FEDERAL COURT OF AUSTRALIA

SunshineLoans Pty Ltd v Australian Securities and Investments Commission [2025] FCAFC 34

Appeal from:	*Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345
File numbers:	QUD 437 of 2024
Judgment of:	**PERRAM, BROMWICH AND COLVIN JJ**
Date of judgment:	24 March 2025
Catchwords:	**CONSUMER LAW** - appeal from declarations of contraventions of s 47(1) of the *National Consumer Credit Protection Act 2009* (Cth) (**Act**) and s 24(1A) of the *National Credit Code* (**Code**) in proceedings brought by regulator under the Act - where appellant in the business of providing small amount credit contracts - where small amount credit contracts made provision for a 'rescheduled payment' or 'amendment' fee (**Amendment Fee**) - whether primary judge erred in finding that the Amendment Fee could not be imposed consistently with the Code because it was a fee prohibited by s 23A and s 31A of the Code - whether evidence as to the circumstances pertaining when an Amendment Fee was charged under the contracts relevant to establishing contraventions - held upon proper construction of contract terms, Amendment Fee could not be imposed consistently with the Code - contraventions upheld - appeal dismissed **CONSUMER LAW** - jurisdiction - where detailed provision made in Act for enforcement of its provisions by regulator - where no like provisions found in the Code - where provisions of the Act enabling the regulator to seek civil penalties for transgressions of Code introduced in 2019 - whether provisions in the Act which empower regulator to apply to the Court for declarations of contraventions and for pecuniary penalties also apply to contraventions of the Code, such that the regulator has statutory authority to apply to the Court seeking declarations - whether Court has jurisdiction to make declarations for pre-2019 conduct - held provisions in the Act with respect to enforcement apply to the Code - source of the Court's jurisdiction to grant declaratory relief different for pre- and post-2019 conduct - source of Court's jurisdiction to grant declaratory relief in respect of pre-2019

conduct found in s 21(1) of the *Federal Court of Australia Act 1976* (Cth) - declaratory orders of primary judge set aside and restated

PRACTICE AND PROCEDURE - conduct of appeal - where more than 30 grounds of appeal advanced - where appeal grounds did not engage with reasoning pathway of primary judge - where appeal grounds challenging factual findings did so by reference to evidence before primary judge - where matters alluded to in appeal grounds not developed in written or oral submissions - consideration of principles in relation to conduct of appeals and formulation of appeal grounds

Legislation:

Constitution, ss 75, 76

Acts Interpretation Act 1901 (Cth) s 13

Federal Court of Australia Act 1976 (Cth) s 21

Judiciary Act 1903 (Cth) ss 39B, 78B

National Consumer Credit Protection (Transitional and Consequential Provisions Act 2009 (Cth) Schedule 8

National Consumer Credit Protection Act 2009 (Cth) ss 3, 5, 6, 10, 14, 15, 22, 29, 47, 50, 51, 53A, 53B, 71, 80, 166, 167, 167A, 167B, 177, 178, 179, 183, 186, 187, 209, 239, 247, 264, 268, 272B, 274, 275, 277, 324, 325, 334, 335, 301D, Part 5-2, Schedule 1 (*National Credit Code*) ss 5, 6, 16, 23A, 24, 31A, 79, 112, 113, 116, 124

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth) Schedule 3

Federal Court Rules 2011 (Cth) r 36.01

National Consumer Credit Protection Regulations 2010 (Cth) reg 70, Schedule 1

Cases cited:

Agricultural and Rural Finance Pty Limited v Gardiner [2008] HCA 57; (2008) 238 CLR 570

Arifin v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2014] FCAFC 61

Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 3) [2024] FCA 786

Briginshaw v Briginshaw (1938) 60 CLR 336

Cush v Dillon [2011] HCA 30; (2011) 243 CLR 298

Dyczynski v Gibson [2020] FCAFC 120; (2020) 280 FCR 583

Frigger v Trenfield (No 3) [2023] FCAFC 49

Maddren v Bell [1998] WASCA 215

Sansom v Sansom [1956] 1 WLR 945

	Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd [2002] FCAFC 157; (2002) 234 FCR 549 *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	194
Date of hearing:	12-14 November 2024
Counsel for the Appellant:	Mr M Wyles KC with Mr A Collins
Solicitor for the Appellant:	O'Shea Lawyers
Counsel for the Respondent:	Mr M Brady KC with Mr S Cleary
Solicitor for the Respondent:	Gadens Lawyers

