



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

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 OUTLINE OF ORAL SUBMISSIONS**Part I: Certification**

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. The five integers of the test set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [2000] HCA 63 (**Vol 4, Tab 10**) (as rearticulated in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 CLR 148, [2023] HCA 15 at [38] (**Vol 4, Tab 13**) and affirmed in *Director of Public Prosecutions (Vic) v Smith* (2024) 98 ALJR 1163, [2024] HCA 32 at [92] (**Vol 5, Tab 19**)) apply to each of the two alternative apprehended deviations for which the appellant contends.

The apprehended deviation in respect of the question of the appropriate penalty

3. In respect of the first alternative apprehended deviations, “the question” which is apprehended to be determined “other than on its legal and factual merits” (the **relevant question**) is: What is the appropriate penalty to achieve specific and general deterrence? (**AS [32], [36(a)]**)
4. The **factor** which might lead the judge to resolve the question of penalty other than on its legal and factual merits is: the Primary Judge’s reasons, including as to the

credibility of the appellant's witnesses, and their evidence. The fair-minded lay observer can rationally and reasonably understand from the Primary Judge's reasons, which they understand go beyond a finding of contravention, that the primary judge has an antipathy to the appellant's defence of the alleged contravention, even indignation. (AS [30]-[31]).

5. The **apprehended deviation** is that the Primary Judge's strongly worded criticism and dismissal of the appellant's defence and its witnesses evidence a frame of mind towards the appellant which will preclude the Primary Judge determining penalty on its legal and factual merits (AS [43]-[44]). The observer understands that in accordance with his judicial oath the Primary Judge will conscientiously seek to set aside any conclusions he has reached about the appellant which travel beyond finding that it contravened, but cannot prevent the subconscious operating (AS [39]). The observer might apprehend that, a judge who considers the appellant "had adopted a deliberately obtruse attitude" and has rejected the evidence of the appellant's witnesses in the strongest terms may well have moved to a position of opposition to the appellant (AS [37]-[43]).
6. The observer might **reasonably** consider that the Primary Judge's frame of mind towards the appellant as revealed in his reasons is incompatible with the impartiality required in the determination of penalty (AS [44]).
7. There is a **logical connection** between the Primary Judge's findings as to credibility at the liability hearing, and the **fear** that the Primary Judge will decide penalty otherwise than on its legal and factual merits when one has regard to the factors relevant to penalty (on which the appellant is entitled to adduce evidence) (RS [6]).
8. The Primary Judge's reasons considered by the fair-minded lay observer understanding the Primary Judge's dismissal of the evidence of the appellant's witnesses, make apparent the reasonableness of the observer's possible perception.

The apprehended deviation in respect of the question of the credibility of Mr Powe's penalty evidence

9. In respect of the second alternative apprehended deviations, the **relevant question** is: What is the credibility of, and the weight to be given to, the evidence that Mr Powe is to adduce at the Penalty Hearing? (AS [36](b))
10. The **factor** which might lead the judge to resolve the question of penalty other than on its legal and factual merits is: the fact that the Primary Judge has already made, and

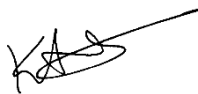
reached a state of actual persuasion in respect of, findings as to the credibility and character of Mr Powe as a witness (AS [30]-[31], RS [8]).

11. There is an **apprehended risk** that the making of the credibility findings concerning Mr Powe might leave the Primary Judge unable to return to the sufficiently impartial state of suspended judgment in which he is to evaluate Mr Powe's second tranche of evidence (AS [37]-[40]).
12. There are three alternative and cumulative **logical connections** by which the making of the earlier credibility findings might prompt the fair-minded lay observer to apprehend that the Primary Judge might not consider the credibility of Mr Powe's evidence in the necessary suspended state of judgment. These concern cognitive anchoring, the apprehension that the Primary Judge took an adversarial position in respect of Mr Powe and the subconscious pressure that the institutional pressure to maintain consistency in fact-finding imposes (AS [45]-[60]).
13. The logic of those connections is not undermined simply because the Primary Judge's credibility findings might be relevant to issues in dispute at the Penalty Hearing (as the majority reason particularly at CAB65 [101] and CAB 80 [161]). The issue of whether the earlier credibility findings should be "carried forward" to the Penalty Hearing is itself an issue that needs to be determined as part of the relevant question (RS [7]-[8]).
14. An illustration of **the reasonableness of the fair-minded lay observer's apprehension** is the fact that both the respondent in this Court, and the majority below, assumed that the Primary Judge's credibility findings would necessarily be relevant to the Court's assessment of Mr Powe's evidence on penalty. There is therefore every chance that the observer might apprehend that the Primary Judge who made those findings would, at the very least, subconsciously carry those findings into his determination of the relevant question; even if the rules of evidence (eg concerning tendency evidence or prior inconsistent statements) do not permit them to be, and even if the evidence of Mr Powe does not provide a basis for them to be, so carried (AS [43]-[44]).

Dated: 16 October 2025



Michael D Wyles



Kateena A O'Gorman