

FEDERAL COURT OF AUSTRALIA

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

File number: QUD 190 of 2022

Judgment of: **DERRINGTON J**

Date of judgment: 12 April 2024

Catchwords: **CONSUMER LAW** – action by regulator under *National Consumer Credit Protection Act 2009* (Cth) for contraventions of the *National Credit Code* – where respondent carries on business of providing small amount credit contracts – whether fee contained in small amount credit contracts permitted to be imposed under the *National Credit Code* – where fee described as an “amendment” or “rescheduled payment” fee – alleged contraventions of ss 24(1A)(a) and (b) of the *National Credit Code* and s 47(1)(d) of the *National Consumer Credit Protection Act* – hearing in relation to liability only – contraventions established

CONSUMER LAW – standing and jurisdiction – whether the court has jurisdiction to consider the regulator’s allegations – where it was submitted that the regulator lacked standing to enforce the civil penalty provisions contained in the *National Credit Code* through ss 166, 167 and 177 of the *National Consumer Credit Protection Act* – arguments rejected – no lack of standing or jurisdiction

CONSUMER LAW – evidence – whether court permitted to make findings beyond individual loan files contained in evidence – where respondent made admissions as to the number of times the impugned fee was charged and accepted by it

Legislation: *Acts Interpretation Act 1901* (Cth)
Australian Securities and Investments Commission Act 2001 (Cth)
Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth)
Corporations Act 2001 (Cth)
Evidence Act 1995 (Cth)
Federal Court of Australia Act 1976 (Cth)

Financial Sector Reform Act 2022 (Cth)
Judiciary Act 1903 (Cth)
National Consumer Credit Protection Act 2009 (Cth)
Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth)
Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth)
National Consumer Credit Protection Bill 2009 (Cth)

Cases cited:

AMS v AIF (1999) 199 CLR 160
Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3) (2012) 213 FCR 380
Australian Securities and Investments Commission v BHF Solutions Pty Ltd (2022) 293 FCR 330
Australian Securities and Investments Commission v Channic Pty Ltd (No 4) [2016] FCA 1174
Australian Securities and Investments Commission v Dunjey [2023] FCA 361
Australian Securities and Investments Commission v Ferratum Australia Pty Limited (in liq) [2023] FCA 1043
Australian Securities and Investments Commission v Hellicar (2012) 247 CLR 345
Australian Securities and Investments Commission v Membo Finance Pty Ltd (No 2) [2023] FCA 126
Australian Securities and Investments Commission v PE Capital Funds Management Ltd (administrators appointed), in the matter of PE Capital Funds Management Ltd (administrators appointed) (2022) 159 ACSR 1
Australian Securities and Investments Commission v Rent 2 Own Cars Australia Pty Ltd (2020) 147 ACSR 598
Australian Securities and Investments Commission v SunshineLoans Pty Ltd [2023] FCA 640
Australian Securities and Investments Commission v TAL Life Ltd (No 2) (2021) 389 ALR 128
Australian Softwood Forests Pty Ltd v Attorney-General (NSW) ex rel Corporate Affairs Commission (1981) 148 CLR 121
Briginshaw v Briginshaw (1938) 60 CLR 336
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337
Corporate Affairs Commission (NSW) v Transphere Pty Ltd (1988) 15 NSWLR 596
Foster v Jododex Australia Pty Ltd (1972) 127 CLR 421
Hobart International Airport Pty Ltd v Clarence City

Council (2022) 399 ALR 214
Independent Commission Against Corruption v Cunneen
(2015) 256 CLR 1
*J Hutchinson Pty Ltd v Australian Competition and
Consumer Commission* [2024] FCAFC 18
Mango Media Pty Ltd v Velingos (2008) 216 FLR 176
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd
(2015) 256 CLR 104
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992)
67 ALJR 170
Nguyen v The Queen (2020) 269 CLR 299
Seven Network Ltd v News Ltd (2009) 182 FCR 160
*SunshineLoans Pty Ltd v Australian Securities and
Investments Commission* [2023] FCA 707
SZTAL v Minister for Immigration and Border Protection
(2017) 262 CLR 362
*Technical Products Pty Ltd v State Government Insurance
Office (Qld)* (1989) 167 CLR 45
*Unique International College Pty Ltd v Australian
Competition and Consumer Commission* (2018) 266 FCR
631
Beatty and Smith, *Annotated National Credit Code* (2014,
5th ed, Lexis Nexis Butterworths)

Division: General Division
Registry: Queensland
National Practice Area: Commercial and Corporations
Sub-area: Regulator and Consumer Protection
Number of paragraphs: 348
Date of hearing: 17 – 20 July, 4 September and 11 October 2023
Counsel for the Applicant: Mr M Brady KC with Mr S Cleary
Solicitor for the Applicant: Gadens
Counsel for the Respondent: Mr M Wyles KC with Mr A Collins and Ms S Gibson
Solicitor for the Respondent: O’Shea Lawyers

ORDERS

QUD 190 of 2022

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Applicant

AND: **SUNSHINELOANS PTY LTD (ACN 092 821 960)**
Respondent

ORDER MADE BY: **DERRINGTON J**

DATE OF ORDER: **12 APRIL 2024**

THE COURT ORDERS THAT:

1. The matter be listed for a case management hearing to set a timetable for the hearing on relief.
2. Costs be reserved for determination following the determinations in relation to relief.

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

REASONS FOR JUDGMENT

DERRINGTON J:

INTRODUCTION

- 1 By these proceedings, the Australian Securities and Investments Commission (ASIC) as the regulator with responsibility for the enforcement of the *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) seeks relief against SunshineLoans Pty Ltd (Sunshine Loans) in respect of alleged contraventions of the NCCPA in the course of its money lending business. Specifically, ASIC alleges that Sunshine Loans charged its customers, who had entered into “small amount credit contracts” (as defined in the NCCPA) certain fees which were prohibited. The relief sought by ASIC includes injunctions and declarations of contravention, as well as the imposition of civil penalties.
- 2 Sunshine Loans denies the alleged contraventions and claims that the fees in issue, which were referred to in its contracts with its customers variously as an “Amendment fee” or a “Rescheduled payment fee” were, in fact, fees which were payable on the customers’ default and so permitted under the legislation. It further alleges that ASIC does not have standing to bring the proceedings and, consequently, that this Court does not have jurisdiction to hear the matter. This latter issue was raised in the course of the interlocutory steps in these proceedings, though it was not until shortly before the commencement of the trial that Sunshine Loans sought to properly agitate the issue by seeking to have it determined separately by a Full Court. Its attempts to do so failed: see *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [2023] FCA 640 (with leave to appeal from that decision being refused in *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* [2023] FCA 707). It subsequently sought to raise the issue as an initial point at the commencement of the proceedings. That was allowed and, after hearing from the parties on it, the determination of that question was reserved and the hearing of the evidence in relation to the issues of liability continued.
- 3 These reasons deal with both the initial question of standing and the question of liability. For the purposes of explaining the issues raised in relation to standing, it is necessary to attribute some nomenclatures to the legislation under consideration. The abbreviation “NCCPA” will be a reference to the whole of the *National Consumer Credit Protection Act*, whilst the

expression the “*Credit Act*” will refer to that Act save for Sch 1, which is the *National Credit Code*. In turn, the *National Credit Code* will be referred to simply as the “*Credit Code*”.

4 Before turning to the issue of standing, it is useful to provide some background to the proceedings which contextualise how that issue and the question of jurisdiction arises.

BACKGROUND

5 Sunshine Loans operates a business as a credit provider of small amount credit contracts, which is regulated by the *Credit Code*.

6 Since 7 January 2011, it has held an Australian credit licence and it appears to have been a not insubstantial provider of small amount credit contracts in the Australian market.

7 During the period from 1 July 2016 to 2 November 2020 (hereinafter referred to as the “Relevant Period”), it utilised, and issued to its customers, five different versions of small amount credit contracts. Each of those versions contained, essentially, the same terms. For convenience, the five iterations of the small amount credit contracts utilised by Sunshine Loans will be referred to in these reasons as the “SACCs”.

8 The SACCs provided for the payment of various fees upon the occurrence of different events, including, relevantly, an “Amendment fee” or a “Rescheduled payment fee”, which ASIC asserts were not permitted under the NCCPA.

9 In its second further amended originating application, ASIC seeks 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) (*Federal Court Act*), for declarations, injunctions and the payment of pecuniary penalties arising from alleged contraventions by Sunshine Loans of ss 23A(1), 24(1A) and 31A(1) of the *Credit Code* and s 47(1)(d) of the *Credit Act*. Although ASIC initially made claims in relation to s 31B of the *Credit Code*, those claims were withdrawn in the course of the trial.

10 The immediately following reasons concern the issue of ASIC’s standing to seek that relief, and the related issue of the Court’s jurisdiction to grant it. As they reveal, Sunshine Loans’ submissions in relation to the question of standing are founded on a misconstruction of the definition of a “civil penalty provision” contained in the NCCPA. Its propounded construction would have the effect of rendering a number of sections in the *Credit Code* which impose civil penalties unenforceable as such. Conversely, a construction of the definition based on an ordinary and natural meaning of the words used avoids that capricious result.

STANDING AND JURISDICTION

11 In brief, Sunshine Loans submitted that ASIC has no standing under ss 166 and 167 of the *Credit Act* to enforce the civil penalty provisions found in the *Credit Code*, with the consequence that there was no justiciable issue between the parties such that the Court had no jurisdiction to hear the matter. It was not suggested that the Court lacked jurisdiction to determine whether or not it did have jurisdiction.

12 Sunshine Loans also submitted that ASIC does not have power to seek an injunction under s 177 of the *Credit Act* to direct Sunshine Loans to comply with the credit legislation where the conduct ASIC alleges Sunshine Loans has engaged in, or is proposing to engage in, constitutes or would constitute a contravention of the *Credit Code* rather than the *Credit Act*.

13 Mr Brady KC, counsel for ASIC, did not contest the proposition that if the alleged contraventions of provisions of the *Credit Code* could not be enforced under s 166 of the *Credit Act*, ASIC would not have standing, and the Court would not have jurisdiction to consider ASIC's allegations in these proceedings.

14 This question of jurisdiction arises because the usual jurisdiction of the Court under s 39B(1A) of the *Judiciary Act 1903* (Cth) (*Judiciary Act*) is displaced by s 186 of the *Credit Act* which provides that Div 2 of Pt 4-3 of the *Credit Act*, which is concerned with the bringing of civil proceedings, applies to the exclusion of, *inter alia*, s 39B of the *Judiciary Act*. Section 187 of the *Credit Act* then confers civil jurisdiction on the Court in relation to civil matters arising under the Act. The Court's jurisdiction is thereupon dependent upon ASIC having standing to bring the proceedings. If ASIC is not entitled to a remedy against a party in the action, there would be no justiciable controversy to constitute a "matter" for the purposes of the exercise of federal jurisdiction: *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 399 ALR 214, 223 [31].

How the claimed lack of standing and jurisdiction arises

15 The substance of ASIC's allegations is that, during the Relevant Period, Sunshine Loans entered into SACCs which imposed a fee not permitted under the *Credit Act* and, thereafter, enforced its payment. In broad terms, it is alleged that the fee was either charged for varying the terms of the loan agreement, amending them by deferring a payment date, or for reorganising the dates on which repayments were due.

16 Section 31A(1) of the *Credit Code* prohibits, in relation to small amount credit contracts, the provision for, or imposition of, fees and charges if they are not of the type enumerated in that section, as follows:

31A Restrictions on fees and charges for small amount credit contracts

- (1) A small amount credit contract must not impose or provide for fees and charges if the fees and charges are not of the following kind:
 - (a) a permitted establishment fee;
 - (b) a fee or charge (a *permitted monthly fee*) that is payable on a monthly basis starting on the day the contract is entered into;
 - (c) a fee or charge that is payable in the event of a default in payment under the contract;
 - (d) a government fee, charge or duty payable in relation to the contract.

Note: See section 39B for the maximum amount that may be recovered by the credit provider if there is a default in payment under the contract.

17 Section 23A provides that a small amount credit contract must not impose a monetary liability on a debtor which is prohibited by the *Credit Code*, and s 24(1A) prohibits a credit provider from entering into a small amount credit contract on terms imposing a prohibited monetary liability or requiring or accepting payment in respect of such a prohibited monetary liability. The latter section imposes a civil penalty of 5,000 penalty units for any contravention. Each of those sections is set out below:

23A Prohibited monetary obligations—small amount credit contracts

- (1) A small amount credit contract must not impose a monetary liability on the debtor:
 - (a) in respect of an interest charge (including a default rate of interest) under the contract; or
 - (b) in respect of a fee or charge prohibited by this Code; or
 - (c) in respect of an amount of a fee or charge exceeding the amount that may be charged consistently with this Code.
- (2) If a provision of a small amount credit contract imposes a monetary liability prohibited by subsection (1) then:
 - (a) each provision (the *void provisions*) of the contract that imposes a monetary liability of a kind referred to in that subsection (whether or not the liability is imposed consistently with this Code) is void to the extent that the provision relates to the liability; and
 - (b) the debtor may recover as a debt due to the debtor any amount paid to the credit provider under the void provisions to the

extent that the amount relates to the liability.

24 Offences related to prohibited monetary obligations—credit providers

(1) ...

(1A) A credit provider must not:

- (a) enter into a small amount credit contract on terms imposing a monetary liability prohibited by subsection 23A(1); or
- (b) require or accept payment of an amount in respect of a monetary liability that cannot be imposed consistently with this Code.

Civil penalty: 5,000 penalty units.

18 Of critical importance to Sunshine Loans’ claim that ASIC lacks standing is s 166 of the *Credit Act* which is, in the first instance, the claimed source of ASIC’s power to make an application for the imposition of a civil penalty and for the Court to make a declaration in relation to any contravention found to have occurred. It is contained in Div 2 of Pt 4-1 of the *Credit Act*, entitled, “Declarations and pecuniary penalty orders for contraventions of civil penalty provisions”, in the following terms:

166 Declaration of contravention of civil penalty provision

Application for declaration of contravention

(1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for a declaration that the person contravened the provision.

Declaration of contravention

(2) The court must make the declaration if it is satisfied that the person has contravened the provision.

(3) The declaration must specify the following:

- (a) the court that made the declaration;
- (b) the civil penalty provision that was contravened;
- (c) the person who contravened the provision;
- (d) the conduct that constituted the contravention.

Declaration of contravention conclusive evidence

(4) The declaration is conclusive evidence of the matters referred to in subsection (3).

19 Sunshine Loans submitted that the reference to “a civil penalty provision” in s 166(1) is a reference to a provision that both meets the definition of that term in s 5(1) of the *Credit Act* and is contained in the *Credit Act*. It submitted that it does not extend to provisions which

satisfy the definitional requirements but which are located in the *Credit Code*. So the submission went, as ASIC’s attempt to enforce the *Credit Code* provisions under s 166 is erroneous, it has no standing to bring the proceedings, and the Court has no jurisdiction to hear the matter.

Relevant legislative provisions

20 In the course of submissions, the parties referred to numerous provisions in both the *Credit Act* and the *Credit Code* in support of their respective positions. It is not necessary to set them all out, but those which are of most relevance are extracted below.

21 Section 3 of the *Credit Act* makes provision for the *Credit Code* as follows:

3 The National Credit Code

Schedule 1 (which is the National Credit Code) has effect as a law of the Commonwealth.

22 The import of this section is not entirely clear. As a schedule to the *Credit Act*, there is little doubt that the *Credit Code* is an operative law of the Commonwealth: see s 13(1) of the *Acts Interpretation Act 1901* (Cth) (AIA). In any event, s 3 seems to remove any doubt about that.

23 Section 4 of the *Credit Act* identifies the purpose of the Part of which it is a section, in the following terms:

This Part is about the terms that are defined in this Act (other than the National Credit Code). (For the terms that are defined in the National Credit Code, see section 204 of that Code.)

Division 2 has the Dictionary (see section 5). The Dictionary is a list of every item that is defined in this Act (other than the National Credit Code). ...

24 Section 5 then provides definitions for numerous words and phrases used in the *Credit Act*. Specifically, the expression “civil penalty provision” is defined as follows:

5 The Dictionary

(1) In this Act (other than the National Credit Code):

...

civil penalty provision: a subsection of this Act (or a section of this Act that is not divided into subsections) is a ***civil penalty provision*** if:

- (a) the words “civil penalty” and one or more amounts in penalty units are set out at the foot of the subsection (or section); or
- (b) another provision of this Act specifies that the subsection (or section) is a civil penalty provision.

25 A further definition in s 5(1) concerns the expression, “National Credit Code”, and is as follows:

National Credit Code means Schedule 1 to this Act, and includes:

- (a) regulations made under section 329 for the purposes of that Schedule; and
- (b) instruments made under that Schedule.

26 Section 5(2) of the *Credit Act* provides:

- (2) In this Act (other than the National Credit Code), a reference to a provision is a reference to a provision of this Act, unless the contrary intention appears.

27 One of the issues which arose between the parties is the meaning of the expression, “this Act”, where it is used in the definition of “civil penalty provision”. That expression is also defined in s 5(1) as, “includes instruments made under this Act”. By s 13(1) of the AIA, the expression would normally include Sch 1, being the *Credit Code*, as it is a part of the Act.

28 The terms of ss 23A(1), 24(1A) and 31A(1) of the *Credit Code* are set out above.

29 Section 204 of the *Credit Code* is the definition section for the purposes of the *Credit Code*, and it similarly provides definitions for diverse words and phrases.

General nature of the submissions

30 In resolving the question of standing, it is not necessary nor practical to deal with each of the submissions raised by the parties. It suffices to observe that the parties had substantially different positions as to the manner in which the *Credit Act* and the *Credit Code* operate. Sunshine Loans submitted that the NCCPA has a dichotomous operation such that the *Credit Act* and the *Credit Code* operate separately and distinctly from each other. Conversely, ASIC submitted that the *Credit Code*, which is a schedule to the *Credit Act* and part of it, should operate in a harmonious and complementary manner.

Principles of construction

31 Although the resolution of the issues before the Court turns, in part, on the construction of the *Credit Act* and the *Credit Code*, there was little to no dispute about the principles applicable to the construction of the legislation in question. They were concisely articulated by the majority in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14]:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose.

Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

(Footnotes omitted).

32 Necessarily, context is also important to the process of construction. The context in which provisions are construed includes the statutory purpose. This was emphasised in *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 28 [57]:

... The technique of statutory construction is to choose from among the range of possible meanings the meaning which Parliament should be taken to have intended. Contrary to counsel’s submission, there was and is nothing impermissible about looking to the context in which s 8(2) appears or seeking guidance from the objects of the ICAC Act as stated in s 2A. Rather, as Mason J stated in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*, it was and is essential to do so:

“[T]o read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation; Attorney-General v Prince Ernest Augustus of Hanover*. Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.”

(Footnotes omitted).

33 It is axiomatic that in construing a provision, or provisions, of an Act, the interpretation which best achieves the purpose or object of the Act is to be preferred to each other interpretation: s 15AA AIA.

The proper construction of s 5(1) and s 166 of the Credit Act

A natural reading of the words used

34 On what might be said to be a natural reading of the words contained in the definition of “civil penalty provision” in s 5(1), the definition would pick up or include s 24(1A) of the *Credit Code* so that it was enforceable under s 166 of the *Credit Act*. If it is considered that the expression “this Act”, as used in the definition, refers to the *Credit Act* as well as the *Credit Code* (which is its schedule), the definition has the following effect:

- (a) The words in the chapeau to the definition, “[i]n this Act (other than the National Credit Code)”, have the effect that the definition of “civil penalty provision” only applies in respect of its use in the *Credit Act*;
- (b) Where the definition refers to “a subsection of this Act (or a section of this Act that is not divided into subsections)”, it includes the provisions of both the *Credit Act* and the *Credit Code*, because the words, “this Act”, would normally have that scope;
- (c) Section 24(1A) of the *Credit Code* is a “civil penalty provision” because it meets the requirements of the first limb of the definition — the words “civil penalty” and one or more amounts in penalty units are set out at the foot of the subsection (or section); and
- (d) Section 166 is a provision of the *Credit Act*, such that the definition is to be used in relation to it, with the consequence that a contravention of s 24(1A) of the *Credit Code* can be enforced by that section.

35 This construction gives the words in parentheses in the chapeau of s 5(1), “(other than the National Credit Code)”, appropriate work as it confines the operation of the defined term to only those provisions of the *Credit Act* and not further. Nevertheless, the definition of “civil penalty provision” is not confined to only those provisions of the type described in the *Credit Act* as opposed to the *Credit Code*.

36 This construction of the definition accords with the decision of Greenwood J in *Australian Securities and Investments Commission v Rent 2 Own Cars Australia Pty Ltd* (2020) 147 ACSR 598 (*ASIC v Rent 2 Own Cars*). That matter concerned, amongst other things, alleged contraventions of ss 17(4), 17(5), 23(1) and 32A of the *Credit Code* by a credit provider which provided credit through hire purchase contracts for the acquisition of used cars from its franchisees. In particular, issues were raised as to the extent to which the accessorial liability provisions operated in relation to the directors of the franchisor company. ASIC sought injunctive relief pursuant to s 177 of the *Credit Act* against those directors and the question that arose was whether s 169 of the *Credit Act*, which provided that a person who is involved in a contravention of a civil penalty provision is taken to have contravened that provision, applied in relation to contraventions of the relevant sections of the *Credit Code*. Greenwood J found that the words “this Act” in the second limb of the definition of “civil penalty provision” extended its operation to the *Credit Code*. In doing so he relied upon s 13 of the AIA which provides that “[a]ll material from and including the first section of an Act to the end of ... the last schedule of the Act ... is part of the Act.” His Honour observed at 623 [121]:

... Accordingly, putting to one side for the moment any engagement or operation of the first limb of the definition, a provision of the National Credit Code will constitute a civil penalty provision of the NCCP Act (and Code) if another provision of the NCCP Act (including the National Credit Code) “specifies” that a particular subsection or section “*is a civil penalty provision*”.

