HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **SUNSHINELOANS PTY LTD**
Appellant

and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUE

2 This appeal concerns the apprehended bias principle in the context of a civil penalty case against the appellant (**SunshineLoans**) the hearing of which is being held in two stages. The single issue is whether the Full Court was correct to overturn the primary judge's decision to recuse himself from further sitting in the case in circumstances where:

2.1 after hearing the first part of the case, in the course of making findings about the existence, nature and circumstances of the contraventions, the primary judge made adverse credit findings in relation to witnesses called by SunshineLoans; and

2.2 at the second stage, in which further evidence relevant to penalties was to be taken, SunshineLoans indicated its intention to call one of those witnesses again.

PART III: SECTION 78B NOTICES

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

PART IV: FACTS

4 In June 2022 the respondent (**ASIC**) commenced a proceeding against SunshineLoans for declarations and penalties under ss 166 and 167 of the *National Consumer Credit Protection Act 2009* (Cth) (**Act**) for contraventions of the National **Credit Code** (being schedule 1 to the Act). The contraventions related to fees it had charged to customers in relation to small amount credit contracts. A key issue in the case was whether the fees

related to loan defaults (as SunshineLoans contended and as was permitted by the Credit Code) or simply to amendments to the repayment schedule in the contract (as alleged by ASIC and as was prohibited by the Credit Code).

5 On 3 July 2023, the primary judge directed, in accordance with common judicial practice in such matters and without objection from SunshineLoans, that the civil penalty proceeding be heard in two stages by first determining whether it had contravened the Credit Code and, if so, then determining the appropriate penalties.[1]

6 On 12 April 2024, the primary judge gave a judgment in relation to the first stage of the hearing in which his Honour (i) held that SunshineLoans had contravened provisions of the Credit Code and (ii) made detailed findings about the nature, extent and circumstances of those contraventions.[2] His Honour rejected certain evidence given by witnesses for SunshineLoans, including evidence from a director (**Mr Powe**) on the "limited, but important, topic" of how the impugned charges should be characterised.[3]

7 On 24 June 2024, SunshineLoans filed an interlocutory application for the primary judge to recuse himself from the further hearing of the case. As initially made, this was based on the broad assertion that adverse findings made in the first judgment meant that his Honour's determination of penalty would be affected by apprehended bias.[4] This broader argument was rejected by the primary judge, for reasons upheld by the Full Court.[5]

8 However, at the hearing of the recusal application on 5 July 2024 the primary judge independently identified a different possible basis for recusal, namely that he would be required to make a second assessment of Mr Powe's credibility. This concern arose from the fact that SunshineLoans had by then filed a further affidavit made by Mr Powe which traversed matters that were the subject of the first judgment and which would again be in issue. This concern was promptly embraced by SunshineLoans in its recusal application, and was the basis on which the primary judge recused himself.[6]

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1 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [2025] FCAFC 32; 308 FCR 514 (**AJ**) at [60].

2 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345.

3 AJ [108] (Bromwich J), describing the findings extracted at [63].

4 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 3)* [2024] FCA 786 (**PJ**) at [22]-[47]; AJ [66]-[68] (Bromwich J).

5 PJ [4]-[5], [19]-[20]; AJ [127] (Bromwich J) and [167] (Colvin J).

6 AJ [68]-[70] (Bromwich J); [131] and [134] (Colvin J).

PART V: ARGUMENT

A GENERAL PRINCIPLES

9 The test for apprehended bias, as set out in ***Ebner*** *v Official Trustee in Bankruptcy*, is whether a fair-minded lay observer might reasonably apprehend the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[7] This requires *first* the identification of what it is said might lead a judge to resolve the case other than on its legal and factual merits and *second* articulation of the logical connection between that factor and the feared deviation from deciding the case on the merits; following this the reasonableness of the asserted apprehension of bias can be assessed.[8]

10 10 Two aspects of the test for apprehended bias are important to this appeal.

11 *First*, "the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice", which the fair-minded lay observer is taken to understand.[9] That reasonable observer will be "taken to be aware of the nature of the decision [which is said to give rise to an apprehension of bias] and the context in which it was made, and the circumstances leading to the decision".[10] As will be explained, the Full Court was correct to conclude that no reasonable apprehension arises here when the nature and circumstances of the case, and the legal and factual matters upon which it is to be resolved, are understood.

