FEDERAL COURT OF AUSTRALIA

SunshineLoans Pty Ltd v Australian Securities and Investments Commission (No 2) [2025] FCAFC 60

Appeal from:	*Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345
File number:	QUD 437 of 2024
Judgment of:	**PERRAM, BROMWICH AND COLVIN JJ**
Date of judgment:	24 April 2025
Catchwords:	**COSTS** - indemnity costs sought by respondent - where appellant's appeal substantively unsuccessful - where respondent alleged unreasonable conduct by appellant in bringing the appeal, formulating appeal grounds and failing to engage with findings of primary judge - whether full indemnity as to costs justified in the circumstances - held appellant's conduct unreasonable in two substantial but not all respects - appellant ordered to pay percentage (90%) of respondent's costs as assessed on an indemnity basis
Legislation:	*National Consumer Credit Protection Act 2009* (Cth) Schedule 1 (*National Credit Code*)
Cases cited:	*Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 5)* [2021] FCA 246 *Australian Mud Company Pty Ltd v Coretell Pty Ltd (No 7)* [2017] FCA 1469 *Coshott v Burke (No 2)* [2018] FCAFC 81 *Jadwan Pty Ltd v Rae & Partners (A Firm)* [2023] FCAFC 182 *King v Yurisich (No 2)* [2007] FCAFC 51 *Latoudis v Casey* (1990) 170 CLR 534 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 2)* [2017] FCAFC 116 *Northern Territory v Sangare* [2019] HCA 25; (2019) 265 CLR 164 *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* [2025] FCAFC 34 *Swansdale Pty Ltd v Whitcrest Pty Ltd* [2010] WASCA 129 (S) *Yeo v Australian Securities and Investments Commission, in*

	the matter of Ji Woo International Education Centre Pty Ltd (No 3) [2018] FCA 1749
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	22
Date of hearing:	Determined on the papers
Counsel for the Appellant:	Mr APJ Collins
Solicitor for the Appellant:	O'Shea Lawyers
Counsel for the Respondent:	Mr MT Brady KC with Mr SJ Cleary
Solicitor for the Respondent:	Gadens Lawyers

ORDERS

QUD 437 of 2024

BETWEEN:	**SUNSHINELOANS PTY LTD (ACN 092 821 960)** Appellant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Respondent

ORDER MADE BY:	**PERRAM, BROMWICH AND COLVIN JJ**
DATE OF ORDER:	**24 APRIL 2025**

THE COURT ORDERS THAT:

1. The appellant pay 90% of the respondent's costs of the appeal as assessed on an indemnity basis.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 The Australian Securities and Investments Commission alleged that SunshineLoans Pty Ltd contravened the *National Credit Code*. Sunshine defended the proceedings. In addition to advancing a defence on the merits, it maintained that the Court lacked jurisdiction to entertain the proceedings. Sunshine failed on its jurisdiction points and on the merits. It brought an appeal in which it maintained the jurisdiction points and also advanced many other grounds of appeal.

2 Sunshine's appeal was substantively unsuccessful: *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* [2025] FCAFC 34.

3 In the course of oral submissions in the appeal, the Court raised an issue as to the appropriate form in which declaratory relief should be expressed. In the result the declaratory orders of the primary judge were set aside and orders were made to the same substantive effect but expressed in terms that made clear the extent to which the declarations related to conduct that may be the subject of pecuniary penalties. Save for that limited aspect, the appeal was dismissed.

4 ASIC now seeks an order that Sunshine pay its costs of the appeal on an indemnity basis. Sunshine says that the appropriate order is that it should bear the costs of the appeal on a party and party basis.

5 The submissions for ASIC rely upon the following matters:

(1) Sunshine's jurisdictional contentions were a central part of its appeal and the points raised were hopeless;

(2) the jurisdictional points were exposed as meritless by the primary judge and they should not have been pursued on appeal;

(3) the other grounds of appeal were doomed to fail;

(4) there was unreasonable conduct by Sunshine in the formulation of the grounds of appeal and in failing to articulate what the primary judge should have found; and

(5) there were statements in the appeal reasons that were critical of the way in which the appeal was conducted by Sunshine.

6 Relevant principles concerning the circumstances in which costs may be awarded on an indemnity basis were summarised in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 2)* [2017] FCAFC 116 at [3]-[5] (Jagot, Yates and Murphy JJ). Broadly, there must be 'some special or unusual feature' that means that costs were imposed unreasonably on the party who seeks the indemnity costs order. As with all costs orders, the purpose remains compensatory not punitive: *King v Yurisich (No 2)* [2007] FCAFC 51 at [19] (Sundberg, Weinberg and Rares JJ) citing *Latoudis v Casey* (1990) 170 CLR 534 at 543 (Mason CJ), 563 (Toohey J), 567 (McHugh J). Generally speaking, indemnity costs orders are only imposed where it is clear that there has been unreasonable conduct that has added to the cost burden of the proceedings: *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 5)* [2021] FCA 246 at [11] (Wigney J).

7 Sunshine advances the following reasons as to why an indemnity costs order is not appropriate:

(1) there was benefit derived from the Full Court considering the appropriate structure of the declarations;

(2) as to matters other than the jurisdiction points, there has been no finding that the points advanced were hopeless or doomed to fail;

(3) as to one of the jurisdiction points, there was no adverse finding as to a lack of merit in the point and the point led the Court to identify matters relating to the proper formulation of the declarations;

(4) as to the criticisms in the appeal reasons: 'it cannot be consistent with authority that simply because there are criticisms relating to some matters pursued on appeal, that somehow indemnity costs should be imposed for the totality of the appeal';

(5) there was no offer to settle put before the Court; and

(6) where there were some grounds that were arguable and different declarations were made to those of the primary judge, there was still a need for appeal costs to be incurred and there is no justification for indemnity costs simply because there has been some criticism of the conduct of the appeal.