(Emphasis in original).

37 It is to be noted that the first limb of the definition was not relevant to the question before the Court.

38 His Honour reached the above conclusion that the expression “this Act” in subparagraph (b) of the definition included the *Credit Code* in the context of the observation (at 609 [52]) that s 5(1) was merely definitional of the words used in the *Credit Act* and must engage with a provision in that Act to have any operation. He observed that s 169 of the *Credit Act*, which applied to persons who were involved in a contravention of a civil penalty provision, encompassed persons who failed to comply with civil penalty provisions contained in the *Credit Code* because the expression “this Act” in the definition of “civil penalty provision” in s 5(1) of the *Credit Act* extended to all provisions of the NCCPA.

39 Although his Honour concluded that the provisions of the *Credit Code* in question in that case were not civil penalty provisions by operation of either of the limbs of the definition in s 5(1), he observed that the legislature had selected two methods (by reference to the two limbs in s 5(1)) of designating “civil penalty provisions” which it applied throughout both the *Credit Act* and the *Credit Code*.

40 Further support for the above conclusion is derived from reading the words of the definition in the context of the Act as a whole. Where the expression “this Act” is used in the legislation it must logically extend to the *Credit Act* and the *Credit Code* by reason of the operation of s 13(1) of the AIA. That this approach is clearly adopted in the *Credit Act* itself can be seen from the fact that where it is not intended to have its ordinary meaning, words of limitation are used immediately following the words “this Act”, such as, “(other than the National Credit Code)”: see, for example, ss 5(2), 10, 14, 15, 22, 178, 179, 324 and 325 of the *Credit Act*. The necessary inference being that where reference is made to “this Act” alone, the relevant section applies in the usual general manner to both the *Credit Act* and the *Credit Code*.

41 The alternative construction posited by Sunshine Loans was that the words of limitation in the chapeau of s 5(1) have a wider impact and limit the operative effect of the words “of this Act” in the definition of “civil penalty provision”, and that they apply only to provisions in the *Credit*

Act which have the described characteristics. However, that would accord those words of limitation a wider operation than they have. In the chapeau, they operate to ensure that the defined terms only apply in relation to the provisions of the *Credit Act* and not the *Credit Code*, and that is as far as their natural meaning can properly extend. It is not possible to give them added effect by applying them to limit the scope of the definition to provisions within the *Credit Act*. Were that to be the case it would necessitate reading words into the definition such that the words “of this Act” were immediately followed with the additional expression “other than the National Credit Code”. The operation of the NCCPA does not require that, and there is nothing in this case which would justify such a step: see *AMS v AIF* (1999) 199 CLR 160, 183 – 184 [63].

42 A notable consequence of the construction referred to above is that it would allow for those provisions in the *Credit Code* which are within the definition of “civil penalty provision” (because the words “civil penalty” and one or more amounts in penalty units are set out at their foot) to be enforced. On the other hand, Sunshine Loans’ proposed construction would have the result that s 24(1A) and other apparent civil penalty provisions contained in the *Credit Code* would be redundant and unenforceable, despite expressing that a contravention could result in the imposition of a civil penalty.

43 It should also be accepted that the construction reached is consistent with the apparent statutory purpose of the *Credit Act* and the *Credit Code*. It is axiomatic that a construction which advances the statutory purpose is to be preferred over one that does not: s 15AA of the AIA.

44 In *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* (2022) 293 FCR 330, 368 [169], the statutory purpose of the *Credit Code* was explained by O’Byrne J (with whom Besanko and Lee JJ agreed) as follows:

It is appropriate to characterise the National Credit Code as remedial legislation. The overarching purpose of the Code is to protect consumers from unscrupulous and unfair lending practices. As observed by McHugh J in *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41 in reference to the *Trade Practices Act 1974* (Cth), such remedial legislation should be construed broadly so as “to give the fullest relief which the fair meaning of its language will allow”, citing Isaacs J in *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384. As Isaacs J made clear in the cited passage, that does not mean that the “true signification of the provision should be strained or exceeded”. But nor should limitations be read in when they are not required by the statutory text.

45 Here, the legislature has included in the *Credit Code* a number of provisions which fit within the definition of a “civil penalty provision” in s 5(1) of the *Credit Act* and which, if excluded

as a matter of interpretation, would not be enforceable by the regulator. Those provisions include ones which prohibit lenders from imposing non-approved obligations on borrowers under small amount credit contracts. They are self-evidently protective of persons who require such loans, and the construction advanced by Sunshine Loans is one which would negate their effect. In addition, the level of penalty imposed for a contravention of s 24(1A) of the *Credit Code* is substantial, revealing that the legislature regarded compliance with the requirements very seriously for the purpose of the protection of persons who might seek small amount credit contracts. The statutory purpose is advanced by the construction identified as it gives effect to the Parliament’s intention to protect borrowers from unapproved terms and conditions.

The legislative history

46 Both ASIC and Sunshine Loans placed reliance on the history of the credit regulation legislation in support of their respective constructions.

47 The introduction of the NCCPA (including the *Credit Code*) in 2010 created a new national credit regime and replaced the state-based *Uniform Consumer Credit Code* (UCCC). As still appears, the *Credit Code*, which essentially replicated the provisions in the UCCC, was enacted as a schedule to the *Credit Act*. Though an important alteration was that ASIC was given responsibility for administering the new legislation, including by enforcing any contraventions of it, the new regime also included licensing requirements for credit providers.

48 In the original iteration of the NCCPA, the penalty regime was centred around the imposition of pecuniary penalties under Div 1 of Pt 6 of the *Credit Code* for a contravention of provisions that were referred to as “key requirements”. These were intended, so the Explanatory Memorandum to the National Consumer Credit Protection Bill 2009 (Cth) explained, to be similar to civil penalties imposed under the *Corporations Act 2001* (Cth), which involve the regulator applying to the Court for a penalty to be paid to the government. Other consequences of a contravention included criminal sanctions by way of penalties and the obligation on a contravenor to make compensation or restitution under s 178 of the *Credit Act*.

49 The original NCCPA was subjected to not insignificant changes by the passing of the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth), which came into effect in 2012. One change was the introduction of the concept of small amount credit contracts and the complementary s 24(1A) was inserted into the *Credit Code* with the apparent intention to impose criminal penalties, albeit not civil penalties, on credit providers who offer or enter into small amount credit contracts on terms which are prohibited.

50 The *Consumer Credit Legislation Amendment (Enhancements) Act* did introduce some civil penalties into the *Credit Code* by the insertion of ss 72(4) and 177B(4). There was no specific provision in the *Credit Code* by which those civil penalties could be enforced, and the only possible mechanism was by an action by the regulator under ss 166, 167 and 177 of the *Credit Act*. By the same amending legislation, certain additional civil penalty provisions were introduced into the *Credit Act* in ss 160B(1), 160C(1), 160D(1) and 160E(2) and (3).

51 The next relevant tranche of amendments came from the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth), which was passed in 2019. It increased the number of civil penalty provisions in the *Credit Code* and, relevantly for present purposes, amended s 24(1A) of the *Credit Code* whereby it was changed from a provision which imposed a criminal penalty to one imposing a civil penalty.

52 The legislative transformation of the *Credit Act* and the *Credit Code* since 2009 reveals a statutory intention to provide a suite of remedies in relation to contraventions of each. Those remedies include the imposition of criminal and civil penalties as well as remedies available to persons affected by breaches in the form of restitution or compensation. The NCCPA is thus regulatory and remedial in nature and intended to provide protection to persons who enter into credit contracts of various types. The source of the power for the enforcement of civil penalties, whether in the *Credit Act* or the *Credit Code*, was apparently intended to be s 166 of the *Credit Act*, with ss 167 and 177 providing avenues of consequential relief. Thus, a consideration of the historical evolution of the NCCPA supports a construction of the definition of “civil penalty provision” that ensures that s 166 of the *Credit Act* operates to include civil penalty provisions in the *Credit Code*, so as not to render them redundant.

53 This history also negates Sunshine Loans’ submission that the legislative intention was to cause the *Credit Act* and the *Credit Code* to operate as separate and distinct regimes. Nothing to that effect appears but, rather, it is clear that the two were intended to be integrated in their operation, even if some matters are dealt with specifically by one and not the other.

Sections 167 and 177 of the Credit Act

54 Sunshine Loans made effectively the same submissions in respect of s 167 that it made in relation to s 166. Section 167 permits ASIC to apply to the Court for an order that a contravenor pay a pecuniary penalty. Relevantly, it provides as follows:

167 Court may order person to pay pecuniary penalty for contravening civil penalty provision

Application for order

- (1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for an order that the person pay the Commonwealth a pecuniary penalty.

Court may order person to pay pecuniary penalty

- (2) If a declaration has been made under section 166 that the person has contravened the provision, the court may order the person to pay to the Commonwealth a pecuniary penalty that the court considers is appropriate (but not more than the amount specified in section 167A).

55 Again, this section operates upon breaches of civil penalty provisions and, by reason of the previous discussion, that includes any section meeting the definitional requirements, regardless of whether it appears in the *Credit Act* or the *Credit Code*. Therefore, ASIC can seek relief under s 167 for contraventions of civil penalty provisions appearing in the *Credit Code*.

56 Similar arguments were also made in relation to the operation of s 177. That section permits ASIC to seek injunctions in relation to contraventions of “this Act”. Section 177(1) relevantly provides:

177 Injunctions

- (1) If, on the application of ASIC or any other person, the court is satisfied that a person has engaged or is proposing to engage in conduct that constitutes or would constitute:
 - (a) a contravention of this Act; or
 - (b) attempting to contravene this Act; or
 - (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
 - (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
 - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
 - (f) conspiring with others to contravene this Act;

the court may grant an injunction on such terms as the court considers appropriate.

57 Consistently with the reasoning adopted above, the expression “this Act” refers to both the *Credit Act* and the *Credit Code*, with the consequence being that the relief sought by ASIC under s 177 for contraventions of provisions in the *Credit Code* is available if the necessary facts are made out. This, too, is consistent with the conclusions of Greenwood J in *ASIC v Rent 2 Own Cars* at 624 – 625 [130].

Alternative methods of enforcement of Credit Code contraventions

58 Sunshine Loans suggested that the enforcement of civil penalty provisions should take place via s 47(1) of the *Credit Act*. That section enumerates certain “general conduct obligations” and, specifically, s 47(1)(d) obliges a licensee to “comply with the credit legislation”. By s 47(4), a contravention of certain subparagraphs of s 47(1) by a credit provider is punishable by the imposition of a civil penalty, though s 47(1)(d) is not one of them.

59 The expression “credit legislation” is defined by s 5(1) of the *Credit Act* as including “this Act”, which necessarily includes the *Credit Code*. This was also explained by Greenwood J in *ASIC v Rent 2 Own Cars*, where his Honour said at 611 [69]:

Section 47(1)(c) and (d) of the NCCP Act provide that a licensee must comply with the conditions on the licence, and comply with the “credit legislation”. The term *credit legislation* is defined to mean the NCCP Act (which includes Sch 1, consisting of the National Credit Code); the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 (Cth); Div 2 of Pt 2 of the ASIC Act and Regulations made for the purpose of that Division; and any other Commonwealth or, relevantly, State legislation that covers conduct relating to credit activities, but only insofar as it covers conduct relating to credit activities.

(Emphasis in original).

60 Conversely, the submission of Sunshine Loans was that the *Credit Code* is brought within the scope of s 47 by subparagraph (d) of the definition of “credit legislation”, which indicates that the expression means, *inter alia*:

(d) any other Commonwealth, State or Territory legislation that covers conduct relating to credit activities (whether or not it also covers other conduct), but only in so far as it covers conduct relating to credit activities.

61 It is difficult to accept that the *Credit Code*, which is a schedule to, and forms part of, the NCCPA, might be described in the latter as being “other legislation”. For the reasons which have been referred to above, the expression “this Act” must mean all parts of the NCCPA including the *Credit Code*. That conclusion is not excluded by the chapeau to s 5(1) for the reasons previously articulated.

62 It would also be an unusual construction were s 47(1)(d) to be taken as the source of the requirement for a credit provider to comply with the civil penalty provisions in the *Credit Code*. It would be an extremely curious operation of the NCCPA were a contravention of a civil penalty provision in the *Credit Code* to only be enforceable in a derivative manner pursuant to s 47(1)(d), albeit not as resulting in a civil penalty.

63 Sunshine Loans similarly submitted that s 124 of the *Credit Code* should be seen as the mechanism through which contraventions of civil penalty provisions in the *Credit Code* are intended to be enforced. It was submitted that this prevented the existence of any legislative lacuna in relation to the enforcement of those provisions. That section provides:

Division 2—Other penalties

124 Civil effect of contraventions

- (1) If a credit provider or lessor contravenes a requirement of or made under this Code, the court may order the credit provider or lessor to make restitution or pay compensation to any person affected by the contravention and, in that event, may make any consequential order it considers appropriate in the circumstances.
- (2) An application for the exercise of the court’s powers under this section may be made by:
 - (a) a person affected by the contravention; or
 - (b) ASIC on behalf of a person affected by the contravention, if the person has consented in writing to ASIC making the application; or
 - (c) ASIC (on its own behalf).

64 It can be accepted that a contravention of any of the provisions which impose a civil penalty for their contravention will enliven s 124(1) at the suit of the persons or entities identified. However, the relief available under that section is the making of orders that the contravenor make restitution or pay compensation, which falls short of enforcing the civil penalty for which provision is made. It was submitted on behalf of Sunshine Loans that enforcement of the civil penalties could occur through the power of the Court to “make any consequential order it considers appropriate in the circumstances”. That, however, should be rejected. The section is directed to compensation or restitution and the additional relief is only that which is consequential to the granting of that relief. That means ancillary orders can only be made where the relief specified has been granted and the orders are consequential upon it. The making of an order that a contravenor pay to the Commonwealth a civil penalty is not consequential upon the making of an order for compensation or restitution.

65 It follows that s 124 does not provide an avenue for the enforcement of civil penalty provisions in the *Credit Code*.

Impact of the Financial Sector Reform Act 2022 (Cth)

66 Sunshine Loans further submitted that support for its construction of the NCCPA could be derived from the *Financial Sector Reform Act 2022 (Cth)* which took effect on 12 June 2023. That Act made a number of amendments to the NCCPA by introducing a number of additional penalty provisions into the *Credit Code*, including s 31C, in respect of which criminal penalties were imposed. It also introduced into the *Credit Act* ss 133CC(1), 133CD(1), 133CE(1) and 133CF(1) which were part of a wide ranging new suite of regulations relating to credit providers, but which specifically dealt with short term and small amount credit contracts. The identified provisions imposed civil penalties whereas others in the new regime imposed criminal penalties. It was suggested that this strengthened the view that there were two regimes for regulation, one being in the *Credit Act* and another in the *Credit Code*.

67 However, it remains the fact that the construction proposed by Sunshine Loans would have the unusual result that the civil penalty provisions in the *Credit Act* regulating the conduct of credit providers providing small amount credit contracts would be enforceable as such, whilst those in the *Credit Code* would not be. That would be somewhat astonishing given that there are now numerous provisions in the *Credit Code* which impose civil penalties: see ss 24, 30B (for regulations made under the *Credit Code* which impose civil penalties), 39B, 72, 155, 156, 174, 177B, 179GA, 179V and 179VC: and on Sunshine Loans' submission, none would be enforceable as such.

68 Particular reference was made to s 31C which was introduced into the *Credit Code* by s 15 of the *Financial Sector Reform Act*. At the same time, s 111 of the *Credit Code* was amended to include s 31C as involving a "key requirement" for the purposes of Div 1 of Pt 6 of the *Credit Code*. Sunshine Loans submitted that the legislature has provided a mechanism for enforcement of s 31C by making it subject to s 112 of the *Credit Code* such that ASIC may enforce it as a "key requirement" provision and the orders which the Court may make under s 113 include the imposition of a penalty. From this, it seemed to be suggested that ASIC had all the power necessary to seek penalties for wrongdoing by credit providers.

69 However, s 24(1A) is not identified as involving a "key requirement" and is not enforceable via action by ASIC under s 112. It follows that reference to the introduction of the *Financial Sector Reform Act* and the new s 31C does not assist Sunshine Loans' submissions. On the contrary, it substantially negates them. In addition, the insertion into the *Credit Code* of a number of additional civil penalty provisions which do not involve "key requirements" means

that, on Sunshine Loans’ submission, these provisions will also be unenforceable. It follows that the sensible construction is that the mechanism for enforcement of the civil penalty provisions in the *Credit Code* is, and remains, s 166 of the *Credit Act*, which is consistent with the ordinary meaning of the definition of “civil penalty provision”.

Conclusion on the operation of s 5(1) and jurisdiction

70 The definition of “civil penalty provision” in s 5(1) operates such that any provision meeting the description in subparagraphs (a) or (b), contained in either the *Credit Act* or the *Credit Code*, is within its scope. This has the consequence that a contravention of such a provision is enforceable by ASIC under ss 166 and 167 of the *Credit Act*, and ASIC is entitled to seek the remedies which it now does in the originating application. It follows that this Court has jurisdiction to hear the matter.

71 Shortly before judgment was due to be delivered in this matter, ASIC drew the Court’s attention to *Australian Securities and Investments Commission v Ferratum Australia Pty Limited (in liq)* [2023] FCA 1043 (*ASIC v Ferratum*). The following observations of Kennett J (at [7]) are consistent with, and reinforce, the conclusion reached above:

... Section 24(1A) of the Code provides for a “civil penalty” of 5,000 penalty units for its breach and is thus a “civil penalty provision” within the meaning of the NCCP Act (see s 5), with the result that declarations and civil penalty orders are available for its breach under Part 4-1 of the NCCP Act as well as the remedies provided for in Part 4-2. Contraventions of s 24(1A) can also attract criminal penalties (s 24(2)).

72 Similarly, it is not the case that s 177 of the *Credit Act* applies only in relation to breaches of the *Credit Act*. The relief sought by ASIC under s 177 for contraventions of provisions in the *Credit Code* is available if the necessary facts are made out.

Other “jurisdictional” challenges

73 A further issue raised by Sunshine Loans was whether ASIC is entitled to obtain declaratory relief in relation to the alleged contraventions of s 24(1A) of the *Credit Code* which occurred prior to 13 March 2019 (hereinafter, the “pre-13 March 2019 contraventions”). Prior to that date, a contravention of that section resulted in a criminal penalty only, but from that date, any contravention resulted in a civil penalty.

74 By way of brief background, by its second further amended originating application, ASIC seeks declarations of contraventions of s 24(1A) of the *Credit Code* by Sunshine Loans in respect of the period from 1 July 2016 to 2 November 2020 (being the Relevant Period). It seeks those

declarations pursuant to s 166 of the *Credit Act* and s 21 of the *Federal Court Act* on the basis that the former provision enables the Court to make declarations in respect of contraventions that occurred after 13 March 2019, whilst the latter provides the Court’s foundation to make declarations in respect of the pre-13 March 2019 contraventions.

75 On 30 August 2023, a few days prior to the commencement of the hearing, Sunshine Loans sought leave to amend its response to ASIC’s further amended concise statement. Leave was subsequently granted, and the amendments made by Sunshine Loans revealed what appeared to be a new jurisdictional challenge; namely, that the Court does not have jurisdiction to make declarations in relation to the pre-13 March 2019 contraventions.

76 Although the submissions made in support of this challenge were opaque, it appears that two main grounds were advanced. First, that the Court did not have criminal jurisdiction such that it was unable to deal with the pre-13 March 2019 contraventions which carried criminal penalties. Secondly, that the Court did not have jurisdiction to make a declaration at the suit of ASIC which had no power to bring proceedings in relation to the pre-13 March 2019 contraventions.

The Court’s jurisdiction in respect of the pre-13 March 2019 contraventions

77 Sunshine Loans’ submission in relation to the first ground was that this Court only had civil jurisdiction under the *Credit Act* and that, until 13 March 2019, a contravention of s 24(1A) only gave rise to a criminal offence. Although not expressly articulated, it appears that the substance of the submission was that where a declaration of contravention is sought in relation to a provision which carries the imposition of a criminal penalty, the jurisdiction which is exercised is criminal in nature and this Court has no such jurisdiction. This was sought to be buttressed by the proposition that if ASIC sought a declaration in respect of the pre-13 March 2019 contraventions, it would be required to prove each contravention beyond reasonable doubt by reason of the section involving the imposition of criminal penalties.

78 The civil jurisdiction of this Court conferred by s 187 of the *Credit Act* is wide and is “in relation to civil matters arising under this Act”. The reference to “matter” includes any act or omission. Additionally, this Court’s jurisdiction is expressly stated to be without limitation.

79 Here, ASIC’s claim for declarations in relation to the pre-13 March 2019 contraventions is a “civil matter” arising under the *Credit Act* for the purposes of s 187. ASIC seeks only a declaration of contravention and does not seek the imposition of any criminal penalty. On the

matters mentioned in its second further amended concise statement, no issue is raised that Sunshine Loans has engaged in any criminal conduct and no determination or declaration is sought that any criminal conduct has occurred. ASIC has stated that no criminal proceedings are on foot or contemplated, such that the potential for prosecution of Sunshine Loans is not imminent or “on the cards”.

80 There are many instances where Courts have made declarations that persons have breached legislative provisions which, if a contravention is established to the requisite degree in criminal proceedings, may also constitute a criminal offence: see, for example, *Australian Softwood Forests Pty Ltd v Attorney-General (NSW) ex rel Corporate Affairs Commission* (1981) 148 CLR 121, where it was expressly recognised that the defendants were liable to criminal prosecution in relation to the conduct in respect of which the declaratory relief was sought; *Corporate Affairs Commission (NSW) v Transphere Pty Ltd* (1988) 15 NSWLR 596, 603, where there was express recognition of the right of the Crown to seek a declaration of contravention of a statutory provision which would also constitute criminal conduct, but where it was also recognised that the declaration is *not* one that a crime has been committed.