12 *Second*, just as litigants do not choose their judges, judges do not choose their cases and
20 they are not at liberty to decline to hear cases without good cause.[11] While it remains important that justice is seen to be done "it is equally important that judicial officers discharge their duty to sit" and do not accede too readily to suggestions of apprehended bias, leading to the "intolerable" prospect of a litigant influencing the composition of the court.[12] As a result, a conclusion of apprehended bias "must be firmly established and

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7 *Ebner* (2000) 205 CLR 337 at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

8 *Ebner* (2000) 205 CLR 337 at [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ) and ***Charisteas*** *v Charisteas* (2021) 273 CLR 289 at [11] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).

9 ***Johnson*** *v Johnson* (2000) 201 CLR 488 at [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), followed in *Charisteas* (2021) 273 CLR 289 at [12].

10 ***Isbester*** *v Knox City Council* (2015) 255 CLR 135 at [23] (Kiefel, Bell, Keane and Nettle JJ); *QYFM* (2023) 279 CLR 148 at [72] (Gordon J).

11 *Ebner* (2000) 205 CLR 337 at [19]-[20]. See also ***QYFM*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at [29] (Kiefel CJ and Gageler J).

12 ***Re JRL****; Ex parte CJL* (1986) 161 CLR 342 at 352 (Mason J); *QYFM* (2023) 279 CLR 148 at [277]-[278] (Jagot J).

should not be reached lightly".[13] Where apprehended bias is not so demonstrated, the judge should refuse to recuse themselves: to do otherwise creates unnecessary burdens on courts and parties, and may give encouragement to attempts by a party to influence the composition of the bench or to cause delay.[14] As will be explained, these concerns are engaged in the present case and, there being no reasonable apprehension of bias, the Full Court was correct to have overturned the primary judge's recusal decision.

B THE DECISION OF THE FULL COURT INVOLVED NO ERROR

B.1 The Full Court's reasons

13 Each of the judges on the Full Court accepted that the primary judge failed to apply the
10 *Ebner* test to the particular circumstances before him. Instead the primary judge erroneously treated the matter as falling within a category of cases in which recusal was essentially automatic or inevitable.[15] Having identified that error, the judges proceeded to apply the *Ebner* test afresh, and were divided as to the result: Bromwich J and Colvin J each held that the recusal was an error; Perram J (in dissent) held it was not.

14 The majority judges commenced by identifying the correct test and applicable principles.[16] As to the first stage of the *Ebner* analysis, their Honours identified the factor that, it was said, might lead the primary judge to resolve the case other than on its merits: namely, that he would be assessing Mr Powe's credibility in relation to contentious evidence at the second hearing in circumstances where his Honour had already made
20 adverse findings about Mr Powe's credibility at the first hearing.[17]

15 As to the second stage – the articulation of the logical connection between that factor and the apprehended deviation from deciding the case on its merits – their Honours closely examined the nature of the case and how it was to be decided. In the course of careful reasons, both judges emphasised the following three key matters, which they considered the fair-minded lay observer would understand as a matter of ordinary judicial practice.[18]

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13 *Re JRL* (1986) 161 CLR 342 at 371; *QYFM* (2023) 279 CLR 148 at [278] (Jagot J).
14 *QYFM* (2023) 279 CLR 148 at [277] (Jagot J).
15 See AJ [72], [104]-[105] (Bromwich J); [135]-[138], [164] (Colvin J); see also [13]-[14] (Perram J).
16 See AJ [75]-[85] (Bromwich J); [136] (Colvin J).
17 See AJ [104], [108] (Bromwich J); [134], [135] (Colvin J).
18 See AJ [82], [101], [122], [124] (Bromwich J); [139], [145], [148], [152] (Colvin J).

15.1 *First*, the case had been bifurcated in a way which was common to civil penalty proceedings – for reasons of efficiency and fairness – with the question of whether SunshineLoans had contravened the Credit Code to be determined prior to the question of relief. While the hearing of the case was thus divided into two stages for practical reasons, these were not separate judicial adjudications or cases. There was, in effect, a single trial that was interrupted by a decision on some but not all issues, which decision was then to govern the next stage of the trial.[19]

15.2 *Second,* the findings made in relation to the first stage of the hearing would be central to the consideration of penalty. That is because in fixing a penalty that will be effective for specific and general deterrence the Court must have regard to all relevant matters, including the nature and extent of the contraventions and the circumstances in which the contraventions took place.[20]

