence[72] that might prevent the primary judge from reaching the requisite impartial "frame of mind"[73] either:

(a) in conducting the intuitive synthesis. For example, the primary judge's instinct might be pre-formed by the primary judge having already concluded that both Mr Bennetts and Mr Powe gave evidence in a manner that appeared schooled; and/or

(b) in assessing the credibility of, and weight to be given to, the evidence that Mr Powe is to give at the penalty hearing. For example, the fact that the primary judge had already been actually persuaded that Mr Powe was not an honest witness might cause the primary judge to be too quick to be actually persuaded that the evidence that Mr Powe is to adduce at the penalty hearing is similarly lacking in honesty.

37 The intuitive synthesis, including the determination of the question of the credibility of, and weight to be given to, the evidence that Mr Powe is to adduce at the penalty hearing, must be done on legal and factual merits using "a frame of mind"[74] in which judgment is suspended until all of the evidence relevant to the appropriate penalty has been adduced.

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[70] *Sdrolias v Allianz Australia Insurance Ltd* [2022] NSWCA 20 at [16]-[17] (McCallum JA, with whom MacFarlan and Meagher JJA agreed). See also *Jones v Dunkel* (1959) 101 CLR 298 at 305 (Kitto J).

[71] The primary judge's credibility findings are outlined in paragraph 9, above.

[72] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 224 [232] (Gleeson J).

[73] *Isbester* (2015) 255 CLR 135, [2015] HCA 20 at 157 [63] (Gageler J).

[74] *Ibid*.

38 The necessary "frame of mind"[75] or "attitude"[76] in which a judge must impartially deal with the question for determination is akin to the "Negative Capability" described by the poet, John Keats: "that … when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason".[77] In *Isbester* Gageler J explained that the required judicial mind must be able to achieve "a neutral evaluation of the merits": ie, "the 'kind or degree of neutrality' that the hypothetical fair-minded observer would expect in the making of the particular decision within the particular statutory framework".[78] This is not to "demand a mindset of impeccable neutrality".[79]

39 The apprehension of the observer, in the context of contemporary Australian society, will be informed of "[t]he vagaries of "human frailty"" and "[t]he unknowable effects of the subconscious"[80]. The observer "understands that information [as well as attitudes] consciously and conscientiously discarded might still sometimes have a subconscious effect on even the most professional of decision-makers".[81]

40 The New York University philosopher, Jane Friedman, describes the frame of mind of suspended judgment as an "attitude of committed neutrality".[82] Friedman explains that one necessarily suspends judgment when one inquires into a question and "that suspending is something one does in order to genuinely inquire."[83] Suspended judgment is "an openness or even willingness to inquire further."[84] In dialogue with Jane Friedman, Michael Masny argues that "that Friedman is right to claim that suspending judgment

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[75] *Isbester* (2015) 255 CLR 135, [2015] HCA 20 at 157 [63] (Gageler J).

[76] Jane Friedman, "Why Suspend Judging?" (2017) 51 Noûs 302, 303; *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 176 [82] (Gordon J).

[77] John Keats' letter of about 21 December 1817 to George and Tom Keats, in *The Letters of John Keats, 1814-1818*, Hyder Edward Rollins (ed) (Cambridge University Press, 1958) vol 1 at 193.

[78] *Isbester* (2015) 255 CLR 135, [2015] HCA 20 at 155 [58] (Gageler J). See also *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 562 [179] (Hayne J), referring to "the fundamental requirement that the judge is neutral."

[79] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 224 [233] (Gleeson J).

[80] *Ibid* at 245 [297] (Jagot J). *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, [2019] HCA 50 at [27) (Kiefel CJ and Gageler J) quoting *Public Utilities Commission of the District of Columbia v Pollak* (1952) 343 US451 at 466-467. See also at [51], [97], [99] (Nettle and Gordon JJ) and at [111] (Edelman J). See also *GetSwift Ltd v Webb* (2021) 283 FCR 328, [2021] FCAFC 26 at 339 [39], 340-341 [44]-[45].