81 It has also been recognised that civil courts should be wary of making declarations against a party for contravention of a statutory provision where a criminal prosecution in respect of the same subject matter as the declarations is a real possibility: *Australian Securities and Investments Commission v Dunjey* [2023] FCA 361 [139]. Though, in that last-mentioned case, Feutrill J did not consider this to provide a basis to refuse to grant the declarations sought as his Honour was satisfied (at [151] – [153]) that ASIC had no intention of referring the contraventions to the Commonwealth Director of Public Prosecutions, and no intention to prosecute the defendants itself under s 274 of the *Credit Act*.

82 ASIC’s approach in the present case of seeking mere declarations of a breach of a criminal provision is uncontroversial and consistent with that adopted by Yates J in *Australian Securities and Investments Commission v Membo Finance Pty Ltd (No 2)* [2023] FCA 126 [23], [50] – [51], [78] – [79] (*ASIC v Membo Finance*). That decision related to admitted contraventions of ss 47(1)(a) and 47(1)(e) of the *Credit Act*, which only became civil penalty provisions from 13 March 2019. His Honour noted that ASIC relied, as it has here, upon both s 21 of the *Federal Court Act* and s 166 of the *Credit Act* as the basis for the declaratory relief because some of the provisions alleged to have been contravened were criminal penalty provisions at

the time of the contraventions, rather than civil penalty provisions. Notably, his Honour was prepared to make declarations in reliance on s 21 of the *Federal Court Act*.

83 The making of a declaration in a civil suit of the contravention of a statutory provision which, in other proceedings, might carry with it the imposition of a criminal penalty, does not transform the proceedings into a criminal prosecution. Here, the relief sought by ASIC in relation to the pre-13 March 2019 contraventions is a civil matter and therefore falls within the scope of s 187 of the *Credit Act*.

The limited scope of s 166 of the Credit Act

84 Sunshine Loans further submitted that ASIC has no power to bring an action against it in respect of the pre-13 March 2019 contraventions under s 166 of the *Credit Act*, because that section only provides ASIC with the power to seek a declaration that a person has contravened a civil penalty provision. However, the potential limits of s 166 are irrelevant in circumstances where ASIC does not rely upon it to support its declarations in this respect. Section 21 of the *Federal Court Act*, being the provision upon which it relies, provides:

The Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.

85 The power under s 21 is only limited by the Court's discretion: *Foster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 435; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160, 389 [1016]; and it extends to making a declaration at the suit of a regulator to encourage compliance with an Act which the regulator has responsibility to administer: *Australian Securities and Investments Commission v PE Capital Funds Management Ltd (administrators appointed), in the matter of PE Capital Funds Management Ltd (administrators appointed)* (2022) 159 ACSR 1, 41 [201]. The power has been used to make declarations where the provision contravened was also a criminal offence. Some examples in relation to the *Credit Act* are *ASIC v Rent 2 Own Cars* at 617 [97], 619 [105] and 682 [436(1)], which concerned contraventions of s 32A of the *Credit Code*, and *Australian Securities and Investments Commission v Channic Pty Ltd (No 4)* [2016] FCA 1174 [1817], which concerned contraventions of s 133(1) of the *Credit Act* which was both a civil penalty provision and an offence by reason of s 133(6).

86 Sunshine Loans claimed, however, that there was no civil matter arising under the *Credit Act* because ASIC did not have power to bring a proceeding for contravention of the *Credit Act*, and absent that power there was no civil matter. It relied upon the observations in *Hobart*

International Airport Pty Ltd v Clarence City Council at 223 [29] to the effect that there needed to be a justiciable controversy between the parties in the sense of there being some right, duty or liability to be established by the determination of the Court. Further reliance was placed on the following proposition at 223 [31]:

The question in these appeals can be approached in this way because, in federal jurisdiction, “questions of ‘standing’ to seek equitable remedies such as those of declaration and injunction, [when they arise,] are subsumed within the constitutional requirement of a ‘matter’”. The “significance of standing to the existence of a matter for the purposes of Ch III” is, in essence, that there is no “matter” “unless there is a remedy available at the suit of the person instituting the proceedings in question”.

87 So it was said, the only remedy for ASIC in relation to the pre-13 March 2019 contraventions was pursuant to s 206 of the *Credit Act*, being the power to take criminal proceedings, or s 274 of the *Credit Act*, being the power to prosecute. As has been demonstrated above, that is not correct, and ASIC has wider powers under the *Credit Act* to take action in relation to contraventions of its provisions.

88 Moreover, by s 239 of the *Credit Act*, ASIC has “the general administration of this Act” — that carries with it the power to seek declarations in relation to its contravention, even without express statutory foundation. In *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* (2012) 213 FCR 380, 441 [271], Perram J observed the following in relation to ASIC’s standing to seek declarations of contraventions of the *Australian Securities and Investments Commission Act 2001* (Cth):

The Court appears not to have an express power under the ASIC Act to declare, at the suit of ASIC, that provisions of that Act have been breached. But it does have a general power to make a binding declaration of right even where no consequential relief is claimed by virtue of s 21 of the *Federal Court of Australia Act 1976* (Cth). The course of authority in this Court confirms that where a regulator seeks a declaration of a contravention of the statute it administers, it has standing to pursue that claim: cf *Australian Competition and Consumer Commission v Goldy Motors Pty Ltd* [2001] ATPR 41-801 at [30] per Carr J; *Australian Competition and Consumer Commission v Kaye* [2004] FCA 1363 at [199] per Kenny J.

89 That observation was adopted and applied by Allsop CJ in *Australian Securities and Investments Commission v TAL Life Ltd (No 2)* (2021) 389 ALR 128, 173 [217]. As his Honour indicated (at 174 – 175 [223]), a declaration of the contravention of an Act at the suit of a regulator who has responsibility to administer it can be made using the power in s 21 of the *Federal Court Act*:

Section 21 of the Federal Court Act is wide enough to encompass a declaration sought by a regulator to vindicate the public interest in encouraging compliance by a party and others with an Act of public importance which the regulator has a statutory

responsibility to administer. The phrase “declaration of right” should not be construed narrowly and extends to any situation involving the field of legal relations: *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation* [1977] 1 NSWLR 43 at 65E–F. See also *Sankey v Whitlam* (1978) 142 CLR 1 at 23; 21 ALR 505 at 513–14. It extends to obligations and duties of a party the bringing about or encouragement of compliance with which is within the remit of the regulator in its statutory duty of general administration.

90 This is a complete answer to Sunshine Loans’ assertion that what was required was an express or specific conferral of power on the Court. Here, ASIC has general administration of the *Credit Act* and has the standing and authority to bring proceedings for declarations to vindicate the public interest in the encouragement of compliance with that Act.

91 It follows that ASIC’s claim for relief in relation to the pre-13 March 2019 contraventions is relief which ASIC is entitled to pursue and in respect of which the Court has jurisdiction to grant. As such, it is a “civil matter” for the purposes of s 187 of the *Credit Act*.

Matters raised in Sunshine Loans’ concise response

92 A number of additional matters were raised by Sunshine Loans in its second further amended response to ASIC’s second further amended concise statement as to the Court’s alleged lack of jurisdiction. Although they were not the subject of any substantial oral submissions, they need to be considered, albeit briefly.

93 Section 204 of the *Credit Act*, which was raised by paragraph 2E of Sunshine Loans’ response, is irrelevant to the matters under consideration. It is concerned with the exercise of powers by State or Territory courts in relation to persons who have committed offences under the *Credit Act* and there are no relevant criminal proceedings in this matter.

94 By paragraph 2G of Sunshine Loans’ response, it was asserted that there was no original jurisdiction in the Federal Court in relation to offenders or persons charged with offences against the *Credit Act*. That is incorrect, as some jurisdiction is vested in this Court by s 188 of the *Credit Act*. However, regardless of whether that is so or not, it is irrelevant in this case where no issue of criminal responsibility arises.

95 Contrary to the assertion in paragraph 2K, this Court does have jurisdiction to determine whether Sunshine Loans contravened s 24(1A) in the period prior to 13 March 2019, as such a determination is a civil matter for the reasons referred to above.

96 By paragraph 2M, Sunshine Loans asserted that ASIC is prohibited from pursuing proceedings for alleged offences against s 24(1A) of the *Credit Act*, but again, that is irrelevant in the context of the present proceedings.

97 By paragraph 2N, it was complained that ASIC did not make any application under s 124(2) of the *Credit Act*, however, that complaint does not assist Sunshine Loans as s 124(2) is only relevant where orders for restitution or compensation are sought, which is not applicable in this case.

98 In relation to paragraphs 2P and 2Q of Sunshine Loans' response, ASIC accepted that this Court does not have jurisdiction by reason of s 39B of the *Judiciary Act* to make a declaration that Sunshine Loans contravened s 24(1A) of the *Credit Code*, because s 39B does not apply to Div 2 of Part 4-3 of the *Credit Act*. Nevertheless, it relied upon the Court's unlimited civil jurisdiction with respect to the *Credit Act* conferred by s 187(1) as the foundation of the Court's jurisdiction in relation to the pre-13 March 2019 contraventions and the power granted by s 21 of the *Federal Court Act* to give the relief. There is, consequently, no basis for striking out any part of ASIC's claim.

99 Sunshine Loans' concern expressed in paragraph 2S is founded upon the notion that ASIC is pursuing criminal proceedings against it but, as has been explained, that is not the nature of the current action.

100 By paragraph 2U, it was submitted that this Court does not have original jurisdiction to grant an injunction under s 177 of the *Credit Act* upon a finding that Sunshine Loans contravened s 24(1A) of the *Credit Act* prior to 6 June 2019. Whether that is so or not does not need to be determined because, as is revealed below, there is more than sufficient conduct subsequent to that date to potentially support the issuing of an injunction.

101 It follows that none of the matters raised by Sunshine Loans give rise to a finding that this Court lacks jurisdiction to deal with, or that ASIC lacks power to seek relief in relation to, the contraventions alleged in the present proceedings.

LIABILITY

102 The remainder of these reasons concern the question of Sunshine Loans' liability for the various alleged contraventions of the *Credit Act* and the *Credit Code* arising in connection with the SACCs which it entered into with its customers (who are also referred to interchangeably below as the "borrowers").

The SACCs

103 In the Relevant Period, the SACCs utilised by Sunshine Loans took five different forms, although each version was substantially the same. Each SACC was contained in a composite document of multiple parts which were headed, respectively, “Consumer Credit Contract Schedule Financial Table”, “Information Statement – Small Amount Credit Contract”, “Consumer Credit Contract Terms – Small Amount Credit Contract”, and “Direct Debit Request New Customer Form”.

104 The standard forms of the SACCs from the Relevant Period were contained at Annexure A to E of the Statement of Agreed Facts, and were used by Sunshine Loans as follows:

- (a) for the period from 1 July 2016 until 31 July 2017, the version contained at Annexure A was used;
- (b) for the period from 1 August 2017 until 28 February 2018, the version contained at Annexure B was used;
- (c) for the period from 1 March 2018 until 31 May 2018, the version contained at Annexure C was used; and
- (d) for the period from 1 June 2018 until 2 November 2020, either of the versions contained at Annexure D or Annexure E was used.

105 In the “Consumer Credit Contract Schedule Financial Table” document (referred to herein as the “Financial Table”), the following words appear immediately below the heading of the document:

This Financial Table together with the Consumer Credit Contract Terms forms the Consumer Credit Contract between you and us.

106 The Financial Table is in the form of an offer from the borrower to enter in a credit contract with Sunshine Loans as the credit provider “on the Terms set out in this Financial Table and the Consumer Credit Contract Terms”, although the execution page of the agreement is contained at the end of the document headed “Consumer Credit Contract Terms – Small Amount Credit Contract” (hereinafter referred to as the “CC Contract Terms”).

107 The Financial Table is substantially in the form of a schedule which sets out the borrower’s name, the type of financial facility required, the amount of credit including establishment fees and the first month’s credit charge, the total of the repayments and an identification of the

regularity of the required repayments. Below those matters, the Financial Table sets out the “Credit Fees and Charges” (the emphasis appearing in the original):

Credit Fees and Charges:	
Fees and Charges retained by us and included in Amount of Credit:	\$151.20
Made up of the Establishment fee	\$126.00
and the First month’s credit charge	\$25.20
Monthly Credit Charge	\$25.20
Other Fees and Charges retained by us:	
Default fee or Direct Debit Dishonour fee	\$35.00
Rescheduled payment fee	\$35.00
Arrears account management fee <i>(Charged on the 7th day from the original last repayment date and weekly thereafter)</i>	\$30.00
Fees and Charges paid to others:	
Direct Debit Fee (directly charged by EziDebit)	\$0.55 per payment
External debt collection costs	Not Ascertainable
External legal enforcement costs	Not Ascertainable

108 The reference to the “Rescheduled payment fee” in that part of the Financial Table is important in the context of the dispute between the parties. In subsequent iterations of the CC Contract Terms, that fee was relabelled as an “Amendment fee”.

109 For clarity, unless stated otherwise, any extracts from the SACCs have been taken from the version of the SACC contained at Annexure A of the Statement of Agreed Facts.

110 The CC Contract Terms document does not elaborate upon all of the rights and obligations that appear in the schedule in the Financial Table. It commences by repeating that the terms of the agreement between the borrower and Sunshine Loans are to be found in it and the Financial Table. It then provides that Sunshine Loans agrees to lend the amount of credit identified in the Financial Table subject to the terms set out. Those terms include the right to terminate the

agreement upon, *inter alia*, the borrower's default. Under the heading, "Credit Charges", adjacent to cl 2, the following is provided:

You will pay all the Credit Charges shown in the Financial Table from the day you obtain the Amount of Credit until the balance on your account with us has been completely repaid.

111 Clause 3 of the CC Contract Terms is important in this case. It provides:

3. Repayments

1. You must make the repayments shown in the Financial Table subject to any other repayment arrangements or variations agreed between us from time to time.
2. If this contract is terminated or reaches its term, you will pay us:
 - a. the unpaid balance of the Amount of Credit; and
 - b. any other credit fees or other charges or other amounts payable under this Consumer Credit Contract whether debited to your account at that time or not.
- ...
5. If your cheque or direct debit is dishonoured then:
 - a. that repayment will not be considered as made; and
 - b. the default fees and direct debit dishonour fees and charges shown in the Financial Table will become due and owing and can be debited to your account from the date that the cheque was received or the direct debit was attempted.
6. If any repayment either in part or in whole amount remains outstanding after the Date of Final Payment shown in the Financial Table, we may charge you the amount shown as an Arrears account management fee in the Financial Table for each week until and unless such amount is paid in full, up to the limits prescribed by law.
- ...

112 Clause 5 of the CC Contract Terms explains the position between the parties where there has been a default by the borrower:

5. Default

1. You will be in default under this Consumer Credit Contract if:
 - a. you do not make the repayments shown in the Financial Table, **or such other repayments as agreed between us from time to time**, on or before the days on which they are due;
 - b. you do not make any other payment required by this Consumer Credit Contract;
 - c. any document information provided by you in your

application form or otherwise is found to be false or inaccurate, or materially changes at any point and you do not provide us with updated information within a reasonable period; or

- d. **you breach any variation of this Consumer Credit Contract as agreed between us** or as imposed by a court, tribunal or dispute resolution agency.

2. If you are in default under this Consumer Credit Contract:

- a. the unpaid balance of the Amount of Credit ; and
- b. any other default fees, credit fees or other charges or other amounts payable under this Consumer Credit Contract whether debited to your account at that time or not

all become due and payable.

...

(Emphasis added).

113 Clause 6.3 also relevantly provides:

6. General Provisions

...

- 3. If we waive our rights under this Consumer Credit Contract from time to time, such waiver will only be for that specific time on those terms only and unless we agree to vary this Consumer Credit Contract and provide notice of such variation in writing.

114 The combination of the Financial Table and the CC Contract Terms provides a somewhat problematic agreement. There are a number of fees and charges which appear in the Financial Table which have no correlating clause in the CC Contract Terms to elucidate the circumstances in which they are payable. For instance, in the Financial Table, there appears an item called “Establishment fee”, and adjacent to it is an amount of \$126.00. It is not referred to in the CC Contract Terms, either directly or indirectly, save that it might be seen as part of the amount of “credit” which it is said is lent to the borrower. Similarly, the Financial Table refers to a “Monthly Credit Charge” of \$25.20, though there is nothing in the CC Contract Terms which directly refers to it. There are some generalised references to charges which are “reasonably incurred” and the statement in cl 2 that the borrower is to pay “all the Credit Charges shown in the Financial Table” from the commencement of the loan. However, save for the title given to the charge in the Financial Table, there is nothing to indicate that it is to be paid monthly.

115 In contrast, there is a correlation between the entry in the Financial Table of “Default fee or Direct Debit Dishonour fee” and the CC Contract Terms where the latter identifies, in cl 3.5(b), that the fee will become payable if a “cheque or direct debit is dishonoured” or, pursuant to cl 5.2, where the borrower is in default under the credit contract. Similarly, the fee described in the Financial Table as “Arrears account management fee” is referenced in cl 3.6 of the CC Contract Terms as being an amount payable where “any repayment either in part or in whole amount remains outstanding after the Date of Final Payment shown in the Financial Table”.

116 The “Rescheduled payment fee”, however, does not appear to have any direct correlation with the CC Contract Terms. Although the terms make generalised references to fees and charges which are referred to in the Financial Table, there is no term which specifically identifies the occasion on which a “Rescheduled payment fee” is payable by the borrower. The same observation applies in relation to an “Amendment fee”, where that expression is used in subsequent iterations of the Financial Table. For convenience, the fee (whether described as a rescheduled payment fee or as an amendment fee) will hereinafter be referred to as the “Amendment Fee”.

117 In the Statement of Agreed Facts, the parties agreed that during the Relevant Period, Sunshine Loans entered into 670,609 SACCs on the terms set out in one of the five versions referred to above. Each included the Financial Table which made provision for the charging of the Amendment Fee.

118 It was also agreed that, prior to entering into a SACC with a borrower, Sunshine Loans required the borrower to complete an online application form and provide documents in support of their application for credit.

119 At the time of entering into a contract with a borrower, Sunshine Loans arranged for the borrower to enter into a direct debit arrangement with either Ezidebit Pty Ltd or PowerPay Pty Ltd, pursuant to which the amounts of the scheduled repayments would be automatically debited from the borrower’s bank account and electronically transferred to Sunshine Loans.

120 During the course of the loan, Sunshine Loans would communicate with the borrowers via telephone calls or by electronic means on the internet. The latter communications included emails and other written communications with Sunshine Loans employees through a portal on Sunshine Loans’ website.

121 The interactions between Sunshine Loans’ customer service officers and the borrowers were recorded in a “customer transaction log” by the customer service officer either recording details of their telephone conversations with the borrower in it, or copying written electronic messages exchanged with the borrower into it.

122 Part of the recording of the transactions between Sunshine Loans and the borrowers involved the preparation and maintenance of statements of account for each borrower’s SACC.

The issues raised

123 The case advanced by ASIC concerns the inclusion of the Amendment Fee in the 670,609 SACCs which Sunshine Loans entered into in the Relevant Period, the alleged charging of that fee on 12,693 occasions, the alleged payment of the fee by borrowers on 8,376 occasions, and the alleged receipt of \$293,160.00 by Sunshine Loans in respect of the fee.

124 At the centre of the dispute is ASIC’s contention that the Amendment Fee is not within the scope of fees and charges which are permitted under s 31A(1) of the *Credit Code*. The specific area of debate between the parties appeared to be whether the Amendment Fee falls within s 31A(1)(c), which permits the imposition of, or provision for, a “a fee or charge that is payable in the event of a default in payment under the contract”.

125 On the basis that the Amendment Fee does not fall within s 31A(1), ASIC claims that Sunshine Loans contravened s 24(1A)(a) of the *Credit Code* by entering into the SACCs on terms imposing the Amendment Fee, and that it contravened s 24(1A)(b) by requiring payment of the same and, thereafter, receiving payment. Each of these alleged contraventions are said to also amount to a breach of s 47(1)(d) of the *Credit Act*, which requires a credit provider to comply with the credit legislation. ASIC seeks injunctions and declarations of contravention, as well as the imposition of civil penalties.

126 These reasons concern only whether ASIC has established the alleged contraventions. What relief should be granted, if any, is to be determined following a further hearing. As a result, the following issues presently arise for determination:

- (a) Whether the SACCs which Sunshine Loans entered into with borrowers imposed or provided for a monetary liability which was prohibited by the *Credit Code*. In particular, whether the Amendment Fee falls within s 31A(1)(c) of the *Credit Code*;
- (b) If the Amendment Fee was a prohibited monetary liability, whether, and on how many occasions, Sunshine Loans contravened:

- (i) s 24(1A)(a) of the *Credit Code* (concerning the entry into a small amount credit contract on terms imposing a prohibited monetary liability); and
 - (ii) s 24(1A)(b) of the *Credit Code* (concerning the requirement or receipt of payment of an impugned fee or charge); and
- (c) If any of the breaches of s 24(1A) are made out, whether they also constitute a breach of s 47(1)(d) of the *Credit Act*.

127 Before turning to these issues, it is appropriate to briefly consider the standard of proof necessary to establish the alleged contraventions.

Onus and standard of proof

128 Sunshine Loans made several submissions in relation to the standard of proof that ought to be applied in the present proceedings and whether the evidence adduced by ASIC was sufficient to satisfy the Court that the alleged contraventions occurred.

129 The starting point is s 202 of the *Credit Act*, which provides the standard of proof to be applied in “civil proceedings”:

If, in proceedings (other than proceedings for an offence), it is necessary to establish, or for the court to be satisfied, for any purpose relating to a matter arising under this Act, that:

- (a) a person has contravened a provision of this Act; or
- (b) default has been made in complying with a provision of this Act; or
- (c) an act or omission was unlawful because of a provision of this Act; or
- (d) a person has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to a contravention, or a default in complying with, a provision of this Act;

it is sufficient if the matter referred to in paragraph (a), (b), (c) or (d) is established, or the court is so satisfied on the balance of probabilities.