15.3 *Third*, the primary judge's adverse credit findings in relation to Mr Powe were findings that were directly relevant to the need for specific and general deterrence, including because they exposed the approach taken by SunshineLoans to charging "amendment fees" that were proscribed under the Credit Code and because they were relevant to assessing SunshineLoans' culture of compliance.[21] It followed that the primary judge would necessarily, as part of his statutory task, have regard to those findings in the second stage of the hearing and in the resolution of the case. As such, there could be no requirement for him to make a second adjudication of Mr Powe's credibility independently of those earlier views.[22]

16 The majority judges therefore concluded that there was no logical connection between those earlier findings having been made and an apprehended deviation from deciding the case on its factual and legal merits: taking those earlier findings into account was part of, and not a deviation from, determining the case on its factual and legal merits. Thus, the second stage of the *Ebner* test was not satisfied and there could be no reasonable apprehension of bias.[23]

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19 See variously AJ [49], [54]-[55] (Bromwich J); [140]-[141], [144]-[147], [150] (Colvin J).

20 See variously AJ [58], [71], [111] (Bromwich J); [147]-[148] (Colvin J).

21 See variously AJ [64], [71] and [107]-[108], [113] (Bromwich J); [148] (Colvin J).

22 See variously AJ [101], [107], [111]-[112], [124] (Bromwich J); [151], [164] (Colvin J)

23 See eg at AJ [122] (Bromwich J); [152]-[153] (Colvin J).

B.2 Ground 3

17 SunshineLoans' submissions commence with Ground 3. As this ground turns on a simple mischaracterisation of the majority's reasons it can be dealt with briefly.

18 The gravamen of the complaint appears to be that – contrary to holding in *Ebner* that there is no category of case requiring automatic recusal – the majority "determined that in this category of case before them, an apprehension of bias cannot arise": see SunshineLoans' submissions (**AS**) at [27]. It is clear that their Honours did not do this. On the contrary, they repeatedly acknowledged the possibility that a judge may conduct a two-stage civil penalty hearing in such a way as could give rise to a reasonable apprehension of bias,
10 requiring a recusal part-way through the hearing process.[24]

19 SunshineLoans makes its argument by emphasising (at AS [24]-[25]) certain words in passages from Bromwich J's judgment. But those emphases obscure the qualifiers "merely" and "only",[25] which make clear that the passages reject no more than the idea that an apprehension of bias would *automatically* arise. As explained at paragraph 13 above, the very error found to have been made by the primary judge was one of assuming that the case fell into a category in which recusal was automatic. It would be surprising if the majority had then fallen into precisely the same species of error; but they did not.

20 SunshineLoans also says that the majority judges erred by "aligning the observer with the court" and "assuming the observer to know the detail of the court's case management
20 processes": AS [28]. It is not clear how this could assist in establishing ground 3. In any case it is wrong. As explained at paragraphs 11 and 15 above, their Honours attributed to the fair-minded lay observer an understanding of the kind of ordinary context and judicial practice necessary to inform a reasonable assessment. This fits comfortably within what "ordinary experience" suggests is possessed by the public[26] and is at the level of understanding with which the fair-minded lay observer is typically imbued. Moreover, SunshineLoans appears elsewhere to accept as much (see at AS [33]).

21 Accordingly Ground 3, and the submissions made in support of it, disclose no error.

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[24] See AJ [100], [101], [112], [122], [124] (Bromwich J); [149], [152] (Colvin J).

[25] See at AJ [100]-[101], [112] (Bromwich J).

[26] *QYFM* (2023) 279 CLR 148 at [48] (Kiefel CJ and Gageler J), quoting *Vakauta v Kelly* (1989) 167 CLR 568 at 585.

B.3 Grounds 1, 2 and 4

22 Beyond the high-level assertion that the majority erred, the focus of each of grounds 1, 2 and 4 is left somewhat unclear. The submissions do not map onto how the actual grounds are framed, but instead treat them all as going to a single error. And, while this appeal is governed by the "correctness" standard,[27] it will be seen that the central argument which now seems to be made in support of those grounds has evolved significantly from that put to the Full Court. As a result, a distinctive feature of SunshineLoans' submissions on these grounds is that they do not clearly and squarely identify the parts of the majority judges' reasons which are said to be wrong.