ORDERS

QUD 437 of 2024

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

ORDER MADE BY: **PERRAM, BROMWICH AND COLVIN JJ**

DATE OF ORDER: **24 MARCH 2025**

THE COURT ORDERS THAT:

1. The declaratory orders of Derrington J made 5 July 2024 be set aside.

2. The Court declares that pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) for the period between 1 July 2016 and 12 March 2019 SunshineLoans Pty Ltd:

   (a) by entering into 424,905 small amount credit contracts (**SACCs**) which each provided for it to charge a fee of $35.00 for agreeing to amend the terms of the SACC (or part thereof) and in particular for agreeing to allow additional time for payment of credit charges (**Amendment Fee**), contravened s 24(1A)(a) of the *National Credit Code* (being Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth)) on 424,905 occasions by entering into SACCs on terms which imposed a monetary liability (being the Amendment Fee) prohibited by s 23A(1)(b) and s 31A(1) of the *National Credit Code*;

   (b) by charging the Amendment Fee to consumers on 8,921 occasions, contravened s 24(1A)(b) of the *National Credit Code* on 8,921 occasions in that it required payment of an amount in respect of a monetary liability (being the Amendment Fee) that could not be imposed consistently with the *National Credit Code* because it was prohibited by s 23A(1)(b) and s 31A(1) of the *National Credit Code*;

   (c) by accepting payment of the Amendment Fee from consumers on 5,129 occasions, contravened s 24(1A)(b) of the *National Credit Code* on 5,129 occasions in that it accepted payment of an amount in respect of a monetary liability (being the Amendment Fee) that could not be imposed consistently with

the *National Credit Code* because it was prohibited by s 23A(1)(b) and s 31A(1) of the *National Credit Code*;

(d) by reason of the conduct identified in declarations 2(a), 2(b) and 2(c) above, SunshineLoans Pty Ltd also contravened s 47(1)(d) of the *National Consumer Credit Protection Act*.

3. The Court further declares that pursuant to s 166(2) of the *National Consumer Credit Protection Act* for the period between 13 March 2019 and 2 November 2020, SunshineLoans Pty Ltd:

(a) by entering into 245,704 SACCs which each provided for it to charge the Amendment Fee, contravened s 24(1A)(a) of the *National Credit Code* on 245,704 occasions by entering into SACCs on terms which imposed a monetary liability (being the Amendment Fee) prohibited by s 23A(1)(b) and s 31A(1) of the *National Credit Code*;

(b) by charging the Amendment Fee to consumers on 3,772 occasions, contravened s 24(1A)(b) of the *National Credit Code* on 3,772 occasions in that it required payment of an amount in respect of a monetary liability (being the Amendment Fee) that could not be imposed consistently with the *National Credit Code* because it was prohibited by s 23A(1)(b) and s 31A(1) of the *National Credit Code*;

(c) by accepting payment of the Amendment Fee from consumers on 3,247 occasions, contravened s 24(1A)(b) of the *National Credit Code* on 3,247 occasions in that it accepted payment of an amount in respect of a monetary liability (being the Amendment Fee) that could not be imposed consistently with the *National Credit Code* because it was prohibited by s 23A(1)(b) and s 31A(1) of the *National Credit Code*;

(d) by reason of the conduct identified in declarations 3(a), 3(b) and 3(c) above, SunshineLoans Pty Ltd also contravened s 47(1)(d) of the *National Consumer Credit Protection Act*.

4. Save as to orders 1, 2 and 3, the appeal is dismissed.

5. By 7 April 2025, or such further time as may be allowed, each party seeking an order as to costs of the appeal shall file written submissions of no more than five pages

specifying the order sought and the submissions advanced in support of the making of that order together with any necessary affidavit in support.

6. By 14 April 2025, or such further time as may be allowed, the opposing party shall file any written submissions in reply of no more than five pages specifying any alternative order sought and the opposing submissions advanced together with any necessary affidavit in support.

7. Subject to further order, the question of the appropriate order as to the costs of the appeal will be determined on the papers.

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

REASONS FOR JUDGMENT

THE COURT:

1 SunshineLoans Pty Ltd conducts a business as a provider of credit. Between 1 July 2016 and 2 November 2020, an 'amendment fee' of $35 was charged by Sunshine to thousands of its customers who had entered into 'small amount credit contracts' (described by the parties as SACCs). The fee was paid by many of them. The Australian Securities and Investments Commission alleged that Sunshine contravened the *National Credit Code* by entering into the contracts and by charging and receiving the fee. ASIC brought proceedings against Sunshine seeking declarations of contravention and orders imposing pecuniary penalties. Sunshine defended the proceedings. In addition to maintaining that ASIC had not established any contravention of the Code, Sunshine claimed that, for various reasons, the Court lacked jurisdiction to entertain the proceedings.