130 Sunshine Loans’ core submission was that s 202 does not apply to the present case, and that the standard of proof to be met to satisfy a contravention of s 24(1A) of the *Credit Code* is the criminal standard of beyond reasonable doubt. The justification advanced was that the present proceedings must properly be understood as being “proceedings for an offence” and therefore criminal in nature. Principally, that was said to be because of the operation of s 24(2) of the *Credit Code*, which provides:

Offence

- (2) A person commits an offence of strict liability if:
- (a) the person is subject to a requirement under subsection (1) or (1A);
and
 - (b) the person engages in conduct; and
 - (c) the conduct contravenes the requirement.

Criminal penalty: 100 penalty units.

131 Sunshine Loans submitted that the criminal nature of the present proceedings is bolstered by the circumstance that, if a declaration is made that Sunshine Loans contravened s 24(1A), it will then have effectively committed the strict liability offence proscribed in s 24(2).

132 Whilst it is true that a finding of a contravention of s 24(1A) may lead to a criminal prosecution, it does not follow that the applicable standard of proof is that which is required in criminal proceedings. The intersection between the civil and criminal processes provided under the NCCPA is specifically addressed in Div 3 of Pt 4-1 of the *Credit Act*. Relevantly:

- (a) Section 168 of the *Credit Act* provides that a contravention of a civil penalty provision is not an offence;
- (b) When hearing proceedings relating to a contravention, or a proposed contravention, of a civil penalty provision, s 170 of the *Credit Act* requires the court to apply the rules of evidence and procedure for civil matters: see also s 140 of the *Evidence Act 1995* (Cth) (*Evidence Act*);
- (c) Criminal proceedings may be started against a person for conduct that is substantially the same as the conduct constituting a contravention of a civil penalty provision regardless of whether a declaration of contravention has been made: see s 173 of the *Credit Act*; and
- (d) By s 201 of the *Credit Act*, the legislature has specifically contemplated that civil proceedings brought under the NCCPA may disclose the commission of an offence.

133 It is a separate question to the determination of the applicable standard of proof whether, considering the overlap between the contraventions and the criminal offence, it is appropriate in the exercise of the Court's discretion to make a declaration of contravention of s 24(1A). Any such question is to be determined at the relief stage.

134 Had ASIC commenced these proceedings seeking the imposition of criminal penalties under s 24(2), the criminal standard of proof would have been applicable. However, it did not. It only seeks relief in the form of declarations of contravention, civil penalties and injunctions. It has

stated that no criminal proceedings are on foot or contemplated in that respect. On the matters mentioned in its concise statement, no issue is raised that Sunshine Loans has engaged in any criminal conduct and no determination or declaration is sought that any criminal conduct has occurred. It can be accepted that no prosecution of Sunshine Loans is imminent or “on the cards”.

135 The making of a declaration in a civil suit of the contravention of a statutory provision which, in other proceedings, might carry with it the imposition of a criminal penalty, does not transform the civil suit into a criminal prosecution. The existence of s 24(2) therefore does not alter the nature of the present proceedings: being civil proceedings brought for the contravention of civil penalty provisions. Contrary to Sunshine Loans’ submissions, s 202 of the *Credit Act* is applicable to the present proceedings, such that the standard of proof necessary to satisfy the Court of any contraventions of s 24(1A) is the balance of probabilities.

136 Despite this, there can be no doubt that serious and substantial penalties could be imposed on Sunshine Loans by the present proceedings. The seriousness of the allegations made and the consequences which flow from any potential findings are considerations which must affect the answer to the question whether the relevant contraventions have been sufficiently established: see s 140(2) of the *Evidence Act*; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 170 – 171; *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (*Briginshaw*).

137 Sunshine Loans also complained that ASIC had adduced “limited evidence” which could enable the Court to reach “a reasonable decision”. As is discussed subsequently in these reasons, there is no deficiency in ASIC’s case and nor is its evidence limited. On the contrary, the case is a strong one. Once the nature of Sunshine Loans’ obligations under the NCCPA are identified and the terms of the SACCs understood, the contraventions alleged by ASIC are almost self-evident, in the sense that they follow from the finding that the Amendment Fee was prohibited.

138 It also ought to be noted, in light of the Full Court’s recent decision in *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* [2024] FCAFC 18, that serious care has been taken in the determination of whether the evidence adduced by ASIC supports the case advanced against Sunshine Loans. Whether to a *Briginshaw* standard or to the criminal standard, I am satisfied that the alleged contraventions (as set out below) occurred.

The prohibitions in the Credit Code

139 Before turning to the first issue, being whether the SACCs provided for a monetary liability which was not permitted by s 31A(1) of the *Credit Code*, it is useful to briefly consider each of the various prohibitions in ss 23A, 24(1A) and 31A(1) of the *Credit Code*.

Section 31A(1): imposing or providing for fees and charges

140 The prohibition in s 31A(1) is in respect of the entry into SACCs which either “impose or provide for” fees and charges which are not of the permitted kind. As the discussion below indicates, s 31A(1) draws a distinction between a clause which has the legal effect of imposing on a consumer a fee of a particular kind, and a clause which purports to do so but is not effective. The latter is a reference to a clause which “provide[s] for fees and charges”. The chapeau to s 31A(1) indicates that the section is concerned with what the SACC does and it attaches to both the immediate imposition or charging of a fee and the making of provision for the charging of a fee.

141 The expression, “payable in the event of default”, in s 31A(1)(c) is sufficiently clear. It means that the clause in question must impose an obligation which is conditioned upon the failure of the borrower to comply with an obligation created by the terms of the SACC as they are from time to time. In other words, the liability to pay must not arise unless and until such a default occurs. Recently, Kennett J observed in *ASIC v Ferratum* at [39]:

[T]he preferable understanding of s 31A(1)(c) is that it permits the imposition of a fee on a consumer that responds to a “default in payment” by the consumer and is triggered either by the event of default itself or an event that occurs while the consumer remains in default. ...

142 However, the final part of the above passage — that s 31A(1)(c) permits the imposition of a fee triggered by an “event that occurs while the consumer remains in default” — should not be taken as suggesting that a fee may permissibly be imposed upon the occurrence of *any* event that occurs while the consumer remains in default. The liability to pay the fee must, on every occasion, be conditioned upon an event of default in payment by the borrower.

143 Ultimately, those points were not seriously in dispute and the issue substantially became whether the Amendment Fee imposed or provided for in the several iterations of the SACCs, was “payable in the event of a default in payment under the contract”. If it was not, it would be beyond the scope of the permitted terms in s 31A(1) and result in a contravention.

Section 23A(1)(b): imposing a prohibited monetary liability

144 The relevant part of s 23A(1)(b) provides that a SACC “must not impose a monetary liability on the debtor ... in respect of a fee or charge prohibited by this Code”. In this case, the allegation was that the fees actually imposed by the SACCs were not imposed in the event of default as was claimed and, therefore, were prohibited. However, the concern of s 23A(1)(b) is, again, with the effect of the operation of the contract. It is not concerned with the conduct of the credit provider under a SACC: see *ASIC v Ferratum* [31]: which is dealt with in s 24(1A).

145 For the purposes of ss 23A(1)(b) and 24(1A)(a), a contravention will only occur in relation to the imposition of “a monetary liability” in respect of fees or charges prohibited by the *Credit Code*. The compendious expression, “a monetary liability”, is apt to include the fee or charge itself and that self-evident proposition is confirmed by the Revised Explanatory Memorandum to the Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth), which explains s 23A in the following terms at [5.30]:

... The changes proposed in section 23A would mean that providers of small amount credit contracts will not be able to impose any credit fees or charge other than those expressly permitted under section 31A. ...

146 There was no real dispute that the Amendment Fee in question in this case sought to impose a fee or charge on the borrowers.

Section 24(1A): entering a contract on terms imposing a prohibited monetary liability or requiring or accepting payment of an amount in respect of a monetary liability

147 Section 24(1A) creates a civil liability offence in relation to a credit provider entering into contracts containing prohibited clauses, as well as attempting or purporting to enforcing them.

148 The relevant terms of s 24(1A)(a) are to the effect that a credit provider must not enter into a SACC “on terms imposing a monetary liability prohibited by subsection 23A(1)”. As mentioned above, the latter section referred to includes fees imposing a monetary liability which is prohibited by the *Credit Code*.

149 It would seem to be apparent that the prohibition is not upon entering into a SACC which, in fact, imposes a prohibited obligation. That could not occur because, if the monetary obligation in question was prohibited, it would be void by reason of s 23A(2). The term in question could therefore not be “imposed” in the sense of creating an actual obligation on the borrower to make a payment. For that reason, the expression “on terms imposing” must be distinguished

from that of merely “imposing” an obligation, such that s 24(1A)(a) applies to SACCs which purport to impose terms which are prohibited by the *Credit Code*.

150 In a similar way, s 24(1A)(b) provides that the credit provider must not “require or accept payment of an amount in respect of a monetary liability that cannot be imposed consistently” with the *Credit Code*. Here, the prohibition is on the requirement to pay, or the acceptance of, an amount in respect of a “monetary liability” which cannot be imposed in accordance with the *Credit Code*. Any clause which purports to do that would be void by reason of s 23A(2) and it follows that, if such a clause existed in a SACC, it would be void in any event and not give rise to a “liability” which could be enforced. Hence, a contravention of this civil penalty provision will occur when the credit provider seeks to obtain payment or accepts payment purportedly in relation to a prohibited monetary liability. Self-evidently, the prohibition is upon the *conduct* of requiring or accepting payment and it is in this respect that the manner in which Sunshine Loans charged the Amendment Fee is relevant to the assessment of any alleged contraventions.

Was the Amendment Fee a prohibited monetary liability?

151 Whether or not the SACCs imposed or purported to impose a prohibited monetary liability by reason of the Amendment Fee and met the description in s 23A(1)(b) is a matter of contractual interpretation. Contrary to Sunshine Loans’ submission, it matters not whether or how Sunshine Loans charged the fee, even if that is relevant to a certain extent in relation to the contraventions of s 24(1A)(b). The only question is whether, on the basis of the terms of the SACCs, the borrower became liable to pay the Amendment Fee otherwise than in the event of a relevant default.

The nature of the Amendment Fee

152 Whilst the various iterations of the SACCs are poorly drafted, at least to the extent that they were intended to achieve clarity, the description of the Amendment Fee affords some primary indication as to when the fee was payable. In the case of the fee described as a “Rescheduled payment fee”, it is easily assumed that it was payable when the time or times for the making of a payment to Sunshine Loans was rescheduled. Similarly, the description of a fee as an “Amendment fee”, *prima facie*, indicates that it was payable when the terms of the agreement were amended, including where the scheduled repayments were altered and a rescheduled timetable of repayments was agreed to. There is nothing in the terms and conditions in the CC Contract Terms which alters these assumptions. Indeed, the terms do not mention them at all.

The closest reference is the statement that when all amounts under the contract become due, it includes all fees that are payable: see cll 3.3 and 5.2.

153 The above conclusion is supported by the existence of other fees referred to in the Financial Table. The “Establishment fee” is only referred to there and the obligation to pay it is inferentially drawn from its description. So too is the fee referred to as the “Monthly Credit Charge”. Although the occasion on which that latter fee is payable is also not expressed in the CC Contract Terms, the inference from its description is that it is paid monthly. It follows that the form of the SACCs is that, subject to a contrary indication, the obligation to pay the fees described in the Financial Table is identified from the description given to them.

154 Though post-contractual conduct is not available to construe the contract, comfort for the foregoing conclusion can be obtained from a review of the statements of accounts which show that the occasion of the charging of the fees reflected the name attributed to them. Default fees were paid on default. Establishment fees were paid on the establishment of the loan. The Monthly Credit Charges were fees which were paid monthly throughout the course of the loan. Arrears account management fees were paid when the loan was in arrears. No reason was offered as to why it would be only in the case of the Amendment Fees that the name of the fee did not reflect the occasion on which it was charged.

155 Conversely, the “Default fee” and the “Direct Debit Dishonour fee” are specifically referenced in the CC Contract Terms. In cl 3.5(b), they are identified as becoming payable if a cheque or direct debit is dishonoured. Clause 5.2 also provides that if there is a default under the agreement, the default fee becomes repayable. Although the structure of the agreement differs in relation to these fees, the terms relating to them still support the not unrealistic notion that the description given to the fees in the Financial Table accords with their purpose and the occasions on which they become payable.

156 The nature of the Amendment Fee, referred to as either an “Amendment fee” or a “Rescheduled payment fee”, can be further revealed by cl 5.1(a) of the CC Contract Terms, which refers to a default occurring when the borrower fails to “make the repayments shown in the Financial Table, or such other repayments as agreed between us from time to time, on or before the days on which they are due”. The reference to “such other repayments as agreed ... from time to time”, shows that the parties contemplated the possibility of the initially scheduled repayments being varied or amended by mutual agreement. Such variations may take numerous forms, including deferring payments for a period and extending the date for the making of final

payments, deferring some payments and increasing later payments so that the loan is paid out on the original date for repayment, or reducing payments for a period of time with or without an extension of the overall loan period. Similar inferences arise from cl 5.1(d), which includes as a “default” an occasion where a borrower breaches any variation of the agreement, and also from cl 6.3, which refers to agreements to vary the terms of the contract.

157 The necessary conclusion is that the agreement between the parties contemplated a variety of circumstances in which a variation might take place and they would include within them the rescheduling of payments. When that occurred, the “Rescheduled payment fee” or the “Amendment fee”, depending on the nomenclature used, applied to render the borrower liable for an additional fee.

158 There is logical coherence to this construction. Where the parties agree upon an alteration to the repayment schedule there is, in the ordinary course, a variation of the original contractual rights and obligations. That is, the lender has agreed that it will accept the altered payment arrangements in lieu of the original obligations. Although Mr Wyles KC, counsel for Sunshine Loans, submitted that there was no consideration passing from the borrower for Sunshine Loans’ promise to accept a later repayment, the payment of the \$35.00 fee would easily accommodate that requirement. Indeed, it is axiomatic that such was the intention.

159 The foregoing gives the SACCs between Sunshine Loans and the borrowers a sensible, businesslike operation which also has a logical result.

160 It was not seriously suggested that there was any ambiguity in relation to the construction of the words “Rescheduled payment fee” or “Amendment fee” in the Financial Table which could thereby provide a gateway, assuming that it is needed, to consider the factual circumstances surrounding the entry into the contract: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 – 117 [46] – [52], referring to *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352. If there were no ambiguity, the words would have their natural meaning which would, on balance, be that the fees are as described by their title.

161 In any event, here, part of the circumstances surrounding the entry into of the SACCs was the giving of the “Information Statement” by Sunshine Loans to each borrower prior to their entry into the relevant SACC. Mr Powe, a director of Sunshine Loans, identified that the purpose of providing the statement to the borrower was so that they understood that they could contact

Sunshine Loans at any time under the terms of their SACC, and because it was required by the *Credit Code*. He was correct in that latter respect, as s 16 of the *Credit Code* provides that a credit provider must not enter into a credit contract unless they have provided the intended borrower with an information statement, in the form prescribed by the regulations, about the borrower's statutory rights and obligations. During the Relevant Period, the form of Sunshine Loans' Information Statement complied with the regulated form and largely replicated it.

162 Clause 14 of the Information Statement given to Sunshine Loans' customers included the following:

14. What do I do if I cannot make a repayment?

Get in touch with your credit provider immediately. Discuss the matter and see if you can come to some arrangement. You can ask your credit provider to change your contract in a number of ways, for example -

- to extend the term of the contract and either reduce the amount of each payment accordingly or defer payments for a specified period; or
- to simply defer payments for a specified period.

15. What if my credit provider and I cannot agree on a suitable arrangement?

If you have been unemployed, sick or there is another good reason why you are having problems with your contract, then your contract may be able to be changed to meet your situation.

You may be able to apply to the court. Contact your Government Consumer Agency or get legal advice on how to go about this.

There are other people, such as financial counsellors, who may be able to help.

163 Clause 14 further evidences that, at the time of entry into the relevant SACCs, the parties anticipated that circumstances might arise whereby some arrangement might be entered into by which payments might be reduced or deferred. Necessarily, this variation of the contract terms will result in a rescheduling or amendment to the quantum or timing of the repayments originally agreed upon. In those circumstances, it is reasonable to suppose that the entries in the Financial Table concerning an "Amendment fee" or "Rescheduled payment fee" related to the occasions when such arrangements between the borrower and Sunshine Loans were negotiated.

164 Again, properly construed, the Amendment Fee (whether described as an "Amendment fee" or a "Rescheduled payment fee"), was a fee which was to be paid by a borrower who entered into an arrangement whereby their repayment obligations were amended by agreement with Sunshine Loans. The fee was payable because those initial obligations had been changed by

an agreement, the effect of which was that different repayment obligations were assumed, and no default of the original obligations occurred.

“Payable in the event of a default in payment under the contract”

165 In order to fall outside the scope of s 31A(1)(c), it is necessary that the Amendment Fee was payable otherwise than “in the event of a default in payment under the contract”. As mentioned, the phrase “in the event of” requires a connection between the payment and the default and necessarily implies the existence of causality, in the sense that the obligation to pay arises consequent upon the occurrence of a default. Such a construction is supported by the note following the end of s 31A, which reads:

Note: See section 39B for the maximum amount that may be recovered by the credit provider if there is a default in payment under the contract.

166 Section 39B of the *Credit Code* provides as follows:

39B Limit on amount that may be recovered if there is default under a small amount credit contract

- (1) If there is a default in payment under a small amount credit contract, the credit provider in relation to the contract must not (whether by repayments under the contract or otherwise) recover more than twice the adjusted credit amount in relation to the contract.

Civil penalty: 5,000 penalty units.

167 The operation of this section emphasises that the fees which are properly regarded as payable in the event of default are those which, by the terms of the agreement between the parties, become owing as a result of the borrower making a default in payment of an amount for which they are liable by the contract’s terms. That construction provides coherence of operation as between the contract terms.

The Amendment Fee was a prohibited fee

168 Regardless of whether the fee in question is described as an “Amendment fee” or a “Rescheduled payment fee”, on its face, the fee is payable on the parties agreeing to amend the terms between them. No doubt, this will usually occur in relation to the rescheduling of payments under the agreement, as contemplated by cl 14 of the Information Statement. Moreover, the contractual obligation to pay the fee does not arise consequent upon the borrower having made a default in payment of any amount otherwise payable under the agreement. The obligation to pay the fee arises because the terms of the agreement have been amended such that payment in accordance with the varied or amended agreement will avoid a default

occurring. So much appears from cl 5.1(d) of the CC Contract Terms, which provides that a default will occur in circumstances where the borrower has failed to comply with the terms of the agreement as varied.

169 Therefore, the Amendment Fee is not a fee or charge which was payable “in the event of a default of a payment” under the SACC. It was, therefore, a fee or charge prohibited by s 31A of the *Credit Code*.

Did Sunshine Loans enter into SACCs on terms imposing a prohibited monetary liability?

170 Being a fee prohibited by s 31A(1), the Amendment Fee met the description of a “monetary liability prohibited by s 23A(1)”. The consequence is that, on each occasion on which Sunshine Loans entered into a SACC containing an Amendment Fee in the Financial Table, it contravened s 24(1A)(a).

171 In the Statement of Agreed Facts, it was agreed that during the Relevant Period, Sunshine Loans entered into 670,609 SACCs on the terms set out in the five versions contained in Annexures A to E of the Statement. Each of those versions contained the offending “Amendment fee” or “Rescheduled payment fee” in the Financial Table, the substance of which has been considered above.

172 It is not necessary to analyse whether, or the way in which, Sunshine Loans charged the Amendment Fee in respect of each alleged occasion of contravention of s 24(1A)(a). Further, and contrary to Sunshine Loans’ submissions, the Statement of Agreed Facts provides a sufficient evidential basis on which the Court can make a finding (beyond the example loan files) of the number of times Sunshine Loans entered into an offending SACC.

173 It follows that, subject to the discussion of certain “defences” below, Sunshine Loans contravened s 24(1A)(a) of the *Credit Code* on 670,609 occasions during the Relevant Period.

The effect of cl 6.1

174 Included in the CC Contract Terms was cl 6.1, which provided:

6. General Provisions

1. Any provisions of this Consumer Credit Contract which are rendered void or illegal or otherwise unenforceable or which give rise to a penalty, whether civil or otherwise, by law will only be ineffective to the extent required by law and are otherwise effective and all other clauses not effected by such law shall remain as fully effective.

175 It was submitted by Sunshine Loans that this clause (and the corresponding clauses in subsequent iterations of the CC Contract Terms) had the effect that the provisions of the SACCs on which ASIC relied as giving rise to a breach of the *Credit Code* were ineffective or inoperative such that they could not result in any liability. However, that cannot be the correct construction of cl 6.1. Its words are sufficiently clear. It operates when a clause of the agreement is “rendered void or illegal or otherwise unenforceable”. In this sense, the contract contemplates that its clauses have a *prima facie* operation as between Sunshine Loans and the borrowers, but that they may be “rendered” void or illegal or unenforceable by some legislative provision. The clause does not purport to render other clauses of the agreement void or unenforceable if they are contrary to legislation — all that it does is purport to save them to the extent to which they do not contravene a relevant law.

176 In this context it is relevant that cl 6.1 does not provide that, if a clause *would* be rendered void, illegal or unenforceable, it will be effective only to the extent that it is lawful. Rather, it allows the clauses to operate according to their terms, but subject to the vitiating effect of legislation.

177 It follows that cl 6.1 does not have any mollifying effect on the operative clauses to the extent to which they are contrary to the *Credit Code*.