23 In those circumstances the grounds are most conveniently answered by considering the *Ebner* steps in turn. This broadly aligns with the approach in SunshineLoans' submissions albeit that those submissions divide, and join, certain of those steps in ways that differ from how they are expressed in *Ebner* and subsequent cases.[28]

Step 1 – identification of the factor that might lead the judge to resolve the case other than on its legal and factual merits

24 Insofar as SunshineLoans identifies the relevant factor as being the making of adverse credibility findings in relation to Mr Powe's evidence at the first stage of the hearing, in circumstances where he will give further (disputed) evidence at the second stage of the hearing, this step aligns with what was found by the majority judges and is uncontroversial here. However, SunshineLoans' submissions go beyond this in two respects, neither of which assists it.

25 *First*, SunshineLoans identifies the factor as being adverse findings made against its witnesses generally (not just Mr Powe): see AS [30]-[31]. As none of its other witnesses are to give evidence at the second hearing, to express the factor in this way would seem to involve an attempt to resurrect its broader complaint that the primary judge might reasonably be seen to lack an impartial mindset on the whole question of penalty. So much is suggested by the concern that the primary judge's "instinct might be pre-formed" by his findings about the evidence of both Mr Bennetts and Mr Powe (AS [36(a)]), and

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[27] See *Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 218 at [42].

[28] For example, the second step is divided into two parts at AS [32]-[35] and [36]-[44]; and part of that second step (the logical connection) is then dealt with as part of the third step at AS [45] to [60].

also by the claimed need for the judge to "eliminate from his decision on penalty his belief that the appellant's witnesses were untruthful" (at AS [43]).

26 As explained at paragraph 7 above, an argument of that kind was rejected by the primary judge and by the Full Court on the notice of contention. It is without any merit for the reasons explained in those decisions.

27 *Second*, SunshineLoans seeks to characterise the primary judge's assessment of Mr Powe's (and other witnesses') evidence as being more extreme and far reaching than it was. It invokes the label of "extreme scepticism" in an attempt to align this case with the very different situation considered in *British American Tobacco v Laurie*.[29] The primary judge's findings were made in the course of hearing one and the same case. They were appropriately calibrated to the evidence before him, and the substance of the relevant adverse credit finding "was in a quite narrow compass, directed to the unsuccessful attempt by Mr Powe to recharacterise the basis for the impugned charge to customers as being for an anticipated default, rather than for changing the agreement as to when a payment was to be made"; there was "no wider rejection of his evidence or impugning of his character beyond that limited, but important, topic".[30]

28 In making those adverse credit findings, his Honour made findings on a topic that was relevant to his conclusion in finding the contraventions to have been established, and directly relevant to the penalty to be imposed. But to do that was simply to do what was necessarily part of his task in deciding the case. The reasons why that is so were carefully and persuasively explained by the majority judges.[31] SunshineLoans does not identify any error in their Honour's understanding of the case, or any reason to doubt that the fair-minded lay observer would, at least in general terms, understand as much.

29 Seen in that context, the primary judge's findings went no further than was appropriate to ensure that the parties were fairly informed of his conclusion as to credit and able to participate in the next stage of the hearing with a proper understanding of that conclusion. In particular, he did not express himself in a way, or in a context, that suggested the possibility of any pre-judgment of the case then before him.[32]

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

[30] AJ [108] (Bromwich J).

[31] See paragraphs 15 to 15.3 above, and the passages there footnoted.

[32] Cf *BAT v Laurie* (2011) 242 CLR 283 at [145] (Heydon, Kiefel and Bell JJ).

Step 2 – the logical connection between that factor and the feared deviation from deciding the case on the merits.

30 SunshineLoans' argument on step 2 commences with it accepting the following starting point: when determining the appropriate penalty to be imposed on SunshineLoans, the primary judge will be required to conduct an instinctive synthesis which will take into account the earlier adverse credit findings with respect to Mr Powe (AS [32]), including the fact that he did not give evidence at the first hearing in an honest manner (AS [33]). SunshineLoans here accepts a key aspect of the majority judges' reasoning which it resisted below:[33] namely that the ordinary and proper course of hearing the case involves taking what was determined at the first stage of the hearing and carrying that through to the second stage in order to decide the case.[34]

31 From this starting point, SunshineLoans' description of the manner in which it says the primary judge would be required to determine the case is somewhat difficult to follow. The central proposition appears to be that the judge would be required to take his assessment of Mr Powe's evidence into account in determining the penalties and even (in some way) in assessing Mr Powe's further evidence (AS [32]-[33]) while, simultaneously, remaining in an impartial frame of mind in which those findings influence (in some other way) the credibility of, and weight to be given to, any further evidence from Mr Powe on the question of penalty (AS [36(b)] and [43]).