2 The primary judge conducted the final hearing in two stages. The first stage was for the determination of the jurisdictional issues and whether 'liability' had been established. The second stage was for the determination of the terms of any relief, including pecuniary penalties. Upon completion of the first stage of the final hearing, the primary judge delivered reasons determining that the Court had jurisdiction and concluding that Sunshine had contravened the Code: *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345 (**PJ**).

3 After delivering those reasons, the primary judge then listed a date for the determination of the relief to be granted on the application, including whether there should be an order imposing pecuniary penalties and, if so, the amount of those penalties. Sunshine claimed that by reason of certain adverse findings that had been made by the primary judge in the reasons that had been published, the primary judge should recuse himself from conducting the further hearing. The primary judge made declarations of numerous contraventions of s 23A(1), s 24(1A)(b), s 31A(1) of the Code and s 47(1)(d) of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**) but otherwise recused himself and made orders for the proceedings to be reallocated to another judge: *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 3)* [2024] FCA 786.

4 Sunshine has appealed against the making of the declarations. ASIC has appealed against the orders for reallocation. These reasons concern Sunshine's appeal.

Outcome

5 For the following reasons, the contentions advanced in support of the appeal by Sunshine should not be accepted. Ordinarily that would result in an order dismissing the appeal. However, during oral submissions an issue arose as to the appropriate way to express the declaratory relief granted by the primary judge having regard to the statutory purpose served by certain aspects of that relief. In the result, we are of the view that the extent to which the declarations relate to conduct that might be the subject of a pecuniary penalty should be made clear on the face of the declaration.

6 As the appeal by Sunshine challenged the making of the declaration, this Court, sitting on appeal, may make a declaration in different terms if it concludes that it is the order that can and should have been made and it is in the interests of justice to do so, bearing in mind the need for fairness as between the parties and finality. In our view, the appropriate course is for this Court to make an order amending the declarations made by the primary judge to reflect our view as to the appropriate terms in which to express the declaratory relief, but for the appeal to be otherwise dismissed.

Construction of the relevant Code provisions regulating fees that can be charged

7 Section 24(1A) of the Code provides that:

> 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.

8 ASIC alleged that Sunshine had entered into small amount credit contracts contrary to (a) and also had both required and accepted payment contrary to (b).

9 *As to (a)*, s 23A(1) relevantly provides that a 'small amount credit contract must not impose a monetary liability on the debtor … in respect of a fee or charge prohibited by this Code'. The relevant prohibition is in s 31A of the Code which identifies the prohibited fees or charges by describing, in effect, the categories of fees that can be charged. It does so by providing that a small amount credit contract 'must not impose or provide for fees and charges' if they 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.

10 It was the position of Sunshine that the amendment fees that it had imposed were fees 'payable in the event of default in payment under the contract'.

11 The manner in which the contracts may have been administered or the circumstances in which the contentious amendment fees may have been imposed are matters that have no relevance to an adjudication of the merits of ASIC's case insofar as it alleged contraventions of s 24(1A)(a). The terms of the statute are such that it is clear that it is the act of entry into a contract which imposes a fee of a kind that is prohibited that constitutes the contravention. Aside from the jurisdictional points raised by Sunshine, the only matter raised by Sunshine that might have answered that aspect of ASIC's case was its claim that under the terms of the contracts the amendment fee was only payable in the event of default in payment under the contract. Whether that is so must turn upon the proper construction of the contract terms.

12 Contentions by Sunshine to the effect that the circumstances pertaining as between Sunshine and each of its customers when an amendment fee as provided for in a contract came to be required to be paid might bear upon whether there was a contravention of s 24(1A)(a) lacked any foundation in the statutory language and must be rejected. Post contractual conduct of that kind could not bear upon the proper construction of the contract terms: *Agricultural and Rural Finance Pty Limited v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 at [35]. No contrary submission was advanced by Sunshine in the appeal.

13 *As to (b)*, Sunshine accepted that it had both required and accepted payment of 'amendment fees' from thousands of its customers (noting that not all customers who were charged the fee actually paid the fee as charged). However, Sunshine maintained that in the circumstances in which those fees had been required to be paid (and in which payment was accepted in those instances where the amendment fee was paid) the fees were imposed consistently with the Code.