The impact of s 23A(2) of the Credit Code

178 A similar submission was made in relation to s 23A(2)(b) of the *Credit Code*. It was said that, as that section rendered a provision of a SACC which imposed a monetary liability prohibited by s 23A(1) void, the clauses of the SACCs which imposed the Amendment Fee were necessarily inoperative, such that they could not be prohibited by s 23A nor contravene s 24(1A) of the *Credit Code*.

179 This submission has a not insubstantial degree of circularity to it. Its effect is that, whilst s 23A(1) provides that a SACC must not impose a monetary liability on the debtor which was prohibited by the Act, s 23A(2) provides that if a SACC imposed such a prohibited monetary liability, it was void. It followed that where a SACC was entered into which purportedly imposed a prohibited monetary liability, it would not in fact impose the liability, and s 24(1A) would not have been contravened.

180 This fails to appreciate the terms of s 24(1A) and the conduct which it seeks to penalise. Although referred to above, the subsection provides:

(1A) A credit provider must not:

- (a) enter into a small amount credit contract on terms imposing a monetary liability prohibited by subsection 23A(1); or
- (b) require or accept payment of an amount in respect of a monetary liability that cannot be imposed consistently with this Code.

Civil penalty: 5,000 penalty units.

181 The concern of subsection (a) is not the entry into a SACC which *imposes* a prohibited monetary liability, it is the entry into a SACC “*on terms imposing*” a prohibited monetary liability. It is apparent that the legislature was alive to the fact that such clauses would be rendered void, hence it focused on the terms of the SACC, regardless of whether they would in fact be operative.

182 Such a construction gives the words of s 24(1A)(a) their natural and ordinary meaning. It also has the consequence of avoiding rendering that section inutile, as would be the result if Sunshine Loans’ submission was accepted. A construction that avoids rendering sections of an enactment redundant is to be preferred to one that does. Additionally, such a construction furthers the objective and purpose of the *Credit Code*: to protect, *inter alia*, persons who enter into small amount credit contracts. That protection is buttressed on the identified construction which retains the operative effect of the civil penalties imposed by s 24(1A).

Sunshine Loans contravened s 24(1A)(a)

183 Given that neither of the above defences are made out, it is found that Sunshine Loans contravened s 24(1A)(a) of the *Credit Code* on the identified 670,609 occasions during the Relevant Period, being each occasion on which it entered into a SACC which made provision for the Amendment Fee.

Did Sunshine Loans require or accept payment of a prohibited monetary liability?

184 The second and third set of contraventions on which ASIC relied in its second further amended originating application concerned the requiring and accepting of payment of amounts in contravention of s 24(1A)(b) on the basis that the payments required and accepted were of amounts that could not be imposed consistently with the *Credit Code* because they were each a monetary liability prohibited by s 23A(1).

185 These alleged contraventions were said to arise on Sunshine Loans’ requirement and acceptance of payments in relation to the Amendment Fee during the Relevant Period. ASIC alleged that the act of requiring payment was one form of contravention of s 24(1A)(b), and the act of accepting payment was another.

The evidence from the 66 loan files

186 The specific direct evidence before the Court in relation to the manner in which Sunshine Loans conducted its business, was constituted by the materials produced by Sunshine Loans to ASIC consequent upon ASIC's delivery of certain statutory notices. In particular, ASIC relied on loan files in relation to 66 of Sunshine Loans' customers which Sunshine Loans had produced. Such files revealed the manner in which the loans were repaid over time as well as certain communications between the customers and Sunshine Loans. Relevantly, the documents contained in each of the files included:

- (a) The loan document package consisting of the Financial Table, the Information Statement, and the CC Contract Terms which included the execution page;
- (b) A direct debit request form for the customer authorising the withdrawal of amounts from their bank account;
- (c) A statement for the customer's loan showing debits and credits, including a description of the nature of those transactions;
- (d) A customer communications log which recorded oral, online or other communications between Sunshine Loans and the relevant customer; and
- (e) Sunshine Loans' internal working documents in relation to the assessment of the loan.

187 Most of the files also included a copy of an updated repayment schedule which had been sent to the customer after they had asked for a variation of the repayment obligations and to which Sunshine Loans had agreed.

188 The loan files required by ASIC in the several notices and provided by Sunshine Loans were the files in respect of the first four loans to which an Amendment Fee was charged on or after certain dates identified in the respective notice. The point sought to be made was that the 66 files produced were relatively random, with the only relevant criteria being that they involved the charging of the Amendment Fee. ASIC's case is that the 66 files which were adduced as evidence are representative of the manner in which the Amendment Fee was charged to borrowers and paid by them over the course of the Relevant Period.

189 At the conclusion of the trial, ASIC acknowledged that five of the loans relied upon were entered into by Sunshine Loans more than six years prior to the commencement of the action and, therefore, outside of the period in respect of which action can be taken under s 166 of the *Credit Act*. Those customers and their associated files which were exhibited to the affidavit of

Mr Smirnov sworn 21 November 2022 (First Smirnov Affidavit) were Customers 16 (whose file was contained at SS-55), 18 (whose file was contained at SS-36), 19 (whose file was contained at SS-56), 27 (whose file was contained at SS-59) and 32 (whose file was contained at SS-44). Whilst it will not be possible for ASIC to obtain relief in respect of any contraventions relating to those customers, the evidence of the manner in which Sunshine Loans dealt with them remains relevant to the extent to which ASIC relied upon a practice or pattern of behaviour.

Two approaches to assessing the alleged contraventions of s 24(1A)(b)

190 For convenience, it is appropriate to restate the terms of s 24(1A)(b):

(1A) A credit provider must not:

...

(b) require or accept payment of an amount in respect of a monetary liability that cannot be imposed consistently with this Code.

191 The reference to “a monetary liability that cannot be imposed consistently with this Code” necessarily includes monetary liabilities prohibited by s 23A(1) which, in turn, includes those prohibited by s 31A. That means that it encompasses a monetary liability which is imposed by a term or sought to be imposed by a prohibited term.

192 Here, the Amendment Fees which were purported to be charged by each of the five versions of the SACCs were prohibited terms. The remaining question is whether the amounts required or accepted by Sunshine Loans were “in respect of” those terms.

193 There can be no question as to the width of that expression. It is of wide import and the words take their colour from the context in which they are used: *Technical Products Pty Ltd v State Government Insurance Office (Qld)* (1989) 167 CLR 45, 51. Nevertheless, they only require there to be “some discernible and rational link” between the matters in question: *Mango Media Pty Ltd v Velingos* (2008) 216 FLR 176, 179 [14].

194 Here, the expression denotes the requirement for a discernible and rational link between the requirement for, or acceptance of, payment of an amount on the one hand, and the Amendment Fee on the other.

195 There are two potential approaches to the determination of Sunshine Loans’ liability under this section. The first, and preferable, approach largely turns on the construction of the terms of the SACCs and the documentary evidence concerning the entries included on the borrowers’

accounts which identified the charging of an Amendment Fee, and the subsequent payments made by the borrowers to discharge their loan obligations including payment of the fee.

196 The second approach, being the approach adopted by Sunshine Loans, involved an assessment of each borrower's file to determine whether the amounts accepted or required to be paid were, in fact, amounts payable in respect of an amendment to the relevant SACC. Sunshine Loans suggested that the evidence from the files of each loan account demonstrated that what actually took place between the parties was not an amendment to the terms of the SACC, such that the amount charged and described as an Amendment Fee was not, in fact, a fee payable in respect of an amendment. It was submitted that there was no evidence of any agreements to amend the borrowers' liability to make payments under the SACCs, and that what really occurred was the payment of a fee because the borrowers had defaulted in paying out the loan in the time frame originally agreed upon.

197 More specifically, Sunshine Loans submitted that, when the evidence before the Court was considered, it would become clear that its practice was not to charge an Amendment Fee until the end of the loan period, by which time the borrower had not paid the instalments on the loans in accordance with the initially agreed schedule. This, so it was said, had the result that the fees were "payable in the event of a default in payment". There are difficulties with this approach, and, in cross-examination, it led one of Sunshine Loans' directors to the absurd proposition that a variation to a loan agreement did not result in there being any amendment to it.

198 The first and most obvious difficulty with Sunshine Loans' contention is that for a fee to be within the scope of s 31A(1)(c), such that it is "payable in the event of a default", its imposition must be occasioned by, or conditioned upon, the occurrence of a default. It is insufficient that the payment is not *recovered* until after a default has occurred. A fee or charge that is incurred by a borrower (in the sense that they become obliged to pay it) before any default has occurred, does not become one payable in the event of default merely because it is paid after a default has subsequently occurred. As determined above, the Amendment Fee was payable on, or occasioned by, an amendment of the terms of the relevant SACC.

199 The second difficulty is that the evidence shows that Sunshine Loans *did* charge the Amendment Fee prior to the occurrence of a default of payment under the agreement. Sunshine Loans' submission in relation to this point proceeded upon the assumption that any agreement or arrangement between it and a borrower to alter the timing and/or the quantum of repayments

had no effect on the borrower's obligation to make repayments in accordance with the payment schedule to which the parties had originally agreed. In general terms, its submission was that even where the borrower had contacted it and agreed with a representative that there would be an alteration to the originally agreed repayment schedule and, in respect of which alteration the borrower would be told that the Amendment Fee would be charged, there was in fact no alteration to the terms of the relevant SACC. So the submission went, even where the borrower had contacted Sunshine Loans, been told by one of its officers that Sunshine Loans was agreeable to an alteration of the payment schedule, and a new schedule of repayments was sent to the borrower, there was no alteration to the borrower's repayment obligations as originally agreed. Therefore, it was said, the borrower was in default when they paid in accordance with the agreed schedule.

200 It is difficult to know whether, in this respect, Sunshine Loans had adopted a deliberately obtruse attitude, was effectively misleading borrowers, or was concocting a fanciful argument to avoid liability in these proceedings. The evidence which is identified below shows that the pattern was that a borrower would contact Sunshine Loans seeking an alteration to their payment obligations (for example, by extending the time for repayment or the amount of each repayment) and a new schedule would be agreed, and the borrower would be charged the Amendment Fee. The agreed amendment would usually be confirmed by the sending of a new payment schedule to the borrower. It is difficult to see how that variation to the initially agreed payment terms could have the consequence that payment in accordance with it by the borrower would mean that a default occurred.

201 Even if the events could be characterised in the manner asserted by Sunshine Loans, the evidence revealed that there were numerous occasions on which it charged the \$35.00 Amendment Fee prior to there being a default under the initial or amended terms of the relevant SACC.

202 As the discussion below reveals, on the identified occasions, Sunshine Loans did require payment of an amount (being \$35.00) from borrowers in respect of the Amendment Fee which was a prohibited monetary liability. At the very least, the \$35.00 amount was added to each borrower's statement of account (which they were able to see via their online access portal) and appeared adjacent to the words "Amendment fee" or "Rescheduled payment fee". The creation of that statement to the borrower showing the amount, and purportedly what it was for, establishes that the payment was required "in respect of" the prohibited monetary liability.

Despite its submissions to the contrary, by engaging in that conduct, Sunshine Loans indicated to borrowers that they were required to make payment of the total amount due on the statement, including the fee in question, in order to discharge their indebtedness to it. In any event, the evidence before the Court went further than that. It showed that, as a matter of Sunshine Loans' practice, the borrowers were told that a "Amendment fee" or "Rescheduled payment fee" would be required for altering the terms of the agreement in accordance with the amendments to the repayments that had been agreed. The evidence also established that before the amendment to the payment schedule occurred, the customer indicated their agreement to pay the Amendment Fee.

203 With respect to the submissions of Sunshine Loans to the contrary, these facts are all that is required to establish its liability under s 24(1A)(b) for "requiring" payment of a prohibited monetary liability.

204 The same largely applies to the contraventions of "accepting" payment of the amounts in respect of the Amendment Fees. As the below discussion reveals, on a number of occasions, Sunshine Loans accepted payment of an amount (being \$35.00) from borrowers in respect of the Amendment Fee which was a prohibited monetary liability.

Were the relevant SACCs amended or varied?

205 Central to Sunshine Loans' defence was the assertion that there was no evidence that any amendments had been made to the SACCs entered into between it and the borrowers. It claimed that there was no evidence that the agreements were changed or altered (orally or in writing) by identified words, or at all. It submitted that on no occasion did it "reach any consensus ad idem with [a] customer to vary in writing the terms of the Financial Table of that customer's SACC". It added that the statutory requirements "dictated that no 'variation' of the SACC could be affected [sic] unilaterally by Sunshine..." (emphasis in original).

206 Sunshine Loans sought to frame the interactions between it and the borrowers who requested a deferral of a payment as ones where the borrower merely indicated that they would not be able to make a forthcoming payment and that, thereafter, they failed to make that payment. It followed from this, so it was said, that they were in default and the Amendment Fee was payable consequent upon that default. Though the recorded interactions appeared to disclose an agreement that the borrower would not be making a forthcoming payment and that the Amendment Fee would be charged, Sunshine Loans submitted that no amendment or variation to the relevant SACC occurred. That submission has more than a degree of unreality about it,

and critically, is contrary to the effect of the clear words used by the parties as recorded in the customer transaction logs. It is nonetheless necessary to deal with certain legal arguments which were advanced as denying the possibility of the loan agreements being varied in the known circumstances.

The effect of s 40 of the Credit Code

207 The first submission was that any agreed variation or alteration to a SACC could not amount to an amendment of it by reason of the operation of s 40 of the *Credit Code*. That section relevantly provides:

40 Changes etc. under contracts

If:

(a) there is:

...

(ii) a deferral or waiver of an amount under an existing credit contract; or

(iii) a postponement relating to an existing credit contract; and

(b) the change, deferral, waiver or postponement is made in accordance with this Code or the existing credit contract;

then the change, deferral, waiver or postponement is not to be treated as creating a new credit contract for the purposes of this Code.

208 Sunshine Loans submitted that where it and its customers had agreed upon the deferral of payments to be made under a SACC, s 40 operates to ensure that the agreement did not amount to a variation of the SACC.

209 However, that submission fails to appreciate the meaning of the expression “a new credit contract” in the chaussette of s 40, which needs to be construed in the context of the provisions of the *Credit Code*. That context includes s 16 of the *Credit Code* which requires the credit provider, prior to entering into a credit contract, to give the debtor a precontractual statement setting out the matters required by s 17 to be included in the contract document *and* an information statement in the form required by the regulations of the debtor’s statutory rights and obligations. The requirements of s 17 are substantial, even if not all requirements need to be met for a SACC.

210 When entering into each of the SACCs, that obligation to provide such a document was seemingly complied with by Sunshine Loans by its provision to potential customers of the

Information Statements which are contained in each of the 66 loan files. The statements so provided were in the form required by the regulations and included statements to the effect that a borrower who was unable to make a repayment should seek to come to an arrangement with their credit provider. It is noted that the Information Statement had to be provided *prior* to entry into the SACC or *before* the debtor makes an offer to enter into one.

211 The *Credit Code* also makes provision for the effectuating of an agreement to vary a SACC. It requires, by s 71(1), that the credit provider must provide a written notice to the borrower setting out the particulars of the change, though, by s 72(2), that requirement “does not apply to a change which defers or otherwise reduces the obligations of the debtor for a period not exceeding 90 days”. It, therefore, contemplates that the credit provider and the borrower are able to make agreements between them which are effective to amend the original obligations. It would be inconsistent with s 71 were s 40 to be taken to negate the occurrence of any agreed changes.

212 In this context, s 40 operates so that, if the alteration is of the identified type and has been made in accordance with the *Credit Code* or the existing credit contract, the agreement between the parties is not to be treated as creating a new credit contract. In the absence of that exception, it would follow that with every alteration to a credit contract, the requirements of ss 16 and 17 would have to be complied with and a new statement reflecting the nature of the change and consequences would need to be given. In this way s 40 also avoids the difficulty that would otherwise exist if s 16 applied, in that the statement would need to be given prior to entering into the credit contract or before the debtor makes an offer to enter into it, which would be problematic where the agreement already exists between the parties. That conclusion is supported by the words, “for the purposes of this Code”, at the end of s 40.

213 It follows that s 40 does not have the consequence that where the parties agree to alter the repayment terms of a credit contract, it is not amended or varied thereby. Where the parties validly agree to alter the contract, the variation is effectual to alter their rights and obligations. In the present case, the variations between Sunshine Loans and the 66 example customers in respect of which the Amendment Fee were charged were valid such that the customers did not default by making payments in accordance with the agreed new arrangements.

The impact of s 19 of the Credit Code

214 Sunshine Loans also relied upon the operation of s 19 of the *Credit Code* as rendering any alterations to the relevant SACCs invalid or ineffective. The submission seemed to be that

whilst it and a borrower went about agreeing to amendments to a SACC, they were ineffective, with the result that any extensions to which Sunshine Loans purported to agree were ineffective. As a result, it was said that the Amendment Fees were paid subsequent to the borrowers being in default because they had not made payments in relation to their loan in accordance with the original payment schedule — even though the borrowers would have apprehended that the payment schedule had been altered.

215 Section 19 provides as follows:

19 Alteration of contract document

- (1) An alteration of (including an addition to) a new contract document by the credit provider after it is signed by the debtor is ineffective unless the debtor has agreed in writing to the alteration.
- (2) This section does not apply to an alteration having the effect of reducing the debtor's liabilities under the credit contract.

216 It was submitted that, because the circumstances in which Sunshine Loans allegedly entered into variations or amendments of the SACCs did not involve the borrower agreeing to the alterations in writing, they were rendered ineffective by s 19. However, here, the construction turns on appreciating the meaning of the expression, “a new contract document”, which has been used in s 19 in contradistinction to expressions such as, “an existing credit contract”, or simply “a credit contract”.

217 Importantly, s 19 is found in Div 1 of Pt 2 of the *Credit Code*, which is headed, “Negotiating and making credit contracts”. Unsurprisingly, that Division contains provisions which relate to the form of credit contracts and the manner in which they may be entered into: s 14: the obligations which are imposed on the credit provider in relation to precontractual disclosure: s 16: the matters which must be contained in a credit contract: s 17: the form and expression of credit contracts: s 18: the provisions which must not be contained in specific credit contracts: s 18A: the provision of copies of contract documents to the debtor: s 20: and the early termination of the credit contract prior to performance by the credit provider: s 21.

218 In this context, s 19 can be seen logically to concern the alteration of documentation which the intended debtor has signed and which, if signed by the credit provider, will become a contractual document. Such documentation may be and, indeed, is likely to be the proposed terms of the contract itself. It may also include a document like the Financial Table, the precontractual statement setting out the matters required by s 17, or the information statement in the form required by the regulations, where provision has been made for the borrower to

sign for them. In the present case, all of the papers containing those several elements were included in the one composite document, comprising some 11 to 14 pages, which was signed on the last page of the CC Contract Terms. Each of the several elements, or all of them combined, might be capable of being referred to as a “new contract document”.

219 So, in respect of the current circumstances, it appears that the process followed was that the debtor would receive the composite document and execute the last page of the CC Contract Terms and the Direct Debit Request New Customer Form. The commencing words indicate that on it being given to Sunshine Loans, the debtor is making an offer to enter into the SACC on the terms contained in the Financial Table together with the CC Contract Terms. Thereafter, Sunshine Loans would usually execute the agreement and the parties would be bound by it. Section 19 most obviously applies in the interim period between the debtor signing the loan document and it being accepted. It has the effect that no alterations to the wording of the document can be made unless the debtor agrees to the alteration in writing. An oral agreement between a credit provider and a borrower to alter the terms of the contract documents prior to the agreement coming into existence would be ineffective.

220 In the absence of s 19, a credit provider would be able to agree orally with the borrower to amendments to the written terms which would then be binding once executed by it. The requirement for the borrower to agree to any alteration in writing prevents the possibility of there being any dispute about the terms of the agreement entered into. This construction of s 19 accords with the protective nature of the provisions in the *Credit Code*.

221 Sunshine Loans’ interpretation of s 19 to the effect that the expression “new contract document” refers to or means the actual credit agreement is problematic. If it were intended to refer to a credit contract into which the parties had entered, it can be expected that the expression “credit contract” would have been used. It is an expression defined by the *Credit Code* to mean a contract that had been entered into by the parties and, where that is the intended meaning, that is the expression used throughout the *Credit Code*. Indeed, in s 19(2), reference is made to a “credit contract” and one might expect that if the expression “new contract document” had been intended to mean the same thing, the same words would have been used.

222 This view is supported somewhat by the observations in Beatty and Smith, *Annotated National Credit Code* (2014, 5th ed, Lexis Nexis Butterworths) 139 – 140, where the learned authors observed:

Division 2 of Pt 4 [s 71] prescribes requirements to be followed if the parties to a credit contract agree to change its terms. The Code is unclear as to when an alteration or addition referred to in s.19 becomes an agreed change to which Div 2 of Pt 4 applies. That is, if both the debtor and the credit provider have signed the contract before the alteration or addition is made, the alteration or addition may be an agreed change to the contract. The logical interpretation is that s.19 (and not Div 2 of Pt 4) only applies to alterations or additions which are made at the contract formation stage. Section 19 should only be relied on for alterations which are essentially corrections or insertions of information which is incorrect or which was omitted by accident, but which all parties to the credit contract intended to be included, and not to change rights, obligations or liabilities. All other agreed alterations or additions after signing should be treated as agreed changes and the applicable requirements of Div 2 of Pt 4 should be followed.

223 Where the parties have each signed the agreement and are bound by it, any amendment is to occur by reference to s 71. That conclusion is supported, if it needs to be, by the heading to the Division, “Changes by agreement of parties”. Section 19, by comparison, applies prior to the formation of the contract. I would disagree with the learned authors of the above cited passage that it could apply to relatively minor administrative mistakes and errors. Although the logic of that view is enticing, it does not accord sufficient attention to the differences in wording between s 19 which utilises the term, “new contract document”, and s 71 which refers to an “existing credit contract”.