32 This argument was not put (at least not in any clear way) before the Full Court. Nonetheless, the majority judges' reasons provide the answer to it: in all of the circumstances of the case before the primary judge, and how it was to be resolved on its legal and factual merits, his Honour was not required to put the earlier findings out of his mind in the way now suggested by SunshineLoans, and so no reasonable observer could expect him to do so.

33 In endeavouring to make good this explanation of the "feared deviation", SunshineLoans makes a number of confounding submissions. Two examples illustrate the point.

34 *First*, it expresses concern about "[t]he 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"

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[33] See AJ [59]. See also Respondent's Book of Further Material, Tab 2 (Submissions of SunshineLoans dated 22 October 2024) at eg [23], [29].

[34] See paragraphs 15.1 to 15.3 above, and the passages there footnoted.

and how such findings might be used: AS [32]. But it identifies no findings "as to the appropriate weight to be given" to the earlier evidence. The weight to be given to Mr Powe's earlier evidence will therefore simply be determined in the ordinary way, having regard to the evidence as a whole at the second stage of the hearing. In that respect the prior adverse credit findings may well come to be relevant to assessing the credibility of evidence given in relation to penalty; it would be surprising if it were not.[35]

35 *Second*, it says that "the relevance of the earlier adverse findings to the penalty hearing is one of the issues that must itself be determined afresh and impartially at the penalty hearing": AS [34]. Again, it is far from clear what this means. The "relevance of the earlier adverse findings to the penalty hearing" has not been the subject of any conclusion by the primary judge; so to say that this must be "determined afresh and impartially" is confounding. Again, the primary judge has simply made findings of a kind that will be relevant to the penalty. Precisely how significant they will be in the penalty analysis will no doubt depend upon the further evidence (including from Mr Powe) and submissions that will be received at the further hearing on those matters.

36 These kinds of propositions then underpin a submission at AS [37] that "[t]he 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 the legal and factual merits using a 'frame of mind' in which judgment is suspended until all of the evidence relevant to the appropriate penalty has been adduced." That necessary "frame of mind" is developed at AS [38]-[42], including by reference to romantic poets and legal philosophers, in which information must be both taken into account, but also "suspended" from consideration. The end result of SunshineLoans' argument is that the judge must take into account the earlier credibility findings but must, at the same time and in some cognitively separate way, not be influenced by them when assessing the credibility of, and weight to be given to, Mr Powe's further evidence.

37 In these ways SunshineLoans' argument would have the primary judge (or any judge undertaking a bifurcated civil penalty proceeding) undertaking a form of mental gymnastics as to when and how prior adverse credit findings can be taken into account at the second stage of the hearing where a witness is called a second time. Unsurprisingly, this highly artificial reasoning process is unsupported by authority. SunshineLoans cites

[35] See, eg, *ACCC v We Buy Houses Pty Ltd (No 2)* [2018] FCA 1748 at [95]-[98] (Gleeson J).

both *Isbester* and *QYFM* as supporting the need for such a "frame of mind". But those cases do not assist it because they both concern a decision-maker who, by reason of a previous role in relation to the party, might have been perceived to have brought an adversarial frame of mind to their later decisions. Neither case suggests the need for a "frame of mind" with the kinds of cognitive nuance that SunshineLoans describes.

38 This error in SunshineLoans' argument is further exposed when regard is had to the position of the fair-minded lay observer. On that argument, not only is the primary judge subject to a series of confounding obligations as to how and when he may, or will be required, to have regard to his earlier credit findings, but the fair-minded lay observer is taken to understand those highly technical and nuanced matters. That proposition has more than an air of unreality about it.

39 In the result, the apprehended deviation SunshineLoans identifies is not a deviation at all. Rather, it will be no more than what the primary judge is required to do to determine the case on its factual and legal merits. As the majority judges explained, the primary judge's adjudication of the credibility of Mr Powe's penalty evidence, and the fixing of an appropriate penalty, was necessarily to be informed by the views he reached about Mr Powe's evidence at the first stage of the hearing, not independently of them. Those views were properly to be "carried forward" to the second stage of the hearing.[36]

40 The fair-minded lay observer would understand as much. They would understand the primary judge to be approaching the determination of penalty with an open frame of mind, until all evidence with respect to penalty is adduced. They would equally understand that the primary judge could be persuaded that Mr Powe was dishonest in aspects of his evidence concerning the nature and extent of the contraventions at the first stage of the hearing, whilst keeping an open mind on the ultimate question of penalty until any further evidence had been adduced. To accept as much is to accept what has long been understood in the context of criminal law proceedings, namely that the fair-minded lay observer would not reasonably apprehend bias when a judge might make a second credibility finding within a single proceeding.[37]

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[36] See paragraphs 15.1 to 15.3 above, and the passages there footnoted.

