HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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 OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

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

(a) Legal context understood by the fair-minded lay observer (RS [4]-[6], [11], [15])

2. The primary judge directed, and SunshineLoans accepted, that this civil penalty case be heard in two stages. The fair-minded lay observer can be taken to understand the ordinary judicial practice and the statutory context for this two-stage hearing process.

3. ***Ordinary judicial practice.*** In a contested civil penalty case it is usual to first determine what contraventions have been made out and then determine the penalties to be imposed for those contraventions. That approach secures both fairness and efficiency. (**CAB Tab 4 [54]-[56], [140]-[147]; see also [28]**)

4. ***Statutory provisions.*** The Credit Act requires a court to have regard to "all relevant matters" in setting a penalty of appropriate deterrent value. Many of those matters will be determined by findings made at the first stage of the hearing. Accordingly, the case proceeds on the basis that relevant findings made at the first stage will form part of the penalty assessment at the second stage. These may include findings about the stance of the respondent and the credibility of its witnesses at that hearing. (**CAB Tab 4 [52]-[53], [58]-[59], [111]-[113]; [148]-[151]; see also [25]-[26]**)

   - *National Consumer Credit Protection Act* ss 166, 167 (**Vol 1 Tab 3, p 298-299**)
   - *Pattinson* (2022) 274 CLR 450 at [15]-[19], [58], [60] (**Vol 4 Tab 6**)

5. The majority found that the fair-minded lay observer would understand such matters, at least in a general way (**CAB Tab 4 [82], [122], [124]; [139], [145], [148], [152]**). That conclusion accords with the conventional approach to the fair-minded lay observer.

   - *Johnson v Johnson* (2000) 201 CLR 488 at [13], [55] (**Vol 4 Tab 12**)
   - *Isbester v Knox City Council* (2015) 255 CLR 135 at [23] (**Vol 4 Tab 11**)
   - *CNY17* (2019) 268 CLR 76 at [20]; [58]-[59], [94]; [135], [140] (**Vol 4 Tab 9**)
   - *DPP (Vic) v Smith* (2024) 98 ALJR 1163 at [91]-[95] (**Vol 5 Tab 19**)

(b) Ebner step 1 – identification of the relevant factor (RS [24]-[29])

6. SunshineLoans makes two arguments, which engage somewhat different considerations as to why the primary judge might resolve the case other than on its merits, namely:

   6.1. a **broad argument** based on the findings about the credibility of Mr Simmons, Mr Bennetts and Mr Powe (see eg **AS [9], [31], [36(a)]; AR [2]-[3]**) – on that argument the relevant factor is simply the nature of the findings made;

   6.2. a **narrow argument** based on its intention to lead further evidence from Mr Powe (see eg **AS [10], [32], [36(b)]; AR [7]**) – on that argument the relevant factor is that his credibility will again be in issue, in circumstances where adverse findings have been made about his earlier evidence.

7. On both arguments, the primary judge's adverse findings must be viewed in the context of his decision, and how he dealt with the arguments SunshineLoans chose to advance.

   - *ASIC v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345 (**Vol 5 Tab 18**)
   - *SunshineLoans* (2025) 308 FCR 474 at [23], [40]-[44], [176]-[181] (**Vol 5 Tab 25**)

(c) Ebner step 2 – no logical connection (RS [30]-[41])

8. As to the broad argument, there is no logical connection between the credibility findings and the feared deviation from deciding the case on the merits. This is because the judge should *not* "eliminate from his decision on penalty his belief that the appellant's witnesses were untruthful": cf **AS [44]**. On the contrary, those findings are relevant to deterrence. Both the primary judge and the majority were right to reject that argument. (**CAB Tab 2 [22]-[47]; CAB Tab 4 [127], [134], [167]**)

9. On SunshineLoans' narrow argument there is, for the same reason, no logical connection established. The findings about Mr Powe's earlier evidence will be relevant to penalty and, in that context, to assessing his further evidence. Again, the majority was correct to reject that argument. (**CAB Tab 4 [122]-[126]; [148]-[151], [164]**)

10. SunshineLoans' argument is not supported by the "nuanced" state of mind which it says is required: **AR [8]**. Rather, common sense and judicial experience deny that approach.

    - *We Buy Houses Pty Ltd (No 2)* at [25], [94]-[98], [144] (**Vol 5 Tab 17**)
    - *R v Masters* (1992) 26 NSWLR 450 at 469-473 (**Vol 5 Tab 24**)
    - *R v Lars* (1994) 73 A Crim R 91 at 106-108 (**Vol 5 Tab 23**)
    - *R v Hutchinson* (unreported, SASC, 30 July 1993) at 12 to 17 (**Hand up**)

(d) Ebner step 3 – reasonableness (RS [42]-[51])

11. It follows from the absence of a logical connection that any apprehension of bias could not be a reasonable one. In that context, what is reasonable will depend on the totality of the circumstances and the underlying concern to ensure public confidence in the judiciary.

- *CNY17* (2019) 268 CLR 76 at [21] (**Vol 4 Tab 9**)
- *Webb v The Queen* (1994) 181 CLR 41 at 51-2, 68 (**Vol 4 Tab 14**)
- *Johnson v Johnson* (2000) 201 CLR 488 at [12], [41], [52] (**Vol 4 Tab 12**)
- *Ebner* (2000) 205 CLR 337 at [65] (**Vol 4 Tab 8**)

12. The hypothetical observer would understand, from the totality of the circumstances, that the judge was doing no more than resolving the case in the manner agreed by the parties at the outset and in accordance with what was always understood to be his function. For the judge to recuse himself in that situation would not promote confidence in the judicial system. (**CAB Tab 4 [152]-[154]**)

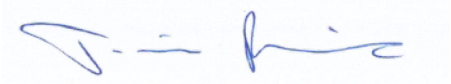
(e) Duty to sit unless apprehended bias firmly established (RS [52]-[58])

13. A conclusion of apprehended bias must be firmly established and should not be reached lightly. Where it is not so established, judges must discharge their duty to sit.

- *QYFM* (2023) 279 CLR 148 at [29], [277]-[278] (**Vol 4 Tab 13**)
- *Ebner* (2000) 205 CLR 337 at [19]-[20] (**Vol 4 Tab 8**)

14. Apprehended bias is not established here, much less firmly so. In those circumstances the primary judge's recusal would have unwarranted deleterious effects on the administration of justice by (i) encouraging the impression that SunshineLoans had successfully influenced the composition of the court by excluding a judge whom it considered to be unfavourable; (ii) encouraging the impression that a litigant could use unmeritorious apprehended bias applications to obfuscate and delay; (iii) creating unnecessary burdens for the parties and the court; and (iv) encouraging the impression that it will be possible for a disappointed party to revisit, before a new judge, findings made at the first hearing.

Dated 16 October 2025



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