224 Section 19 therefore does not operate to exculpate Sunshine Loans in any way.

225 Therefore, at least in relation to each of the 66 example customers, Sunshine Loans reached an agreement with each of those customers that the relevant SACC would be amended or varied such that, upon the charging of the Amendment Fee to the customer’s account, the customer would be able to refrain from making a repayment as had been provided in the original schedule without defaulting in their payment obligations. The question which then arises, on Sunshine Loans’ case, is whether the Amendment Fees were chargeable when Sunshine Loans and the borrower agreed to an alteration or variation to the relevant SACC.

The evidence of the requirement or acceptance of payment of the Amendment Fees

226 The evidence in the 66 loan files revealed the circumstances in which the Amendment Fee was allegedly charged on each loan. That information is summarised in Schedule 1 to ASIC’s opening outline of submissions, which reveals:

- (a) the date on which the fee was to be paid and on which the Amendment Fee was applied to the loan;

- (b) the date in the customer transaction logs of the communications with the borrowers which gave rise to the subsequent deferral of the scheduled payment and the rescheduling to a new date and what that entry says;
- (c) the date on which the Amendment Fee was charged;
- (d) whether the consumer was provided with an account statement or other document detailing the account balance of the loan, which included the Amendment Fee, on or before the date that the rescheduled payment was originally due to be paid by the consumer; and
- (e) the date on which the loan was paid out as recorded in the statement of account.

227 Necessarily, the precise communications between the staff of Sunshine Loans and each of the 66 customers, as recorded in the transaction logs, varied according to the circumstances confronting each person. In general terms, the end result of the communications was that there was agreement that the original repayment obligations need not be complied with and that a new timetable for repayment was agreed upon. This was followed by the making of entries in the loan account statement whereby a \$35.00 fee was added to, in the sense of being charged to, the borrower's indebtedness. Against that amount, the words "Contract Amendment" were inserted.

228 On many, if not most, occasions the customer was emailed a document which contained a schedule reflecting the agreed variation of the repayments. It was headed "Payments Remaining" and would usually identify the amounts of the repayments to be made, the dates on which they were to be made, and the balance of the loan account on the making of each repayment. The new payment schedule, if followed, would cause the loan to be paid out by the originally agreed date. The document identified the balance of the loan as of the date of sending the schedule, but indicated that any payments made in the prior two days may not have been included in the summary and that, although it was valid as at the date of the statement, it may not include all fees as others might get added in the future.

229 The updated payment schedules also incorporated the \$35.00 amount attributable to the Amendment Fee into the payments listed in the new schedule. From this, it can be seen that Sunshine Loans "required" the payment of the Amendment Fee from the point at which it was charged.

230 In most cases, the updated schedule was sent on the day of the making of the agreement to vary the repayment terms. This meant that payment in accordance with the fee was “required” by Sunshine Loans prior to the date in the original unamended agreement for repayment. Therefore, at the time of the charging of the Amendment Fee, the borrower was not in default.

231 There were also instances where the borrower paid the Amendment Fee after it was charged to their account and prior to the date originally agreed upon as the date for the repayment of the loan. This could occur in a number of ways. In relation to the borrower designated as Customer 33 (whose file was contained at SS-21 and SS-79 of the First Smirnov Affidavit), it occurred because a variation was sought and agreed to, but the customer then determined to pay out the balance of loan, which included a \$35.00 Amendment Fee, before the due date. In such circumstances, it could not be said that the fee was payable in the event of a default in payment under the contract such that it fell within s 31A(1)(c) of the *Credit Code*.

232 In a letter to ASIC of 5 May 2021, O’Shea Lawyers, on behalf of Sunshine Loans, admitted that the charging of the Amendment Fee in this way occurred on 60 occasions. However, it was said that this had happened by mistake and that the payments were being returned. In the light of the circumstances of this case, that excuse cannot be accepted. It is apparent that the Amendment Fee was required by Sunshine Loans consequent upon the agreement of a variation to the original repayment schedule. It was charged and payable and, therefore, “required” prior to there being any default in the payment of any amount.

233 The communications recorded in the customer transaction logs reveal that the borrowers communicated with Sunshine Loans in several different ways. Usually, it was by way of telephone, email or by typing a written message to Sunshine Loans via a portal on its website. The text of the email or message on the portal was incorporated into the transaction log and, if the communication was by way of telephone call, the substance of the communication was recorded. Given that there were 66 files and a transaction log for each file, it is not practicable to set out the details of each relevant communication in these reasons. Nevertheless, ASIC’s written submissions set out some exemplars of the transaction log recordings, and it is useful to repeat them here.

234 From the file of the person designated Customer 55, which was contained at SS-120 to the First Smirnov Affidavit, the following appears in the customer transaction log where the debtor contacted Sunshine Loans on 6 April 2020:

Dear Payment Team, I would like to request that my final Account payment of \$220 due to be paid on 10th April to be deferred until 10th May as I can't afford it this month. Can you please advise your response via email when you get a chance?

Many Thanks

...

Thank you for contacting us. To be able to stop/adjust/reduce/move scheduled payment(s) you will need to provide valid documentation to support your request. ...

...

Thanks for sending through your bill. We have held your payment due on the 9/4/2020, you have incurred a \$35 Contract Amendment Fee.

235 In the statement of account on 6 April 2020, a "Contract Amendment" fee of \$35.00 was added to the borrower's indebtedness of \$220.00, increasing it to \$255.00. The date for the making of the final payment was 9 April 2020 and in the statement of account is the notation "Repayment Held", apparently indicating that the payment was not debited from the account on that day. A payment schedule was sent to the borrower although it showed that the date for the repayment of the loan remained as 9 April 2020, which appears to be discordant with the agreement reached.

236 The second example related to Customer 46, whose file was contained at SS-111 of the First Smirnov Affidavit. In the customer transaction log for 7 September 2020, the following communications appear:

Good Morning can i get my loan repayment done fortnightly instead of weekly but with the same amount please.

...

Unfortunately unless you are experiencing financial hardship, we are unable to change the terms and conditions of the contract.

...

Ok can I get it delayed for 1 week and then get it taken out the following week please Thank you ...;

...

Debit 15/09 has been held with the \$35 amendment fee. This will extend your loan past original end date 27/10 and extra fees will apply.

(Errors in original).

237 The communications had the consequence of Sunshine Loans accepting that the customer would not be able to pay for a week and the payments were then extended. The statement of account shows that the Amendment Fee of \$35.00 was charged and debited to the account on

7 September 2020, and the direct debit was not processed the following week on 15 September 2020. A statement of the payments remaining was sent to the customer which showed that the payment on 15 September 2020 would not be debited from the customer's account and it set out the remaining payments until 3 November 2020, at which point the loan would be discharged if the payments identified were made.

238 The third exemplar referred to was Customer 48, whose file was contained at SS-113 of the First Smirnov Affidavit. On 5 October 2020, the customer wrote to Sunshine Loans and the following exchange occurred:

Hello, my next payment is due on the 8th October , however I have started a new job and need to have the payments changed to the 23rd October please. could you please get back to me via email asap as I do not want to go into arrears nor have a negative against my name please.

...

Hi Natasha

Thank you for contacting us. Debit 08/10 has been held with the \$35 amendment fee. If you can provide a copy of your new contract, we can hold the fees.

Please attach as a reply. Will you still be paid fortnightly from 22/10?

...

Hello,

Yes I will be paid fortnight.

Thanks you very much

...

Thank you for advising. Your updated repayment schedule has been emailed through.

(Errors in original).

239 The account statement shows the debiting of the customer's account of a "Contract Amendment" fee of \$35.00 on 5 October 2020 and there being no direct debit of the standard repayment amount on 8 October 2020. An updated payment schedule was emailed to the customer. It set out a schedule of repayments taking into account the held payment and setting out a schedule which, if followed, would cause the loan to be paid out on 19 November 2020, which was the original date for repayment.

240 ASIC's written submissions also record queries received by Sunshine Loans from customers who asked whether it was possible to defer a payment. Reference was made to Customer 43, whose file was contained at SS-108 of the First Smirnov Affidavit. That customer had, on 5

October 2020, contacted Sunshine Loans and asked for her next payment to be deferred. She was told that it would be, “with the \$35 amendment fee”. The statement of account shows that these transactions were put into effect. In this way, the agreement struck between the parties was somewhat simple in that the request to vary was made and Sunshine Loans agreed and acted immediately to alter the terms of the loan and deduct the Amendment Fee.

241 It also appears that, on other occasions, customers sought advice as to their ability to alter the repayments of their loan and were advised that doing so would incur the Amendment Fee. After taking some time to think about it, they then agreed to pay the fee so as to allow the alteration to the payments. This can be seen from the file of Customer 59, whose file was contained at SS-124 of the First Smirnov Affidavit. There, the customer transaction log records the following:

Call in. Wanted to cancel this weeks payment due to unexpected bill, explained fees and issues with this. Was going to think about it and call us back.

...

Customer called wanting to hold this weeks payment- advised of the \$35 fee, customer then wants to split the held payment and the fee over remaining payments to finish ontime, made all the changes and sent updated schedule

(Errors in original).

242 The statement of account reveals that a “Contract Amendment” fee of \$35.00 was debited to the account on the date of the second encounter referred to above.

243 The above examples, which are emblematic of the other files, demonstrate that the practice was that an agreement would be reached between the borrower and Sunshine Loans that the obligation to make the loan payment in question would be deferred or delayed upon the borrower’s acceptance of their obligation to make the payment of the \$35.00 Amendment Fee.

244 It is to be remembered that the interactions between the parties took place in the context of their contractual rights and obligations. That included the existence of a fee which was to be paid by the borrower if there was an amendment to the terms of the loan agreement. Therefore, when the borrower asks that Sunshine Loans permit there to be an amendment to the repayment terms and Sunshine Loans agrees to the request, there is an agreement to amend the SACC in respect of which the Amendment Fee is charged. There is no doubt that on some occasions the formation of the agreement more clearly appears from the words used by each party and that, on occasion, the formalities are implied to some extent. There are also occasions where the telephone conversation has been recorded in minimal terms and largely only the effect of it.

Nevertheless, the records are sufficient to demonstrate that a conversation took place which resulted in there being an agreement pursuant to which the borrower would not be required to make the originally scheduled payment. The evidence establishes to a high degree of probability, in fact, almost certainly, that in all cases where Sunshine Loans imposed an Amendment Fee, it did so following the borrower's request to alter or amend the previously agreed schedule of payments and Sunshine Loans' agreement that this may occur. These facts are clearly established from the customer transaction logs contained in the files annexed to the First Smirnov Affidavit and from a consideration of the communications between the parties.

245 Contrary to an array of unfounded submissions advanced on behalf of Sunshine Loans, the circumstances found in the 66 files show beyond any doubt that, in each case, the parties reached an agreement that there would be an alteration to the borrower's payment obligations under their SACC. An objective consideration of what passed between the parties indicates that an agreement was reached that the original obligation to make a payment at a particular time was varied and that a new agreement was reached whereby the borrower was entitled to make payments in a different manner. This conclusion is, with respect, rather obvious. Although it was submitted that there was no consideration for Sunshine Loans' agreement to alter the terms of the SACCs, the payment of the Amendment Fee satisfactorily meets that requirement. Again, the clear indication that this was so appears from the name given to that fee by the parties as part of the written contractual terms. It is, with respect, impossible to reach any other conclusion.

246 As a matter of fact, following those communications, Sunshine Loans imposed the Amendment Fee as a fee for the making of the alteration or amendment to the relevant SACC and it was paid by the borrower in accordance with the written terms of their SACC. Despite repeated denials that the Amendment Fee was charged to the account by Sunshine Loans as a charge for the amendment of the terms of the loan, no reasonable submission was advanced which indicated why else it might have been imposed. Although it was said that it was imposed because there was a default under the agreement, as is readily apparent from the above examples and from many of the files, the fee was imposed well prior to there being any default by the borrower. The submissions that the impugned fee was one chargeable to the borrower upon default were wholly unsustainable.

Requirement to provide documentation

247 It is worth remarking that on numerous occasions when a customer asked that they defer the making of a repayment, Sunshine Loans' agreement was not immediately forthcoming. It was frequently the case that it required the customer to provide some documentary evidence to support their claimed reason for their inability to make the repayments as originally agreed. Examples of this include:

(a) In relation to Customer 34, whose file was contained at SS-60 of the First Smirnov Affidavit, the customer transaction log recorded:

To be able to stop/adjust/reduce/move a scheduled payment you will need to provide valid documentation to support your request.

(b) Similarly, in relation to Customer 35, whose file was contained at SS-61 of the First Smirnov Affidavit, the customer transaction log recorded:

Called requesting to hold his next repayment due to being sick, claims he won't work today and tomorrow. Will email med cert to support the claim. Confirmed that whe just needed to hold the payment from 13-Aug and continue on the 20th and so on

(Errors in original).

248 If the nature of the discussions were as alleged by Sunshine Loans, such documentation would have been irrelevant. It would make no difference to whether there was a default that the borrower was able to substantiate their reason for not paying on time. Such evidence would only be relevant if the nature of the conversations were that the borrower was seeking agreement from Sunshine Loans for an amendment or variation to the agreement as a result of changed circumstances. These instances where Sunshine Loans required additional information, of which there were many, only reinforce that which is otherwise clear — that the agreements were for the amendment of the payment obligations under the SACCs.

Requirement to agree to fee

249 Similarly, the evidence from the customer transaction logs was that it was regularly the case that the customer was to agree to the payment of the relevant fee before the variation agreement was reached. It was only when the customer agreed to the fee that the arrangement was reached. Some examples include:

(a) In relation to Customer 60, whose file was contained at SS-125 of the First Smirnov Affidavit, the customer transaction log recorded the following:

customer called wanting to hold this weeks payment as she has to pay for her

kids school supplies. Advised her of fees, customer still wanted payment held. Customer is aware of fees and said doesn't mind just wants it held

(Errors in original).

- (b) In relation to Customer 35, whose file was contained at SS-61 of the First Smirnov Affidavit, the customer transaction log recorded:

customer called wanting to hold next payment due to not working and caring for ill mother. Held payment out of goodwill (previous loan history) advised of the \$35 held payment fee, advised to have made up before end contract date so he doesn't incur arrears fees. Advised any future payments to be held we require documents

- (c) On occasion, the Sunshine Loans staff made it expressly clear that the fee to be paid was for the amendment of the contract. In relation to Customer 42, whose file was contained at SS-107 of the First Smirnov Affidavit, the following was recorded:

customer called asking to stop his payment this week as he has his rego due - I suggested I halve the payment for him but said he would really like the full payment stopped - I agreed, advised there will be a \$35 contract amendment fee and to make up payment and fee before the 11/11 to avoid going over and incurring arrears fees

- (d) To the same effect is the recording in the customer transaction log for Customer 46, whose file was contained at SS-111 of the First Smirnov Affidavit, where, after a request was made for the holding of a forthcoming payment, the following was recorded:

Debit 15/09 has been held with a \$35 amendment fee. This will extend your loan past original end date 27/10 and extra fees will apply. Final debit is now 03/11 for \$167.64, inclusive of fees for the extra week. An updated payment schedule has been emailed through.

250 It is also worth observing that, despite the clear agreement between Sunshine Loans and the borrowers about the deferral or reduction of specific payments for which the Amendment Fee was paid, it is apparent that the agreement did not make provision for what was to happen to the remainder of the payments. Sunshine Loans adopted the position that the agreement reached — that the customer be entitled to defer a payment for a week or other agreed period — related only to that payment and it did not otherwise extend the loan by the length of the period deferred. Its approach, as shown from the statements of accounts, was that the deferral of a payment for a week did not otherwise alter the timing of future payments. It follows that, if after the deferral period the borrower continued to make the agreed amounts at each relevant period of time, they would inevitably default because the loan would not be repaid within the originally agreed period. ASIC took no point about this conduct and there is no need to consider what may flow from it. However, it does reveal that Sunshine Loans was acutely

aware of the consequences of its agreements with borrowers that there be some amendment to the originally agreed repayment regime. It was similarly aware of the extent of the agreed variation and especially that it did not extend, at least in its view, to the remainder of the original repayment schedule. On many, if not most, occasions Sunshine Loans sent to the borrower an updated repayment schedule which set out the remaining payments which replicated the timing of the originally agreed schedule even if the amount of the payments was increased.

The requests for variations were not notifications of default

251 In a further attempt to avoid the above conclusion, Sunshine Loans submitted that the requests by borrowers to reschedule their payments amounted to notifications by them that they intended to default on the terms of their SACC. With respect, the requests cannot be characterised as statements by the borrowers that they would not comply with the terms of their SACCs. Many were express requests for a variation of the timing of the making of repayments and others were clearly implied requests for that to occur. Indeed, so much was conceded by Mr Simmons, the Chief Operations Manager of Sunshine Loans, in his first affidavit. There, he described the general operations where a customer seeks to defer the making of a payment through the direct debit system that had been established. Specifically, in relation to the response to a request to defer payment, he said at paragraph 12:

In response to such contact, the customer service officer will identify the customer and access their file in the Sunshine System. If the customer makes a defer repayment request the customer service officer either by him or herself or in consultation with their supervisor, will decide whether Sunshine will or will not seek to take payment from that customer's account on the next scheduled date for a repayment to be made. If it is determined that Sunshine will not seek to take payment on the next scheduled repayment date, the customer service operator will notify the customer and select a link marked "hold" on their screen which accesses the customer's file in the Sunshine system and stops the direct debit authority being used on the next repayment date recorded in the file.

252 Thereafter, he described that if Sunshine Loans agreed to hold the payment, the \$35.00 fee would be applied. He went on to assert that the fee was payable because of the borrower's default in making the payment. That evidence was disingenuous as was Mr Simmons' oral evidence. In the circumstances explained by Mr Simmons, the \$35.00 fee was described in the statement of account as an Amendment Fee which, as has been found above, was payable upon the amendment of the relevant SACC. The fee was not described as a "Default fee" or an "Arrears management fee" as was frequently charged when a borrower was in default or in arrears of their repayments. It is highly improbable that on all of the occasions referred to in the 66 files, Sunshine Loans charged an Amendment Fee following an agreement to make an

amendment, but actually intended to charge a Default fee or Arrears management fee consequent upon a default, even though, on no view was there a default.

253 It is true that there were a number of occasions when a borrower contacted Sunshine Loans and indicated that they were unable or likely to be unable to make a forthcoming repayment. It was submitted by Sunshine Loans that this had the effect of the borrower indicating that they would not be complying with the agreed terms and, therefore, amounted to an anticipatory breach. It is not necessary to determine whether any such anticipatory breach occurred, not in the least because Sunshine Loans did not treat it as such. On the contrary, by its staff, it negotiated and agreed upon a variation of the original repayment terms with the borrower. An example of this can be found in the customer transaction log in the file of Customer 26, whose file was contained at SS-40 and SS-89 of the First Smirnov Affidavit. There, the following narration was recorded on 1 February 2017:

Customer is unable to make the payment this week and was going to cancel the direct debits just agreed to hold the repayment and notified

254 It is evident that the customer indicated their inability to make the relevant payment and indicated that they planned to cancel their direct debit authorisation. Rather than let that occur, a Sunshine Loans officer agreed to “hold” the impending payment. The statement of account indicated that a “Contract Amendment” fee was charged on that date although no Default fee or Direct Debit Dishonour fee was charged as might have been expected had Sunshine Loans chosen to treat the non-payment, or indication of an inability to pay, as a default.

255 Despite Sunshine Loans’ attempts to characterise the charging of an Amendment Fee as the charging of a fee payable on default, this was not borne out by the evidence. In respect of all of the 66 example customers whose files were annexed to the First Smirnov Affidavit, the Amendment Fee was charged to the customer’s account on the same date that the repayment was agreed to be deferred. As ASIC submitted, in relation to 64 customers, the payment of the fee occurred prior to the date the original repayment was due. On that basis, there was no warrant for requiring the payment of a fee upon default as none had then occurred. In relation to the remaining two borrowers, being Customer 39 (whose file was contained at SS-63 of the First Smirnov Affidavit) and Customer 26 (whose file was contained at SS-40 and SS-89 of the First Smirnov Affidavit), the Amendment Fee was charged on the date that the payment was due.

256 The evidence well establishes that Sunshine Loans charged the borrowers' accounts with the Amendment Fee on the date on which the agreement with the respective borrower was made — being a time prior to there being any default in payment by them. Its practice of charging the Amendment Fee does not suggest that the fee was payable, nor that it was paid, on default by the borrower.

257 Although counsel for Sunshine Loans took the Court to a large number of individual loans, they only served to strengthen ASIC's case: that the effect of the discussions between Sunshine Loans and its customers was that the terms of the SACC would be varied in accordance with the customer's request such that the forthcoming payment would not be required in accordance with the originally agreed terms, and that the Amendment Fee was payable for this variation.

258 The evidence also establishes that Sunshine Loans required the payment of the Amendment Fee in circumstances which were different from those in which a fee was payable in relation to a default by the borrower. Those fees were variously described as "Default fee" or "Direct Debit Dishonour fee" or "Failed payment fee" and were also charged at \$35.00. That they were so named indicated the circumstances in which they were payable, and the terms of the SACCs identified that they were imposed where the borrower had failed to make a payment on the originally scheduled due date or as varied from time to time.

259 The above conclusion that Sunshine Loans charged the Amendment Fee where it and the customer had reached an agreement to vary the repayment terms is consistent with the manner in which Sunshine loans charged default fees. In the case of 33 of the 66 customers represented by the 66 loan files in evidence, a "Default fee" was charged to the account where the customer failed to make a scheduled repayment without having reached an earlier agreement with Sunshine Loans to defer it. In ASIC's opening outline of submissions, it attached a schedule concerning the payment of "Default fees" by customers. It accurately identified for each customer the date in the loan statement on which such a fee was charged, the original date of repayment that was missed, what (if anything) the customer transaction logs recorded about that event and, finally, whether any correspondence was sent to the customer about the default.