[37] See *R v Masters* (1992) 26 NSWLR 450 at 469-473 (especially 472G-473A) (Hunt CJ at CL, Allen and Badgery-Parker JJ); *R v Lars* (1994) 73 A Crim R 91 at 107 (Wood, Mathews and Badgery-Parker JJ). See also *R v Hutchinson* (unreported, Court of Criminal Appeal of the Supreme Court of South Australia, Coc, Duggan and Debelle JJ, 30 July 1993) at [21].

41 Accordingly, SunshineLoans has not demonstrated any error in the majority judges' approach to the second step.

Step 3 – reasonableness of the asserted apprehension of bias

42 Central to the *Ebner* test is the requirement that the fictitious observer is reasonable. The concern is as to what they "might reasonably apprehend", and the final stage of the inquiry is one of reasonableness. The need for reasonableness ensures an objective test which maintains public confidence in the judiciary.[38] In this case it can readily be concluded – from the fact that there is no logical connection between the earlier findings and an apprehended deviation from deciding the case on its legal and factual merits – that the asserted apprehension of bias is not a reasonable one. However, it is appropriate more fully to address the question of reasonableness for two reasons. First, to answer the three matters which SunshineLoans relies upon as establishing a logical connection of a "reasonable" kind and, second, to show that any apprehension of bias would not be reasonable when the whole of the circumstances are viewed from the standpoint of the reasonable observer.

43 The three matters relied upon by SunshineLoans can be dealt with briefly.

44 ***Cognitive anchoring – AS [46]-[50].*** The primary judge will, of course, have regard to his views about the credibility of Mr Powe's earlier evidence. But as this is a necessary aspect of determining the case having regard to all matters relevant to penalty, there is no logical connection between this and an apprehended deviation from deciding the case on its merits, and certainly not a reasonable one.

45 ***Adversarial position – AS [51]-[54].*** It is simply not the case that a fair-minded lay observer might apprehend that "the primary judge formed an adversarial position as against Mr Powe": see [51]. His Honour was performing his judicial function in an entirely appropriate way and could not on any reasonable view be seen to have adopted the position of an "adversary". This part of SunshineLoans' argument seeks to build on the "sense of disquiet" which informed the reasoning in *QYFM*.[39] Yet that related to a case in which the judge had, in a prior position and a prior case, appeared against the party as an opponent in an adversarial contest. No such disquiet could reasonably arise here.

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[38] *Johnson* at [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[39] *QYFM* (2023) 279 CLR 148 at [49] (Kiefel CJ and Gageler J).

46 ***Institutional pressure for consistent fact-finding – AS [55]-[60].*** By this argument SunshineLoans contends that the primary judge might be seen to feel an institutional pressure – arising from the recognised need for consistency and finality in fact finding – to persist in a conclusion that Mr Powe was dishonest. It goes so far as to say that the observer "can reasonably apprehend that this institutional environment may also undermine judicial impartiality": AS [60]. That proposition should not be accepted. And even if something of that kind could reasonably be apprehended, it might be noted that the concern would be one that applied to all judges, not merely the primary judge. Thus the "institutional pressure" towards consistency and finality would mean that the earlier credit findings would bear just as heavily, perhaps in some ways more heavily, on a new judge faced with deciding the case.

47 Turning then to the broader context for assessing "reasonableness", the error in SunshineLoans' position is further reinforced by considering how the fair-minded lay observer would perceive a recusal having regard to ordinary judicial practice in the context of modern litigation, and the nature and context of the primary judge's decision at the first-stage of the hearing.