[81] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 165 [47] (Kiefel CJ and Gageler J) (quotation marks omitted).

[82] Jane Friedman, "Why Suspend Judging?" (2017) 51 Noûs 302, 304.

[83] *Ibid* at 306.

[84] *Ibid* at 307.

about some matter involves 'intending or aiming to judge' on this matter."[85] However, an inquirer's suspension of judgment ceases upon consideration of decisive evidence that enables formation of a belief.[86]

41 The observer can be taken to understand that to make a finding of fact is to be actually persuaded, and thus to form a belief. The primary judge was able to make the credibility findings only upon feeling an actual persuasion as to those facts.[87] The primary judge must have been satisfied that an evidential basis "positively suggest[ed]"[88] that it was likely that Mr Powe was "not a witness who tried to give his evidence in an honest manner"[89] and "gave evidence in the manner of someone who had been schooled to advance a particular theory".[90]

42 When examining the relationship between inquiry and belief, Friedman goes on to explain that there is a "rational (or similar) conflict" in believing a proposition and having an interrogative attitude towards that proposition.[91] In reference to an example of Inspector Morse investigating a case in which a doctor is shot through her window while having dinner, Friedman explains that "neither believing-Morse nor knowing-Morse can be comfortably thought of as curious or wondering or deliberating about who killed the doctor."[92] The observer can be taken to understand that there is a conflict in having a frame of mind in which one has been actually persuaded, and a frame of mind in which one's judgment is suspended and remains open to be formed.

43 As we have noted above, the observer will understand that the primary judge was so persuaded. The logical connection between that understanding and the perceived inability to bring to bear on the question of penalty the requisite degree of impartiality is tangible. The observer understands that the judge rejected as lacking in credit the appellant's explanation for why it believed it was not contravening. The lay observer accepts that the judge made that finding correctly and was persuaded to it. That understanding logically

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[85] Michal Masny, "Friedman on suspended judgment" (2020) 197 Synthese 5009, 5023.

[86] *Ibid*.

[87] *Sdrolias v Allianz Australia Insurance Ltd* [2022] NSWCA 20 at [16]-[17] (McCallum JA, with whom MacFarlan and Meagher JJA agreed).

[88] *Jones v Dunkel* (1959) 101 CLR 298 at 305 (Kitto J).

[89] Liability Judgment at [304].

[90] *Ibid* at [302].

[91] Jane Friedman, "Inquiry and Belief" (2019) 53 Noûs 296 at 306.

[92] *Ibid* at 301.

gives rise to a reasonable perception that the primary judge may not be able to eliminate from his decision on penalty his belief that the appellant's witnesses were untruthful.

44 That is, the observer might reasonably apprehend that the primary judge might not be able to return to a sufficiently suspended state of judgment, in his review of Mr Powe's evidence in the penalty hearing.

2 – What is the reasonable and "logical connection" between the factor and the apprehended deviation?

45 There are three alternative "logical connections" between the factor and the apprehended deviation identified above in paragraph 36.

46 **Cognitive anchoring**. It is logical for the observer to apprehend that the primary judge might be cognitively anchored to his adverse credibility determination and the persuasion reached by him in making that finding. One aspect of "human frailty" is the mental bias where people rely too heavily on early information received, or an early opinion formed or state of actual persuasion (the "anchor") when making decisions or judgments.

47 In *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* (***Bob Jane***),[93] Besanko J held that:[94]

> [o]rdinarily, a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide where the judge in a previous case has expressed clear views, either about a question of fact which constitutes a live and significant issue in the subsequent case, or about the credit of a witness whose evidence is of significance on such a question.