260 It is useful to consider the first example in that table which concerned Customer 1, whose file was contained at SS-50 of the First Smirnov Affidavit. There, the documents show that a payment was due on 13 March 2018 but the direct debit attempted by Sunshine Loans failed. The statement of account in relation to the loan shows that an "EziDebit Failed Payment Fee" was debited to the account which increased the debt on the account by \$35.00. The customer

transaction log also reveals that a “6Q Notice” was sent to the customer which notified the customer of the default and said:

You must pay to us the sum of \$501.60 plus \$35.00 Default Fees payable under the Loan Contract.

261 The letter subsequently said:

If you fail to make another payment due under the Loan Contract during the next 30 days:

- you will be charged another Default Fee of \$35.00;
- and, if that payment is not made before Saturday, 14 April 2018, we may, without further notice, terminate your Loan Contract and commence enforcement proceedings against you for the entire balance outstanding of the Loan Contract plus the Arrears Account Management Fee of \$30.00 per week plus our reasonable debt collection costs and legal action costs as provided for in the Loan Contract.

262 In many of the files it is recorded that similar letters or emails were sent to customers upon their default. In relation to some of the files a copy of the document has been produced, though in many others none appears in the file. Nevertheless, a perusal of the files shows that Sunshine Loans’ practice was relevantly the same in relation to the notification to customers of any default on the making of a repayment, and that no such action was taken on the occasions when a payment was made later than the originally agreed date, consequent upon an agreed deferral of it and the payment of an Amendment Fee.

263 In terms of the actual requiring and acceptance of payment of fees by Sunshine Loans, it is apparent that the various forms of default fees charged by it were within the scope of those permitted by s 31A(1)(c) of the *Credit Code*, but that the Amendment Fee was required and paid in entirely different circumstances.

The wording of Sunshine Loans’ working documents

264 Moreover, Sunshine Loans’ own documents indicate that the Amendment Fee was charged to the borrower for the making of an amendment to the terms of the original agreement. As mentioned, in the Financial Table which is part of each SACC, the fee is referred to as “Rescheduled repayment fee” or “Amendment fee” and used in contradistinction to a “Failed payment fee” or “Arrears account management fee”. The statements of account in the 66 files describe the Amendment Fee as a “Contract Amendment” fee. Further, in the customer transaction logs, Sunshine Loans’ staff refer to the fee as an amendment fee, and in those logs the pro forma entry used by customer service officers when the scheduled payment has been

deferred and the Amendment Fee is charged reads, “Customer has been deferred until [[x] date]”. Lastly, the first credit contract used by Sunshine Loans in respect of which an Amendment Fee was charged identified the “Rescheduling/administration fee” referred to in the Financial Table (although it appeared to be part of the contract terms) as being chargeable “[w]hen repayment/s are rescheduled, payable following rescheduling”. The admissibility of this document is discussed below.

265 There is, therefore, more than sufficient evidence to establish the purpose of the Amendment Fee and the occasions on which it was charged.

Admissions made by or on behalf of Sunshine Loans

266 In addition to the compelling evidence discussed above, ASIC relied upon certain statements made by or on behalf of Sunshine Loans during ASIC’s initial investigations as amounting to admissions that the Amendment Fee was payable when the credit provider and the borrower agreed to an alteration to the repayment schedule.

267 One admission was in a letter from Mr Powe of Sunshine Loans to ASIC in response to inquiries being made as to the circumstances in which Sunshine Loans charged Amendment Fees in relation to its SACCs. The letter was dated 23 November 2020 and it stated, in part:

We would like you to understand that an amendment fee is never charged if a customer is simply amending the contract by informing us of a change in their –

- Personal or employment details.
- Regular payday from one day to a different day of the week, fortnight, or month.
- Regular pay frequency.

268 The natural inference to be drawn is that the Amendment Fee referred to was charged on occasions when the customer was amending the contract in *other* respects. It is apparent that Mr Powe made those comments at a time when he was unaware of their importance. His evidence in these proceedings 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 his affidavit and during cross-examination to be unsatisfactory.

269 Sunshine Loans complained that this correspondence could not amount to an admission that the Amendment Fee was chargeable upon other forms of amendment to the contracts as it would offend “the common law principle that an admission must be clear and unequivocal”. This complaint does not assist Sunshine Loans. Under the *Evidence Act*, an admission is any

previous representation that is “adverse to the [relevant party’s] interest in the outcome of the proceeding”. It has been said that almost any statement or conduct, no matter how apparently innocuous, is capable of being an admission. Indeed, the statement need not even be against the maker’s interest at the time it was made: see *Nguyen v The Queen* (2020) 269 CLR 299, 322 [57]. The correspondence is probative in circumstances where it is consistent with the majority of the evidence which is otherwise before the Court.

270 In the letter referred to above, Mr Powe added that for commercial reasons, Sunshine Loans had ceased to charge any Amendment Fees from 2 November 2020 and that clearly identifies the subject matter of the admission.

271 ASIC subsequently issued statutory notices to Sunshine Loans. The first was issued on 21 January 2021, pursuant to s 266 of the *Credit Act*. Amongst other things, it required production of the “Complete Loan File for each Relevant Loan”, where “Relevant Loan” was defined to mean “each of the first four Loans that were charged an Amendment Fee” on or after certain identified dates. The notice defined the phrase “Amendment Fee” as being “the fee as listed in the Licensee’s Contract provided in an email from Mr Powe on Monday 7 September 2020”. That contract was a template SACC of the type the subject of these proceedings, which included the usual Financial Table containing a fee described as an “Amendment Fee”.

272 On 7 April 2021, a further notice was issued under s 49 of the *Credit Act*. It required the production of “a written statement containing the information about the credit activities engaged in by you and/or your representatives specified in the Schedule to this Notice.” The Schedule to it required information about the introduction and use of the Amendment Fee by Sunshine Loans. In a letter accompanying the notice, Sunshine Loans’ attention was drawn to a note which contained relevant information, including definitions used in the notice. Relevantly, the expression “Amendment Fee” was defined to mean “the fee charged by the Licensee to reschedule a scheduled payment or part thereof”.

273 Shortly thereafter, on 13 April 2021, a second notice was issued by ASIC under s 266 of the *Credit Act*. By it, ASIC required Sunshine Loans to produce, amongst other things, the first SACC where the Amendment Fee was included, all minutes of board meetings where the contract format was discussed and/or approved, and all books in relation to the inclusion of the Amendment Fee in the SACCs. Several other statutory notices were subsequently issued, though it is not necessary to discuss them in any depth.

274 It is relevant that Sunshine Loans responded to the several statutory notices issued by ASIC and provided the information and documents required, but did not cavil with the definition attributed to the expression “Amendment Fee”.

275 In an email of 28 April 2021, Mr Simmons, on behalf of Sunshine Loans, advised ASIC that the Amendment Fee was first inserted into its SACCs on 4 November 2013. He identified the persons who decided to include the Amendment Fee clause in the agreement and indicated that it was first charged on 5 December 2013.

276 By a letter of 5 May 2021, O’Shea Lawyers, the solicitors for Sunshine Loans, provided further responses to the s 49 notice and the s 266 notices referred to above. The letter gave a Dropbox address by which ASIC could access material provided by Sunshine Loans, including 36 loan files which were said to evidence that the application of the Amendment Fee to the loans was “typical” and “indeed, standard” practice for Sunshine Loans.

277 The letter also indicated that a copy of the first credit contract where the Amendment Fee was charged was included in the material provided. The contract was not in fact included in the material, but it was subsequently provided by an email of 6 May 2021. It was an early iteration of Sunshine Loans’ SACC dated 4 November 2013 and it contained, in the Financial Table, a “Missed repayment (late) fee” of \$35.00 and a “Rescheduling/administration fee” of \$35.00. That latter fee was described on a subsequent page of the contract as follows:

During the Term of the Contract, the customer may become liable for one or more of the following credit fees or charges, which are unascertainable at the time of entering this contract. ...

Other Fees and Charges	Amount	Description
...
Rescheduling/admin fee	\$35.00	When repayment/s are scheduled, payable following rescheduling
...

278 The letter noted that “the terminology has changed over the life of the fee and it was first referred to as a Rescheduling fee”. This makes clear that, although the initial credit contract referred to a “Rescheduling/administration fee”, the fee was in the nature of an Amendment Fee.

279 These circumstances constitute an acknowledgement by Sunshine Loans that the fee which was later referred to as an “Amendment fee” or “Rescheduled payment fee” was a fee charged upon

a rescheduling of the repayments originally agreed to. It is impossible to read the documents as meaning anything else, and that is supported by the following statement in the letter:

Part 3 - All minutes of board meetings where the contract format was discussed and/or approved;

The Amendment (rescheduling) fee was not a matter of continuing Board attention once it was established. There are no board minutes which specifically refer to its adoption.

280 The reference to “The Amendment (rescheduling) fee” is particularly noteworthy and an apparent acceptance by Sunshine Loans and its lawyers that the Amendment Fee was charged where there had been an agreed rescheduling of repayments by the borrower. To similar effect is the following statement on the third page of the letter:

Our client has also provided Two Tables which set out how the Reschedule or Amendment Fee was charged for the sixteen (16) files requested and they have, of their own volition, randomly selected twenty (20) other files from 2017 -2020 to demonstrate that these applications were typical, indeed, standard.

281 There can be no doubt that, by this letter, Sunshine Loans acknowledged that which equated to its practice of charging the Amendment Fee in instances where the parties agreed to a variation of the manner in which the repayments would occur.

282 The identified commentary in the letter from O’Shea Lawyers was, in this respect, entirely correct in that the evidence by itself revealed that the Amendment Fee was charged upon the parties agreeing to a rescheduling of the borrower’s repayments. ASIC relied upon the letter as an admission of the central element of its case as to the nature and purpose of the Amendment Fee and it can be accepted as such, even though the acknowledgments were made at a time before all of the issues in the litigation became apparent. On the other hand, the letter is merely confirmatory of that which emerged from the evidence derived from the 66 example files before the Court.

283 The letter of 5 May 2021 also stated that the number of SACCs entered into by Sunshine Loans which contained an Amendment Fee was 880,094. However, the parties agreed in the Statement of Agreed Facts that the relevant figure for the purpose of the present proceedings was 670,609. The letter also identified the number of occasions in the financial years from 2016 to 2021 that an Amendment Fee was charged by Sunshine Loans and that the total number of individual customers who had paid the fee was 10,427.

284 In relation to the occasions of the charging of the Amendment Fee, the letter from O’Shea Lawyers asserted that Sunshine Loans had given instructions that, according to its policy, “the

amendment fee was charged to the customer's account at the point of contact by the customer requesting to stop a payment". The letter added that, at that point in time, the customer was anticipating a breach of the contract such that the payment was in the event of a default. Leaving aside that erroneous commentary, Sunshine Loans at least acknowledged that the payment was charged at the point where a customer sought relief from the making of a payment. It did not go on to identify that which is obvious from the 66 files before the Court — that the fee was paid following an agreement that there would be a variation or amendment to the agreed repayment schedule — however, that is substantially acknowledged in a later paragraph, which reads:

Every consumer is made aware of the charging of the \$35 Amendment Fee both in the Financial Table of their contract, and verbally if they called or in writing if they emailed to request a rescheduling of their payment.

285 For present purposes, the instructions from Sunshine Loans as relayed by O'Shea Lawyers identify that the fee was payable at the time of there being an amendment to the borrower's repayment obligations. The letter also acknowledged that when the expression "charged" was used, it referred to a relevant amount being added to the outstanding balance, regardless of whether the amount was ever paid.

286 In general terms, these statements made on behalf of Sunshine Loans acknowledge the truth of the circumstances, namely that the customers were charged an Amendment Fee when they sought, and Sunshine Loans agreed, to alter or amend the scheduled repayments.

287 These admissions further establish the purpose of the Amendment Fee and the occasions on which it was charged.

288 It ought to be noted that, during the cross-examination of Mr Powe at the hearing, Sunshine Loans challenged the admissibility of the initial credit contract dated 4 November 2013. In brief, it submitted that the contents of, and questions regarding, the contracts used in 2013 are not rationally probative to the questions before this Court concerning the Amendment Fee contained in the SACCs utilised between 1 July 2016 and 2 November 2020 (being the Relevant Period). Mr Wyles KC for Sunshine Loans further suggested that evidence concerning the initial credit contract would be in the nature of inadmissible tendency evidence. Those submissions cannot be sustained. Although the initial credit contract may not be rationally probative on its own, when it is considered in the context of all the evidence before the Court, its relevance and, therefore, its admissibility, is clear — it reinforces the already

available conclusion that the circumstances in which the Amendment Fee was charged have not changed since the fee was first introduced into Sunshine Loans' SACCs.

289 Additional contracts were provided to ASIC by Sunshine Loans subsequent to the issuing of further statutory notices, and it is reasonable to conclude that such contracts were typical and standard of those issued in the course of Sunshine Loans' business and, indeed, that they were random examples of them.

The evidence from Sunshine Loans' witnesses

290 It appeared from the course of the evidence given by Sunshine Loans' witnesses that they had been well schooled in what to say under cross-examination. Even though there was no doubt from most of the customer transaction logs that the discussions between the customer and the officer of Sunshine Loans was about the deferral of a scheduled payment, each of the witnesses stubbornly clung to the notion that the request was merely for a "stop" to be placed on the next direct debit.

291 In his first affidavit, Mr Simmons asserted that in response to a request from a customer to defer a payment, the customer service officer would reach a decision as to whether Sunshine Loans would take payment from the customer's account on the next scheduled repayment date. He went on to assert that where Sunshine Loans determined not to take a payment on the next scheduled date, the service operator would select a link marked "hold" which had the effect of preventing the system from effecting a direct debit from the customer's account on that next occasion. The system would also prompt the service officer to determine whether a fee of \$35.00 would be recorded in the customer ledger. If it was decided that the fee would be charged, the fee would be recorded in the ledger on the date that the decision was made to prevent the effecting of a direct debit of the customer's account on the next scheduled repayment date.

292 In the course of his oral evidence, Mr Simmons maintained the somewhat disingenuous claim that where the customer service officer recorded that a customer had requested a deferral of a scheduled payment, that amounted merely to a request for Sunshine Loans not to effect a direct debit on their bank account. The intended effect of this construction of the conversation between the customer and Sunshine Loans appeared to be that all the customer asked was that the direct debit be stopped, such that there would be an immediate default in repaying the loan when the scheduled date for the direct debit to occur passed without the debit taking place.

293 Mr Simmons clung firmly to that impossible construction of the customer transaction logs. He was a not unintelligent person and appeared to be able to read and consider the words recorded in the logs whether they were texts, emails, online communications or records of telephone calls. I do not accept that he sought to give his evidence honestly in this respect.

294 Mr Bennetts, the Operations Manager and Head of Assessments at Sunshine Loans, also gave evidence in a manner which suggested that he had been schooled to deny that any agreement existed to amend the terms of the loan and to assert that the customer would be in default if they requested a deferral of a payment. During cross-examination, he was taken to the customer transaction log in relation to Customer 55 (whose file was contained at SS-120 of the First Smirnov Affidavit) and asked about the nature of that which was recorded as follows:

And the customer says:

Dear payment team, I would like to request that my final account payment of 220 due to be paid on 10 April is to be deferred until 10 May, as I can't afford it this month. Can you please advise your response via email when you get a chance. Many thanks.

And then the customer gives her name. And so you would accept that that is a payment deferral request that has been made by the customer in relation to this loan account?--
-Yes.

295 It is apparent that he accepted that the customer had requested a deferral of the scheduled payment. He then also accepted the effect of Sunshine Loans not acting on the direct debit authority as follows:

And the – not acting on the direct debit authority was the facilitation of the agreement that Sunshine had entered into with the customer to defer that payment, wasn't it?---
Correct.

296 He accepted that this was the way an agreement was struck between Sunshine Loans and the customer in relation to the deferral of the payment and the payment of the fee for the deferral:

Yes. And the – there had been agreement between the customer and Sunshine in relation to the deferral of the payment? --- Correct.

297 Despite this, he maintained the position that although the parties had agreed that the payment would be deferred, there was nevertheless a default by the customer for acting in accordance with that agreement and not making the payment which had supposedly been deferred. He was forced to the indefensible position of accepting that there was an agreement between Sunshine Loans and the customer that the latter could defer the payment, but that the fee was charged because there was a default in the repayment terms. He said:

Yes. And once there has been agreement to defer the payment, the customer can't then default on that payment, can she? --- Well, that's exactly what the customer is doing by deferring the payment. She's defaulting on it. We haven't agreed to extend the term of her loan. We have agreed not to take the payment on that fortnight, which as a result, puts her in a place of default.

298 Like Mr Simmons, I do not accept that Mr Bennetts sought to answer honestly the questions put to him in relation to this issue. His approach was not merely to take every opportunity to advance Sunshine Loans' case and his evidence extended to a deliberate misconstruction of the obvious circumstances which were in front of him.

299 The absurdity of the nature of Mr Bennetts' evidence is further revealed by the answers given by him in cross-examination in relation to Customer 61, whose file was contained at SS-126 of the First Smirnov Affidavit. In relation to that customer, he accepted that an agreement had been reached between them and Sunshine Loans that there be a deferral of certain payments, which had the consequence that a \$35.00 Amendment Fee was paid. The customer paid the Amendment Fee and subsequent repayments in accordance with the agreement so made, and paid out the loan on the date originally agreed. Whilst Mr Bennetts accepted that the customer made the payments in accordance with the new arrangements, he asserted that there had been a default because the customer had not made the payments in accordance with the original arrangements. He alleged that the agreement between the customer and Sunshine Loans for the deferral of the payment was not a variation of the relevant SACC. This apparently meant that although there was an agreement to amend the timing of the repayments and although the Amendment Fee was paid, there was no actual agreement to amend the payment terms. In the circumstances, his evidence was disingenuous.

300 He was also cross-examined in relation to Customer 9, whose file was contained at SS-19 of the First Smirnov Affidavit. In that case, the customer had telephoned Sunshine Loans and asked for her next repayment to be halved. Sunshine Loans agreed to that occurring. Mr Bennetts accepted that this amounted to a variation of the repayment agreement that had been entered into between Sunshine Loans and the customer though, on that occasion, no fee was charged for the variation.

301 The effect of Mr Bennetts' evidence was that Sunshine Loans and the customers did in fact come to agreements from time to time to vary their original agreement. Those variations could, in the circumstances, only mean that the customer was not obliged to make the originally scheduled payment but would, instead, make a different payment. Sunshine Loans gave effect to that agreement by putting a hold on the making of a direct debit from the customer's account.

It is, with respect, nonsense to think that there was no amendment to the SACC in such circumstances. On no sensible view could it be accepted that, despite the agreement, the customer would be in default if they did not make the payments in accordance with the originally scheduled arrangement.

302 In a similar manner, 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 in the manner of someone who had been schooled to advance a particular theory.

303 Mr Powe accepted that, from time to time, customers who were unable 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 repayment. However, in the maintenance of the theory which he sought to propound, his evidence became preposterous. He asserted that an agreement between Sunshine Loans and a customer that a repayment be deferred to a date other than that identified in the original payment schedule did not amount to any change to the terms of the original contract. He denied that such an agreement changed the terms of the relevant SACC:

You don't agree with that?---No, I don't. Because the original term of the contract is what they signed, and that is the term of the contract.

And that can't be changed by agreement of the parties?---Yes, of course it can, but if they're going to agree to a – a whole new contract, we would have to issue a new contract.

But you can vary the existing contract in terms of its payment terms, can't you, if you choose to do so?---Yes, but that's not – that's not - - -

Are you saying - - -?---That's not changing the contract. Varying it is not changing it.

Okay. I see?---We can vary – we can vary the terms of the contract. That is not changing the essence of the original contract that was – that was written.

304 If he actually believed his statement, “[v]arying it is not changing it”, it might be somewhat revelatory in this matter. It might explain why Sunshine Loans treated a customer's payment in accordance with an agreed new payment schedule as constituting default of their SACC. However, Mr Powe was also a not unintelligent person. He was a businessman of some ability and success in his area. It is highly unlikely that he would view the interactions recorded in the customer transaction logs as notifications of default. Rather, it is clear that 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 the objective evidence, and he was also not a witness who tried to give his evidence in an honest manner.

305 The witnesses for Sunshine Loans largely accepted the objective evidence derived from the loan files and, in particular, that agreements were reached with the customers that their payments could be deferred. That amounted to a variation of the relevant SACC, for which the customer was obliged to pay the Amendment Fee. If the customer paid in conformity with the new terms, no default of the SACC occurred, and any fee paid was not paid in the event of default. The contentions of Mr Simmons, Mr Bennetts and Mr Powe that the agreements did not vary the terms of the SACCs and that payment in conformity with the agreed variation constituted a breach are incorrect.

306 It was submitted on behalf of Sunshine Loans that ASIC did not directly put to the witnesses that their explanations of what occurred in relation to the deferral of payments was inaccurate with the result that the contrary cannot be submitted now. That submission should be rejected. The issues between the parties in this case were vivid. ASIC's submission was that the agreements reached between the parties was a variation or amendment of the SACC, whereas Sunshine Loans asserted that no such legal consequence occurred and that all that happened was that the customer defaulted in the payment of an instalment or the loan generally. By their affidavits and in their replies in cross-examination, Sunshine Loans was afforded a more than adequate opportunity to explain or comment upon the evidence which was to be used against it. It may well have been that the cross-examination occurred in relation to the exemplar files, but that was entirely appropriate in circumstances where the case has always been advanced on that basis, and Sunshine Loans and its lawyers have always been aware of that.