48 *First*, the fair-minded lay observer would not consider that a witness who was found to have given untruthful evidence in respect of whether they or their company had contravened the law must have some form of "clean slate" with respect to credit when giving evidence about matters affecting the penalty that should be imposed for the contravention. Indeed, the fair-minded lay observer would consider that to be a perverse approach, especially where the evidence given by the witness at the first hearing overlaps factually with that which will be given at the second. Rather, being both "fair-minded" and "lay", the observer would view the matter through a common-sense lens, and therefore expect the judge to approach the witness' further evidence on similar topics at the second hearing with a degree of caution, against the background of the witness having previously been found to have been unreliable and unwilling to give evidence in an honest manner. The fair-minded lay observer would, quite rightly, perceive that it would be productive of *injustice* for the judge to "eliminate from his decision on penalty his belief that [the witness had been] untruthful": cf AS [43].

49 *Second*, the fair-minded lay observer understands that a proceeding of this kind is conducted on the express basis, understood by all parties, that what happens in the first hearing is carried forward to, and provides the foundation for, the second hearing. That

being so, the fair-minded lay observer would perceive it to be unfair for one party, whose evidence is in certain respects rejected as being dishonest and unreliable at the first hearing, to effect the removal of the judge from hearing the second hearing because the party now wishes to avoid those findings being carried forward to the second hearing. At its most basic, the fair-minded lay observer would see this as an objection to the rules of the game, to which the party has previously agreed, at the point at which those rules no longer serve that party's interests. The unfairness this would occasion to the other party is obvious.[40]

50 *Third*, the fair-minded lay observer would appreciate that the primary judge, having heard all the evidence given at the first stage of the hearing, will be best placed to assess the evidence given at the second stage of the hearing and discharge the ultimate duty of fixing a penalty which will have an appropriate deterrent effect. They would view with concern a decision which removes the determination of penalty from the judge best-equipped to make that determination, where this is done on the basis that the judge had previously made findings on matters which any judge determining penalty will be required to take into account.[41]

51 The cumulative effect of these matters is that the fair-minded lay observer would view a judge recusing themselves for the reasons advanced by SunshineLoans as undermining, rather than enhancing, confidence in the fairness of the decision-making process and as "mak[ing] nonsense of the judicial system".[42]

B.4 Recusal required when apprehended bias not "firmly established"

52 The present case illustrates why recusal must be refused when it is not firmly established. It engages many of the well-recognised concerns which attend a too ready acceptance of an apprehended bias application, as can be seen from the following.

53 *First*, it will encourage the impression that litigants can 'choose their judges'. In this case it was very clear that SunshineLoans wished to avoid the case being decided by the primary judge in light of the views he had formed at the first hearing. Those views were formed impartially, fairly and without error, as the wholesale rejection of SunshineLoans'

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[40] See AJ [154] (Colvin J).

[41] See AJ [114]-[116] (Bromwich J).

[42] *R v Masters* (1992) 26 NSWLR 450 at 473 (Hunt CJ at CL, Allen and Badgery-Parker JJ).

appeal from that decision demonstrated.[43] Thus, as the original recusal application was originally framed, SunshineLoans can be seen to have been simply concerned that the judge would not be sympathetic to it in relation to penalty.[44] It seeks to relitigate some of those findings by calling further evidence from Mr Powe. The extent to which that is permitted, and how successful it is, will be a matter for the primary judge. But what should not be encouraged is the perception that, by choosing to put on further evidence from a witness who has previously been the subject of adverse credit findings, a party can have a "second bite of the cherry" and thereby avoid having the case resolved before a judge whom they consider to be unfavourable.[45]

54 *Second*, and relatedly, it would encourage the impression that litigants such as SunshineLoans can delay proceedings against them. In this case that delay is already of significant concern.[46] It would, self-evidently, be compounded were the matter to be reallocated.

55 *Third,* it will impose upon the Court, upon ASIC, and through them the public, the burdens and expense of a further hearing in which a new judge will need to be brought in and put in a position to fully understand and rule upon all of the matters relevant to penalty, which will invariably require that they familiarise themselves with, and possibly resolve further contest about, evidence received to date. That will divert the resources of the Court from other cases and other litigants. The burdens and implications of reconstituting a court parts way through a hearing are well recognised.[47]

56 Those burdens would become the more acute in a case such as the present, where SunshineLoans' further evidence from Mr Powe seeks to reagitate issues already the subject of findings from the first stage of the hearing that are to be relied upon by ASIC in relation to penalty.[48] The implications and complexities of that were recognised by Bromwich J (at AJ [144]-[115]). Considerations of fairness and finality make such

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43 See *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* [2025] FCAFC 34.