48 Justice Besanko determined he should disqualify himself from hearing a contempt application brought against the fourth respondent in circumstances where his Honour had "previously made findings in relation to the fourth respondent's credibility and there [was] sufficient prospect that his credibility" was going to be in issue in the proceeding before him.[95]

49 In *Westpac Banking Corporation v Forum Finance Pty Ltd (Apprehended Bias Application)* (***Westpac***),[96] Lee J determined that he was required to disqualify himself

[93] [2015] FCA 1343.
[94] *Ibid* at [14].
[95] *Ibid* at [22].
[96] [2022] FCA 981.

from hearing a trial on the basis of prior findings of credit made in t the same proceeding.[97] His Honour had, in an application to vary freezing orders made against the third respondent, formed "the general impression" of the third respondent that "were unfavourable to his reliability as a witness".[98] Lee J considered "a reasonable observer would form the impression that my decision making would involve an element of prejudgment, in that the adverse impressions I have already formed would be part of the context in which I judged his evidence given at trial (and perhaps also the way I understand other evidence)".[99]

50 The observer has good reason to apprehend that the frailty in the mental bias of cognitive anchoring might affect later assessments as to credibility, given how impressionistic that assessment necessarily is. As Lee J held in *Westpac*: [100]

> The assessment of credibility is necessarily an impressionistic one, and an unfavourable view taken upon an otherwise minor issue may have consequences for the balance. Further, to be too confident that emphatic disbelief on one issue does not inform, even subconsciously, the approach to be taken to weighing other evidence of the person disbelieved is to underplay the complexity of the human process of decision-making. With the best will in the world, it is very hard for a judge to put out of their mind adverse impressions as to the reliability of a witness in considering all aspects of the evidence of a witness, including evidence given on a later occasion.

51 **Adversarial position**. It is logical for the observer to apprehend that a person in Mr Powe's position "might understandably experience a justifiable sense of disquiet" [101] where the same judge is being asked to assess the credibility again and weight to be given to his evidence. This is so even though that evidence addresses different aspects of the appellant's business (eg, steps taken since the liability decision to remediate the contravening conduct and its effects). Here, of course, the primary judge's final and sceptical findings have been published in a decision to the public. The observer can reasonably apprehend that the primary judge formed an adversarial position as against Mr Powe.

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[97] *Ibid* at [24].

[98] *Ibid* at [1] quoting *Westpac Banking Corporation v Forum Finance Pty Ltd (Freezing Order Variation)* [2022] FCA 910 [45]–[46].

[99] *Westpac* [2022] FCA 981 at [24].

[100] *Ibid* at [22].

[101] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at [49] (Kiefel CJ and Gageler J).

52 In *Murphy v Victoria* (***Murphy***),[102] the appellant argued that it would be "undesirable" to return the proceeding to the original judge because that judge had "made final determinations (albeit on incomplete material) in relation to critical issues in the proceeding".[103]

53 The Victorian Court of Appeal determined that while no question of apprehended bias could arise in respect of observations by the trial judge that he was not satisfied, on the material before him, that the appellant had made good a particular claim, at other points the judge used more emphatic language in rejecting the appellant's contentions.[104] The Court concluded that "a fair minded lay observer might reasonably apprehend that, in respect of the issues dealt with in those parts of the judge's reasons, the judge might not bring an impartial mind to the resolution of the issues about which such firm conclusions have been expressed".[105]

54 The observer is sensitive to the dynamics of the adversarial process. Thus, the observer is not "so abstracted and dispassionate as to be insensitive to the impression that the circumstances in issue might reasonably create in the mind of the actual party who is asserting an apprehension of bias".[106] The observer is taken to be sensitive to when a participant in the adversarial process "might understandably experience a justifiable sense of disquiet" from the orthodox workings of that process.[107]

55 **Institutional pressure to maintain consistency in fact-finding**. The observer can reasonably anticipate that *human frailty* will make it difficult for the primary judge to re-suspend judgment having formed his belief about the honesty of the appellant's witnesses in the liability hearing. The observer can reasonably anticipate that the important institutional value of consistency and finality in decision-making may give rise to a *judicial* frailty, where previous findings of credit about the same witnesses have been made.

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[102] (2014) 45 VR 119, [2014] VSCA 238.

[103] *Ibid* at 151 [106] (Court).

[104] *Murphy* (2014) 45 VR 119, [2014] VSCA 238 at 151–152 [106], [110] (Court).

[105] *Ibid* at 152 [110].