8 As to the changes to the declarations, the submission advanced by Sunshine is fallacious in suggesting that there was some form of relevant benefit derived from the different terms in which the declaratory relief was expressed that might bear upon costs. The issue in relation to the declarations, had it been identified by Sunshine, would not have justified an appeal. It was a very short point raised by the Court during oral submissions. It concerned only the terms in

which declaratory relief should be expressed. It did not call into question any aspect of the findings of fact or law by the primary judge. There was no substantive change to the position of either party arising from the different wording. The additional costs incurred by the parties in addressing the point when raised would be negligible in the overall costs of the appeal.

9 As to the jurisdiction points, there were two points raised. As to the first, we concluded at [110]:

> Sunshine's first jurisdictional point is hopeless. Competent consideration of the point would have revealed it to be so. It should not have been advanced before the primary judge. Once its lack of merit was exposed by the reasoning of the primary judge, it most certainly should not have been the subject of an appeal.

See also [147].

10 As to the second, it concerned the significance of amendments being introduced to the relevant legislation that took effect on or after 13 March 2019. It was a point that was unduly focussed upon the transitional provisions. It failed to engage with the significance of the fact that prior to 13 March 2019 the same provisions existed. Ultimately, it was found to be without merit.

11 Most of the jurisdictional argument was taken up by the first point and the jurisdictional contentions occupied much of the appeal.

12 As to the other arguments advanced by Sunshine on the appeal, we found that 'having regard to the way in which the findings were reached by the primary judge there was an egregious failure to discharge the responsibilities of counsel to confine the case to the real issues and, in an appeal, to state the grounds "briefly but specifically"': at [141]. We were also critical of the way in which submissions were advanced on appeal: at [131], [138], [140], [145], [162], [163], [165]. These aspects meant that the appeal lacked the focus that is essential for the efficient disposition of appeal grounds. It meant that the appeal was longer and, in our assessment, was likely to have increased considerably the burden of responding to the appeal.

13 Nevertheless, despite these criticisms, we do not accept ASIC's characterisation of the matters traversed by Sunshine's other appeal arguments as being hopeless. We do not conclude that it was unreasonable to bring the appeal as to matters other than the jurisdictional points.

14 The remaining points raised by Sunshine in support of its position as to the appropriate costs order were straw men. ASIC relied upon the way in which the appeal was conducted and not upon any issue in relation to settlement offers to support the indemnity order. Further, it was

not suggested that simply because there were criticisms relating to some matters pursued on appeal that there should be indemnity costs as to the whole of the appeal. ASIC's submission was that there had been unreasonableness that infected the whole of the appeal.

15 Consequently, in our view there was unreasonable conduct by Sunshine in the conduct of the appeal in two substantial respects. First, there was the conduct in advancing the jurisdictional points, particularly the first of those points. Second, there was the way in which the appeal grounds and submissions were prepared and presented.

16 In our view, the unreasonable conduct would have accounted for a very considerable amount of ASIC's costs in respect of the appeal. That is because the first jurisdictional point occupied a considerable amount of the written and oral submissions and also because the lack of focus in the appeal meant that there was considerably more work to be done in answering the other parts of the appeal. These are substantial reasons in support of ASIC's position that there should be an award of indemnity costs.

17 However, we are not persuaded that these reasons justify an award of indemnity costs that would encompass all of the appeal costs. There remain costs in respect of which an award of indemnity costs would not be appropriate.

18 The Court has a broad discretion as to the form of the appropriate costs order. 'It is well established that the power to award costs is a discretionary power, but that it is a power that must be exercised judicially, by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation': *Northern Territory v Sangare* [2019] HCA 25; (2019) 265 CLR 164 at [24] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

19 In assessing lump sum awards of costs on a party and party basis, this Court frequently has regard to an appropriate percentage of the total costs incurred: see *Australian Mud Company Pty Ltd v Coretell Pty Ltd (No 7)* [2017] FCA 1469 at [34] (McKerracher J); and *Yeo v Australian Securities and Investments Commission, in the matter of Ji Woo International Education Centre Pty Ltd (No 3)* [2018] FCA 1749 at [27]-[30] (Gleeson J). That said, we note that this does not mean that a discount will always be appropriate: *Jadwan Pty Ltd v Rae & Partners (A Firm)* [2023] FCAFC 182 at [9(7)] (Markovic, Stewart and Anderson JJ). Even so, if party and party costs were to be assessed on a lump sum basis by reference to total costs incurred, it would be likely in most instances that the award would be in the range of 65% to 75% of total costs.

20 Further, if an order is made for costs to be assessed on an indemnity basis, it remains the case that the order does not authorise the recovery of costs that are unreasonable in amount or which have been unreasonably incurred: *Coshott v Burke (No 2)* [2018] FCAFC 81 at [21], [46]-[55] (Logan, Kerr and Farrell JJ); and *Swansdale Pty Ltd v Whitcrest Pty Ltd* [2010] WASCA 129 (S) at [17] (Pullin JA and Kenneth Martin J). Consequently, an assessment of the costs that may be recovered under an indemnity costs order will usually result in something less than a full indemnity for all the legal costs incurred by the party.

21 Taking account of all these matters, in our view the appropriate course is for the costs to be assessed on an indemnity basis but then for a reduction to be applied to that indemnity to allow for the fact that, as to part of those costs, it has not been demonstrated that there should be a full indemnity.

22 For those reasons we would order that the appellant pay 90% of the respondent's costs of the appeal as assessed on an indemnity basis.

I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Perram, Bromwich and Colvin.

Associate: 

Dated: 24 April 2025