14 Sunshine claimed to have imposed the amendment fee on the basis that it was entitled to do so because of the terms of the contracts it entered into with its customers. Its case was that the

amendment fees were (a) only permitted by the contracts to be imposed if there was an event of default in payment under the contract; or (b) were only imposed in circumstances where there was a default. On that basis it was said that its conduct did not contravene the Code.

15 The offence as expressed in s 24(1A)(b) of the Code occurs where a payment of an amount is required or accepted 'in respect of a monetary liability that cannot be imposed consistently with the Code'. Relevantly for present purposes, it is s 31A(1) that specifies what cannot be imposed. Section 31A(1) is concerned with fees or charges that may not be imposed by a small amount credit contract. That is to say, it is a prohibition upon the imposition *by contract* of fees or charges. It provides that a small amount credit contract 'must not impose or provide for' fees and charges unless they are of the kind there specified; relevantly for present purposes, where the fee or charge is payable in the event of default in payment under the contract.

16 Significantly, conduct constituting the offence created by s 24(1A)(b) occurs when payment is required or accepted by Sunshine in respect of 'a monetary liability that *cannot be imposed consistently with this Code*' (emphasis added). As has been explained, where the terms of a small amount credit contract impose or provide for a fee or charge of a kind that is not specified in s 31A then the prohibition in that section has been breached. Put another way, when it comes to fees or charges in a small amount credit contract, a monetary liability cannot be imposed consistently with the Code if its source is said to be a contract term of the kind that is prohibited by s 31A.

17 So, for the purposes of s 24(1A)(b), if an amount is required or accepted for payment on the basis that the monetary liability is sourced in a contractual term that is prohibited by the Code then it is a monetary liability that 'cannot be imposed consistently with this Code'. It would not matter whether the factual circumstances in existence at the time that the amount was required or accepted for payment were such that a different form of 'monetary liability' might have been able to be imposed consistently with the Code. The terms of s 24(1A)(b) focus upon steps taken to obtain payment based upon a 'monetary liability' that the Code does not allow the credit provider to create or impose. It is not concerned with whether the credit provider might have been able to impose some other type of lesser, more constrained or different monetary liability consistent with the Code. It is also not concerned with the particular circumstances in which the steps were taken to require or accept payment in respect of the monetary liability that the Code does not permit the credit provider to impose, specifically whether the fee or charge in fact was imposed in circumstances that might be characterised as the customer being

in default in making payment under the contract. The only issue is whether there was a connection between the act of requiring or accepting payment and the monetary liability that cannot be imposed. The required connection is that the act of requiring or accepting payment must be 'in respect of' such a monetary liability. Where the fee or charge is shown to have been imposed by reference to the terms of a small amount credit contract that required connection is established.

18 The above analysis is supported by the character of s 24(1A)(a) which creates an offence of making a contract 'imposing a monetary liability' that is prohibited. Section 24(1A)(b) creates the related offence of seeking to give effect to that contract.

19 Further, as was explained by the primary judge, the language used in s 24(1A) must be understood in the context of the terms of s 23A(2) of the Code which provides that a provision of a small amount credit contract that imposes a monetary liability prohibited by the Code is void to the extent that the provision relates to the liability. Therefore, s 24(1A) creates an offence in relation to conduct concerning credit contracts that impose void liabilities. Consequently, the offence is not expressed (as you might otherwise expect) as a prohibition upon entering into or giving effect to a provision of a small amount credit contract that the Code provides must not be imposed. Language of that kind would confront the problem that the Code provides that any such provision is void (with the consequence that it was not a provision that could be given effect). Instead, the offence is expressed as a prohibition upon entering into such a contract '*on terms* imposing a monetary liability' that is prohibited (s 24(1A)(a)) and requiring or accepting payment of an amount '*in respect of* a monetary liability *that cannot be imposed*' (s 24(1A)(b)) (emphasis added). Once this further aspect is brought to account it is abundantly clear that the language of s 24(1A) is concerned with the making of a contract with a prohibited term and with requiring or accepting payment of money on the basis of the prohibited term.

20 The fallacy which lies at the foundation of much of the case agitated by Sunshine before the primary judge and on appeal is the notion that Sunshine might be able to justify its conduct in charging and receiving an amendment fee by demonstrating that, in fact, it was only imposed when the customer was in default; or in circumstances where, as a matter of contract law, there was no agreed variation to the contract (but rather conduct permitting the customer to defer payment). None of that matters because the offences created by s 24(1A) concern the making by a credit provider of a contract with a term imposing the monetary liability and requiring or

accepting money 'in respect of' that monetary liability by relying upon that contract as the basis for doing so.