The absence of evidence from customers

307 Sunshine Loans submitted that the Court had to take into account ASIC's alleged failure to call each of the customers whose loans were specifically the subject of these proceedings to give evidence. Specific reliance was placed upon the observations of Heydon J in *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 443 – 444 [256]:

Fifthly, these cases, and *Shalhoub v Buchanan* in particular, merely point out that the greater the failure of a party bearing the onus of proof to call available witnesses with valuable evidence to give, the harder it is to satisfy that onus. The Court of Appeal appeared to accept as much when it said that its rule "takes matters beyond *Jones v Dunkel*, and beyond what was said in, for example, *Shalhoub*". The cases illustrate nothing more than Dawson J's observation: "When a party's case is deficient, the ordinary consequence is that it does not succeed". Counsel for the Hellicar respondents

put the following submission about the principle stated in *Blatch v Archer*:

“The underlying rationale for this principle can be simply put: a party with the burden of proof is expected to meet the requisite proof. If a party provides limited evidence when further evidence was available, a tribunal of fact is entitled to consider that failure when assessing whether the party has produced evidence to satisfy the standard of proof.”

(Footnotes omitted).

308 It is difficult to understand the application of those observations in the circumstances of the present case. Here, there is no deficiency in ASIC’s case and nor is its evidence limited. On the contrary, the case is a strong one, even if it is based on the material obtained from Sunshine Loans alone. The case is largely established on the documents which evidenced the entry into the SACCs which included the impermissible Amendment Fee, the circumstances in which Sunshine Loans and the customer agreed to a variation, the charging of that fee on many occasions, and its receipt from many customers. When one adds to that the admissions made in relation to Sunshine Loans’ business practices and use of contracts which included an Amendment Fee, all of which were undeniable in any event, ASIC’s case contained no weakness in respect of which any customer being called to give evidence might assist. There was simply no occasion for ASIC to contemplate calling witnesses who would be unlikely to have recalled the details of their interactions with Sunshine Loans in any event.

309 It follows that no adverse view should be taken of ASIC’s case by the absence of the evidence of any of the customers.

Should Sunshine Loans be excused from its contraventions?

The claim of mistake of fact

310 Sunshine Loans sought to rely upon s 175C of the *Credit Act* as a defence to ASIC’s allegations. That section provides:

175C Mistake of fact

- (1) A person is not liable to have a declaration of contravention, a pecuniary penalty order, a relinquishment order or any other order made against the person for a contravention of a civil penalty provision if:
 - (a) at or before the time of the conduct constituting the contravention, the person:
 - (i) considered whether or not facts existed; and
 - (ii) was under a mistaken but reasonable belief about those facts; and

- (b) had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.

...

311 In relation to this section, Sunshine Loans bears the evidential burden of proof: s 175C(3) of the *Credit Act*.

312 In its written submissions, it claimed that the facts which it had established, by the evidence of Mr Powe, Mr Bennetts and Mr Simmons, were that: prior to the charging of the \$35.00 Amendment Fee to the customers' accounts, it had a reasonable belief that the SACC between it and the relevant customer had not been varied to change the date for the next repayment; and that it had a reasonable belief that the customer was defaulting in making the payment under the SACC. The essential difficulty with this is that both propositions are not about the existence of "facts", rather they are each matters of the legal effect, within the context of the parties' respective legal rights, of the facts which had occurred. Even if Mr Powe, Mr Bennetts and Mr Simmons had those beliefs about the facts, which is doubtful, they were not reasonable. It is pellucid in this case that the Amendment Fee was charged for the making of an amendment or variation to the repayment terms under the SACC. A cursory consideration of the events and the relationship between the parties makes that clear beyond question. Any suggestion to the contrary is disingenuous.

313 Therefore, there is no need to consider whether the alleged beliefs were held but, as the preceding discussion discloses, were it necessary to decide I could not accept the evidence of those witnesses on that issue.

Relief from liability under s 183 of the Credit Act

314 Although it was not pleaded, in the course of its written submissions, Sunshine Loans sought to rely upon s 183 of the *Credit Act* as affording it a defence. That section provides:

183 Relief from liability for contravention of civil penalty provision

- (1) If:
 - (a) proceedings for a contravention of a civil penalty provision are brought against a person; and
 - (b) in the proceedings it appears to the court that the person has, or may have, contravened a civil penalty provision but that:
 - (i) the person has acted honestly; and
 - (ii) having regard to all the circumstances of the case, the person ought fairly to be excused for the

contravention;

the court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention.

315 Though many of Sunshine Loans' submissions were what might be described as "hopeful", the submissions in relation to this section were at the extreme end of that descriptor. Leaving aside for one moment the question of whether it could be said that Sunshine Loans acted honestly, the Court would need to be satisfied that, in the circumstances, it ought fairly to be excused. Here, there is nothing in its conduct which suggests that it ought to be entitled to any leniency in any finding as to the appropriateness of its conduct. On the findings made, it charged fees to its customers which it was not entitled to charge and did so over an extended period of time. There is no doubt that those fees were payable on the making of an amendment to the original agreement and that ought to have been obvious to Sunshine Loans. The fee was styled as an "amendment" or "rescheduled payment" fee and was regularly paid on the occurrence of those events. The claim that it was charged on the default by the customer cannot be sustained and, if it could, it would only be because Sunshine Loans had misled its customers into believing that the SACC had been varied by agreement when it had not been, and the customer had acted on the faith of the misleading impression by paying in accordance with the new repayment schedule.

316 It is not unfair to say that Sunshine Loans has acted in a wrongheaded manner over an extended period of time and, it is apparent, has not attempted to ascertain the true effect of the *Credit Code* in relation to its operations. That, of itself, prevents s 183 from operating in its favour. This is not a case of a single and excusable isolated non-compliance by an entity which immediately rectifies its conduct when its errant actions are pointed out. There is nothing in the circumstances which suggests that it ought fairly to be excused.

317 Again, were it necessary to determine whether Sunshine Loans acted honestly, I would have to conclude that it did not. If one ascribes to its directors and officers a reasonable level of integrity and intelligence, it would be difficult to conclude that they held any belief that the manner in which Sunshine Loans charged the Amendment Fee to its customers was permitted under the *Credit Code*. As I have found, that lack of honesty extended to the evidence which they gave.

318 There is no basis on which the Court might exercise the power in s 183 of the *Credit Code* to relieve Sunshine Loans from liability for its contraventions.

Sunshine Loans contravened s 24(1A)(b)

319 The above establishes that Sunshine Loans contravened s 24(1A)(b) by requiring the payment of a prohibited monetary liability on each occasion that it charged the \$35.00 Amendment Fee to a customer's loan account. It also contravened s 24(1A)(b) of the *Credit Code* on each occasion that it accepted payment from a customer in relation to the Amendment Fee. Both conclusions are made taking into account the seriousness of the allegations and the requirements of the high degree of assurance required by the test in *Briginshaw*.

The scope of the s 24(1A)(b) contraventions

320 In terms of the specific contraventions established by reference to the 61 loan files in evidence (that is, excluding the five files where the SACC was entered into more than six years prior to the commencement of the action), Sunshine Loans submitted that there were four specific instances where it could not be said that the Amendment Fee was required by Sunshine Loans or actually paid by the customer.

321 The first was Customer 5, whose file was contained at SS-33 of the First Smirnov Affidavit. There, the evidence showed that the loan amount was for \$1,500.00 and that an Amendment Fee of \$35.00 was charged to the account on 1 February 2019. Thereafter, a number of other fees were charged to the account including "EziDebit Failed Payment" fees and "Arrears Management" fees and these were all added to the account. Subsequently, the customer made a series of payments of \$198.00 but additional arrears management fees were charged. Ultimately, although entries were made to the statement of account indicating that arrears management fees were being charged, the amount of each was \$0.00. This occurred because Sunshine Loans had, by that time, charged the customer an amount of additional fees which equalled the amount borrowed and, pursuant to s 39B of the *Credit Code*, it was unable to charge any further fees. At that time the outstanding balance was \$426.00, which was subsequently paid off and the statement of account recorded a nil debit.

322 Sunshine Loans submitted that there was no evidence that the money paid to it was in respect of the Amendment Fee rather than the arrears management fees, albeit that the latter were not charged to the account. That submission should obviously be rejected. The state of the account was maintained by Sunshine Loans and it identified the borrower's indebtedness and the manner in which the payments received were attributed to the debt. It is, with respect, beyond any doubt that it did not increase the borrower's indebtedness in relation to the arrears management fees which it was not able to charge and that it caused the payments received to

discharge the previously arising obligations. Whatever might have happened prior to the date when Sunshine Loans was unable to charge additional fees, it is apparent that once the \$426.00 debt existing at that date was paid off, the customer had paid the amount of the previously charged Amendment Fee.

323 The second instance, which raised a slightly different issue, was in relation to Customer 13, whose file was contained at SS-21 of the First Smirnov Affidavit. That customer entered into a loan for \$2,000.00. On 3 August 2020, a “Contract Amendment” fee of \$35.00 was charged to the account, which resulted in the total indebtedness being \$343.52. On 5 August 2020, the loan amount was reduced to nil consequent upon the payment of an amount necessary to discharge that debt. Some time later, being after ASIC commenced its investigation into Sunshine Loans’ charges, Sunshine Loans repaid the Amendment Fee to 60 customers, one being Customer 13. Sunshine Loans therefore submitted that, because it had repaid the fee, it had not required or accepted its payment. With respect, that submission is not remotely sustainable. The facts, as they appear, make it clear that the fee was “required” because its payment was identified by Sunshine Loans as being a legal obligation owed by the borrower. It is also beyond any doubt that the amount was “accepted” by Sunshine Loans, as is evidenced from the entries in the statement of account which it maintained. The fact that an equivalent amount was subsequently repaid is not to the point.

324 The third customer in respect of whom an issue was raised was Customer 21, whose file was contained at SS-37 of the First Smirnov Affidavit. This loan was for the sum of \$1,250.00 which was advanced on 14 November 2018. Following discussions between the customer and Sunshine Loans, a variation of the repayments occurred and a “Contract Amendment” fee of \$35.00 was charged on 1 February 2019. That resulted in a total indebtedness of \$760.00. The customer subsequently defaulted in the making of a number of payments, resulting in additional fees of \$65.00 being incurred and the total indebtedness increasing to \$825.00. At that point, Sunshine Loans and the customer agreed that the customer would make three payments of \$250.00 to discharge the loan, with the consequence that \$75.00 of the total \$825.00 owing would not be paid. The customer thereafter paid the three instalments and reduced the debt to nil. Sunshine Loans claimed that the Court could not be satisfied that the Amendment Fee of \$35.00 was paid, as it might have been included in the \$75.00 which was written off by Sunshine Loans.

325 The answer to this turns on how the money was accounted for in the account. However, there is insufficient evidence to reach any sufficient conclusion in relation to this issue. It is true that in his affidavit filed 10 July 2023, Mr Simmons identified how he caused Sunshine Loans' computer databases to be interrogated by its IT consultants, InMarket Systems Pty Ltd, to ascertain on how many occasions the Amendment Fee had been paid by borrowers. It appears that the instructions included the following:

Where the customer has repaid the amount financed, the establishment fee and all monthly credit charges, I instructed InMarket to perform an analysis on a "money in money out" basis relying on the order in which any fee was posted to the loan statement. Where any part of the \$35 fee had been paid, I instructed InMarket to count that loan file as one where the relevant fee had been paid.

326 Whilst it is likely that Sunshine Loans operated its loan accounts in the same manner as the instructions given to InMarket Systems Pty Ltd, the evidence falls short of satisfying the onus in this case. The evidence of Mr Simmons certainly shows that he adopted a specific approach to the accounting for payments in the loan accounts for the purposes of the present action, but it is not clear from that acknowledgment that the usual day-to-day business operated that way. It cannot be said that the evidence established that Sunshine Loans received the Amendment Fee from Customer 21.

327 The last specifically referred to customer was Customer 40, whose file was contained at SS-105 of the First Smirnov Affidavit. There, the loan was for \$500.00, and it was advanced on 9 September 2020. On 5 October 2020, the customer indicated an inability to make his repayments and requested a deferral for two weeks. This was agreed to and a "Contract Amendment" fee of \$35.00 was debited to the account. Subsequently, various repayments were made by the borrower and a not insubstantial number of default fees were incurred. At the point where the total indebtedness had reached \$637.00, Sunshine Loans ceased debiting any further default fees to the account. It is apparent that, at this point in time, the borrower had been charged all of the fees which Sunshine Loans was entitled to charge on the loan. Although further defaults occurred and the default fees were noted on the statement of account, a nil amount was debited in respect of them. The loan was subsequently paid off.

328 As was the case in relation to Customer 5, it is apparent that the Amendment Fee was included in the borrower's indebtedness as at the date at which Sunshine Loans was unable to charge any further fees. It is also apparent from the manner in which the payments were made that the borrower repaid the outstanding indebtedness from that date and that included the "Contract

Amendment” fee. There is no sensible argument that Sunshine Loans did not receive payment of it.

Findings as to non-compliance with s 24(1A)(b) of the Credit Code

329 In light of the above, the following specific findings in respect of s 24(1A)(b) can be made by reference to the 61 loan files:

- (a) Between 1 July 2016 and 13 March 2019, Sunshine Loans required payment of the Amendment Fee:
 - (i) from 19 customers, being Customers 1, 2, 3, 5, 11, 12, 14, 17, 20, 21, 23, 24, 25, 26, 28, 29, 30, 36 and 37;
 - (ii) on 19 occasions, being on one occasion in respect of Customers 1, 2, 3, 5, 11, 12, 14, 17, 20, 21, 23, 24, 25, 26, 28, 29, 30, 36 and 37;
- (b) Between 1 July 2016 and 13 March 2019, Sunshine Loans accepted payment of the Amendment Fee:
 - (i) from 11 customers, being Customers 1, 2, 11, 12, 17, 20, 23, 25, 28, 36 and 37;
 - (ii) on 11 occasions, being on one occasion in respect of Customers 1, 2, 11, 12, 17, 20, 23, 25, 28, 36 and 37;
- (c) After 13 March 2019, Sunshine Loans required payment of the Amendment Fee:
 - (i) from 42 customers, being Customers 4, 6, 7, 8, 9, 10, 13, 15, 22, 31, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66;
 - (ii) on 47 occasions, because in respect of Customers 9, 34, 35 and 66 it charged the Amendment Fee on two, three, two and two occasions respectively;
- (d) After 13 March 2019, Sunshine Loans accepted payment of the Amendment Fee:
 - (i) from 35 customers, being Customers 4, 5, 6, 7, 9, 10, 13, 15, 22, 35, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66;
 - (ii) on 39 occasions, because in respect of Customers 9, 35 and 66, it charged the Amendment Fee twice.

The “extrapolation” of the contraventions

330 The remaining question, which was highly contested between the parties, is whether it is open for the Court to make findings of contravention beyond the 66 loan files adduced in evidence.

331 ASIC’s case is that the 66 loan files are representative of the manner in which the Amendment Fee was charged to all customers and paid by them over the course of the Relevant Period. It asks the Court to find that, during the Relevant Period, Sunshine Loans required payment of the Amendment Fee on 12,693 occasions and received payment of the Amendment Fee on 8,376 occasions.

332 The figures advanced by ASIC are derived from evidence adduced by Sunshine Loans in these proceedings, although larger figures were initially provided by Sunshine Loans to ASIC in response to statutory notices prior to the proceedings being commenced. Relevantly, by an email dated 10 May 2021 to ASIC, Dr O’Shea of O’Shea Lawyers set out the “number of times Sunshine Loans has charged the Amendment Fee”. Further, by two affidavits of 10 July 2023 and 24 July 2023, Mr Bigg, a computer program developer at InMarket Systems Pty Ltd, deposed that the sum of the number of occasions the Amendment Fee was paid was 8,376. Those figures can be summarised as follows:

Financial Year	Charged	Paid
01/07/2016 – 30/06/2017	1,003	470
01/07/2017 – 30/06/2018	3,856	1,750
01/07/2018 – 30/06/2019	4,971	3,778
01/07/2019 – 30/06/2020	2,469	2,072
01/07/2020 – 30/06/2021	394	306
Total	12,693	8,376

333 ASIC submitted that the Court could make findings beyond the 66 loan files, because the files were “illustrative” of Sunshine Loans’ practice in relation to all the SACCs. *First*, because the files were a random sample of all the SACCs entered into by Sunshine Loans which were charged an Amendment Fee over the course of the loan. *Secondly*, that the files demonstrate that Sunshine Loans engaged in the same practice of charging the Amendment Fee across the entirety of the Relevant Period. *Thirdly*, it relied on the fact that Sunshine Loans has made admissions in relation to the uniformity of its practice. *Finally*, because the evidence from the

66 loan files is consistent with Sunshine Loans' admissions about its practices during the Relevant Period.

334 Sunshine Loans submitted that an "illustrative" case is not available to ASIC on the evidence because whether the Amendment Fee charged on each occasion was prohibited must be assessed on each occasion it was debited to the customer's loan statement. However, for the reasons which have been given above, a precise analysis of the factual circumstances in each case is not needed to determine whether there has been a contravention, and that is particularly so in circumstances where admissions as to the charging and receipt of the fee have been made.

335 In particular, by its solicitor's correspondence dated 5 and 10 May 2021 and by the evidence adduced by Mr Bigg, Sunshine Loans has admitted to the precise number of times on which it required payment of, and accepted, the Amendment Fee. Although the solicitor's correspondence does not admit to "requiring" the Amendment Fee within the meaning of s 24(1A)(b), in light of the above findings, it is clear that Sunshine Loans required the payment of the Amendment Fee each time it charged the \$35.00 fee to a customer's account.

336 Though it might be accepted that the random nature of the selection of the 66 loan files is sufficient to demonstrate Sunshine Loans' practice of imposing, requiring or accepting impermissible Amendment Fees, it is not necessary to rely on that in respect of the broader findings that ASIC seeks. Those findings can be made by reference to terms of the several iterations of Sunshine Loans' SACCs and the admissions of charging and receiving the fee.

337 The five versions of the SACCs provided that the Amendment Fee was payable upon there being an amendment to the agreement. As such, it was a fee which was not permitted by s 31A of the *Credit Code*, its imposition was prohibited by s 23A, and by s 24, Sunshine Loans was prohibited from entering into a SACC on terms which imposed such a term, from requiring it, or accepting payment of it.

338 Once it was concluded that the Amendment Fee was a prohibited fee, Sunshine Loans' admissions as to the number of times it entered into SACCs with its inclusion and as to the number of times it was charged and received, established the relevant number of contraventions in each respect.

339 It is not necessary to find that the Amendment Fee was paid following a concluded agreement to vary the terms of the initial loan as Sunshine Loans submitted. The contravention of s 24(1A)(b) is to require or accept payment "in respect of" a monetary liability that cannot be

validly imposed. The Amendment Fee was such a liability and Sunshine Loans admitted that it charged it on 12,693 occasions and on 8,376 times it was paid. Such actions of requiring and accepting payment were “in respect of” the prohibited fee and, necessarily, a contravention followed.

340 In any event, it is highly likely that Sunshine Loans followed its practice of charging the Amendment Fee upon the reaching of an agreement between it and the borrower to alter the terms of the loan’s repayment. This was consistent with the evidence of Sunshine Loans’ witnesses as well as its practice as appears from the specific files considered in this case.

341 Sunshine Loans relied on the fact that there are no authorities where a Court has found that a sample of instances are sufficient to make broader findings of contraventions of a civil penalty provision. However, the evidence that will be sufficient to establish a contravention will vary and be dependent on the nature of the contraventions alleged, the circumstances of the case, the existence of any admissions, and the persuasiveness of the specific evidence before the Court. In some cases, a sample of contraventions may well be sufficient to make broader findings of contraventions. The Full Court made observations to a similar effect in *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631, 655 [110] – [111], albeit in the context of unconscionable conduct and the evidence that may be accepted to establish a “system” or “pattern” of behaviour:

... What happened with 80 consumers, even on a hypothetical sample of thousands ... may well be sufficient evidence for a Court to decide whether or not there is a pattern.

In contrast, can conduct in relation to six consumers establish a “pattern of behaviour” or a “system”? As we explain below, in a known class of more than 3,600 consumers, and on the limited evidence before the primary judge, we would find they could not, at least not without persuasive evidence about how the six could be said to be representative of the 3,600.

342 Those observations eschew Sunshine Loans’ submission that there was a need for ASIC to adduce evidence of every single loan file in respect of which a contravention was alleged.

343 In any event, this is not a case where it is necessary for the Court to draw inferences as to whether the 66 example loan files are representative of a larger sample. Once the nature of Sunshine Loans’ obligations under the NCCPA are ascertained and the terms of the SACCs understood, the admissions made render the contraventions alleged by ASIC almost self-evident.

Contraventions of s 47(1)(d) of the Credit Act

344 The final issue of liability is whether Sunshine Loans' contraventions of s 24(1A) of the *Credit Code* also amount to contraventions of s 47(1)(d) of the *Credit Act*. That subsection required Sunshine Loans, as a licensee, to "comply with the credit legislation".

345 As found above, the "credit legislation" necessarily includes the *Credit Code*. By its contraventions of ss 24(1A)(a) and (b) of the *Credit Code*, Sunshine Loans failed to comply with the credit legislation and thereby also contravened s 47(1)(d) of the *Credit Act*.

DISPOSITION

346 ASIC has established an extensive number of contraventions by Sunshine Loans of s 24(1A) of the *Credit Code*, being a civil penalty provision, as well as a contravention of s 47(1)(d) of the *Credit Act*.

347 At the conclusion of the liability hearing, ASIC asked the Court not to make any declarations as to the contravention of any of the provisions, but merely to make findings to support the declarations which might be sought. The intention behind this was that, if the declarations were made, the appeal period would begin to run which would generate difficulties given that no hearing on penalty would have occurred. It is appropriate to adopt that course. The submissions raised by Sunshine Loans concerning the appropriateness of the making of declarations will be dealt with following the hearing in relation to relief, although it should be noted that under s 166(2) of the *Credit Act*, the Court is required to make declarations of contravention.

348 The parties are to be heard as to the appropriate declarations, injunctions, and civil penalties as a result of the findings of contravention.

I certify that the preceding three hundred and forty-eight (348) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate:



Dated: 12 April 2024