[106] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 166 [49] (Kiefel CJ and Gageler J) citing *Johnson v Johnson* (2000) 201 CLR 488, [2000] HCA 48 at 508 [52]; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 260; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 351, 368.

[107] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 166 [49] (Kiefel CJ and Gageler J).

56 "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances."[108] The institutional desire for "[f]inality in litigation"[109] means that once the law provides "the best and safest solution compatible with human fallibility" in the determination of a disputable fact, it then "closes the book."[110]

57 That value is so fundamental that it informs a variety of legal principles, including in respect of appeals and how they are conducted,[111] the three forms of estoppel that the common law recognises in respect of the rendering of a final judgment,[112] the reticence with which Australia's trial courts permit determination of separate questions in proceedings, and the preparedness of trial courts to consolidate proceedings. The principle of finality in litigation forms part of "ordinary judicial practice" so that the observer can be assumed to know of it.[113]

58 The observer can reasonably apprehend that the primary judge faces subtle but significant institutional pressures to reach consistent findings at the penalty hearing in respect of evidence to be given by Mr Powe, even though that evidence will address issues that were not before the court at the liability hearing.

59 It is a given that the observer understands the primary judge's capacity for decision-making "by reason of professional training and experience and fidelity to the judicial oath or affirmation",[114] and his "greater capacity than most to discard "the irrelevant, the immaterial and the prejudicial"'.[115]

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[108] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[109] *Fox v Percy* (2003) 214 CLR 118, [2003] HCA 22 at 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

[110] *The Ampthill Peerage Case* [1977] AC 547 at 569 (Lord Wilberforce).

[111] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [35] (Gleeson CJ, Gummow, Hayne and Heydon JJ)

[112] *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517–518 [22] (French CJ, Bell, Gageler and Keane JJ).

[113] *Charisteas* (2021) 273 CLR 289, [2021] HCA 29 at 297 [12] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ) citing *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13] (footnote omitted), quoted in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, [2006] HCA 55 at 609–610 [111]. See also *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 378–381.

[114] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 165–166 [48] (Kiefel CJ and Gageler J).

[115] *Ibid* citing *Re Polites' Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 87–88 (Brennan, Gaudron and McHugh JJ).

60 At the same time, the observer, understanding the primary judge's capacity for rational judicial reasoning (the product of his training, experience and fidelity to the judicial oath), will also understand that the complexity of the institutional environment within which judges decide cases also impacts the primary judge. That observer can reasonably apprehend that this institutional environment may also undermine judicial impartiality. In particular, the observer's knowledge of the institutional value of consistency in fact-finding and decision-making, and the judge's proper commitment to that value can reasonably contribute to the observer's apprehension of a judicial inertia which will prevent an impartial reconsideration of previous facts found.

PART VII: ORDERS SOUGHT

61 The appellant seeks orders that:

(a) the appeal be allowed;

(b) Orders 1, 2, and 3 made by the Full Court of the Federal Court of Australia on 24 March 2025 be set aside;

(c) the respondent's appeal to the Full Court of the Federal Court of Australia be dismissed;

(d) Orders 1(a) and 2 made by the Federal Court of Australia on 5 July 2024 be reinstated;

(e) the respondent pay the appellant's costs of the appeal to the Full Court; AND

(f) the respondent pay the appellant's costs of the appeal to this Court.

PART VIII: TIME REQUIRED FOR PRESENTATION OF ARGUMENT

62 The appellant estimates that it will need up to two hours for oral submissions in chief, and 15 minutes in reply.

Dated: 4 September 2025

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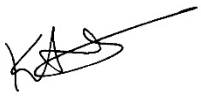

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*National Consumer Credit Protection Act 2009* (Cth)	Version 50	s 5 s 47 **s** 166 s 167 s 177	Provisions in force during the relevant period	1 July 2016 to 2 November 2020
2	*National Credit Code* (Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth))	Version 50	s 23A s 24 s 31A	Provisions in force during the relevant period	1 July 2016 to 2 November 2020
3	*Federal Court of Australia Act 1976* (Cth)	Version 59	s 21	Provisions in force during the relevant period	1 July 2016 to 2 November 2020