44 PJ [22]ff; Respondent's Book of Further Material, Tab 1 (Submissions of SunshineLoans dated 25 June 2024) at [14] and [69]; and Tab 2 (Submissions of SunshineLoans dated 22 October 2024) at [11]-13] and [16]-[18], [20]-[29] and [37]-[38].

45 See eg *Rajski v Wood* (1989) 18 NSWLR 512 at 519 (Kirby P, Priestley JA and Hope AJA agreeing).

46 The proceedings were originally commenced over three years ago, on 6 June 2022. The contravening conduct took place between 1 July 2016 and 2 November 2020.

47 See eg *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642 at 648 (Kirby P).

48 See AJ [69] (Bromwich J).

revisiting an undesirable course.[49] In this regard preventing too-ready a decision to recuse might be seen as part of what has been described in a different context as the systemic "control of the natural desire of a losing party to use every available means of overturning an adverse decision."[50]

57 *Fourth*, a decision that recusal was required in this case may have significant consequences for the two-stage hearing process which is routinely used in civil regulatory cases (and for that matter criminal cases). It might lead to a larger number of cases in which all issues were heard at a single hearing (with the obvious attendant inefficiencies and complexities). Or further, it might lead to a larger number of civil penalty cases in which judges are obliged to recuse themselves (possibly by the device of a litigant, disappointed on receipt of a liability decision, putting on further evidence from a discredited witness), again causing obvious inefficiencies and complexities. It is not difficult to imagine cases in which the burden of a recusal would be very great indeed,[51] and such cases would further present difficult procedural questions for the new docket judge if a party sought to revisit aspects of the original judge's findings. Or, further still, it might lead judges to moderate how they express views as to the credibility of a witness, thus denying the parties a full and complete understanding of the basis upon which the judge found that a contravention had occurred and, in that way, reducing their capacity to present the case they might otherwise have wished to present at the second stage of the hearing.[52] Moreover, the public would then be deprived of the judge's true reasons for finding that a contravention occurred, which is itself at odds with the fundamental principle that justice must both be done and seen to be done.[53] Other participants in the relevant industry will be in the same position, which is likely to obscure the deterrent message which the judge's reasons would otherwise deliver.

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[49] See eg *Mayfair Wealth Partners Pty Ltd v ASIC* [2022] FCAFC 170 at [193]-[196] (Jagot, O'Bryan and Cheeseman JJ).

[50] AM Gleeson QC, 'Finality' (Sir Maurice Byers Lecture) 10 April 2023, published in *Bar Association News* (Winter 2013) at 36.

[51] Examples of civil proceedings involving complex and voluminous evidence include: *ACCC v Cement Australia Pty Ltd* (2013) 310 ALR 165; *ACCC v Air New Zealand Limited* (2014) 319 ALR 388; *ASIC v Westpac Banking Corporation (No 2)* [2018] FCA 751; *Transport Workers' Union of Australia v Qantas Airways Limited* [2021] FCA 873; (2021) 308 IR 244; *ACCC v BlueScope Steel Limited (No 5)* [2022] FCA 1475; *Fair Work Ombudsman v Woolworths Group Limited; Fair Work Ombudsman v Coles Supermarkets Australia Pty Ltd; Baker v Woolworths Group Limited; Pabalan v Coles Supermarkets Australia Pty Ltd* [2025] FCA 1092.

[52] See AJ [119]-[120] (Bromwich J); [149] (Colvin J).

[53] See, eg, *Johnson v Johnson* (2001) 201 CLR 488 at [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

58 For all of these reasons the Full Court was correct, having concluded that apprehended bias was not firmly established, to have overturned the primary judge's recusal decision.

PART VII: ESTIMATE OF TIME

59 It is estimated that 2 hours will be required for the Respondent's oral argument.

Dated: 18 September 2025

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **SUNSHINELOANS PTY LTD**
Appellant

and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
Statutory provisions					
1.	*National Consumer Credit Protection Act 2009* (Cth)	Compilation 23 (in force 23 June 2020 to 17 December 2020)	ss 47, 166, 167, 177 Sch 1 (the *National Credit Code*), ss 23A, 24, 31A	Version in force as at 2 November 2020 (the end of the relevant period).	1 July 2016 to 2 November 2020 (relevant period for pleaded contraventions).
2.	*Federal Court of Australia Act 1976* (Cth)	Compilation 59 (current)	s 21	Provisions in force at all relevant times.	1 July 2016 to 2 November 2020