21 Therefore, in circumstances where Sunshine accepted that it had imposed the relevant fees on the basis of the terms of its contracts with its customers, had required payment of the fees on that basis (and in many instances had accepted payment on that basis), the only issue for the purposes of the alleged contraventions of s 24(1A)(b) was whether the fee could be imposed by the contracts consistently with the Code. Resolution of that issue turned on the proper construction of the contracts.

22 Consequently, the merits of ASIC's case that Sunshine had contravened s 24(1A) in the manner alleged by ASIC turned entirely upon the proper construction of Sunshine's contracts, particularly whether the amendment fee was 'a fee or charge that is payable in the event of a default in payment under a contract' (as well as the jurisdictional points raised by Sunshine).

23 As will emerge, the reasoning of the primary judge rested upon his Honour's conclusions as to the proper construction of the contracts (and the rejection of the jurisdictional points) and also upon an alternative reasoning pathway concerning the evidence as to the circumstances in which the amendment fee was imposed by Sunshine. His Honour made detailed findings of fact and law for the purposes of the alternative pathway. However, they were necessary only to deal with various arguments advanced by Sunshine which sought to give significance to the dealings between Sunshine and its customers when amendment fees were imposed and the manner in which Sunshine was said to have imposed those fees. In a rather confused and unfocussed way, Sunshine sought to challenge those findings on the appeal (a matter to which we will return). However, the significant point to be made at this stage is that, in order to succeed on appeal, Sunshine had to demonstrate that his Honour's approach to the proper construction of the contracts was in error (or to establish error in his Honour's conclusions about jurisdiction).

24 For the reasons which follow, his Honour's conclusions as to the construction of the contracts and as to jurisdiction were correct.

25 ASIC also alleged that Sunshine's conduct amounted to a contravention of s 47(1)(d) of the Credit Act. That provision required Sunshine as the holder of a credit licence to 'comply with the credit legislation'. The primary judge found that by contravening s 24(1A) of the Code, Sunshine failed to comply with the credit legislation: PJ[344]-[345]. The logic of that

reasoning is not sought to be impeached. Therefore, Sunshine's challenge to the declarations as to contraventions of s 47(1)(d) of the Credit Act falls with the failure of its case concerning s 24(1A) of the Code.

The structure of the balance of these reasons

26 The structure of the balance of these reasons is as follows. First, we summarise the reasoning pathway of the primary judge as to the alleged contraventions of s 24(1A). Second, we deal with the proper construction of the relevant contracts. Third, we deal with the jurisdictional points. Fourth, we explain the considerable difficulties for the appeal that arose from the way Sunshine conducted the appeal. Fifth, to the extent we consider it appropriate to do so in those circumstances, we deal as best we can with other points adverted to by Sunshine in the course of the appeal. As we have indicated, those matters had no bearing on the question of construction of the contracts or the jurisdictional issues raised by Sunshine. In our view, it is those matters that are determinative. Sixth, we deal with matters the subject of a late notice given by Sunshine for the purposes of s 78B of the *Judiciary Act 1903* (Cth). Finally, we deal with the question that arose as to the appropriate form in which declaratory relief should be expressed and other orders.

The primary judge's reasoning as to alleged contraventions of s 24(1A)

27 The primary judge began by observing that the contracts utilised by Sunshine during the relevant period 'took five different forms, although each version was substantially the same': PJ[103]. His Honour then considered the relevant terms of the contracts: PJ[104]-[116]. In the course of doing so, he noted that the relevant fee had been referred to as a 'Rescheduled payment fee' in the version of the contract first used in the relevant period but that in subsequent iterations it was relabelled as an 'Amendment fee': PJ[108]. His Honour then observed that, in respect of those fees, they were included in the 'Financial Table' at the beginning of the contract but were not referred to in the contract terms: PJ[116]. The primary judge thereafter used the term 'Amendment Fee' to encompass both terms. We will do the same.

28 After dealing with the onus and standard of proof, the primary judge considered the meaning of the relevant Code provisions. At PJ[143] his Honour observed that ultimately the issue between the parties as to s 31A(1) was whether the Amendment Fee imposed or provided for in the various iterations of the contract used by Sunshine was 'payable in the event of a default in payment under the contract'. Importantly, his Honour then said: 'If it was not, it would be beyond the scope of the permitted terms in s 31A(1) and result in a contravention'.

29 His Honour then turned to s 24(1A). As to paragraph (a) of that provision, his Honour concluded that it applies to contracts which 'purport to impose terms which are prohibited by the [Code]': PJ[149]. As to paragraph (b) of that provision, his Honour concluded that a contravention would occur 'when the credit provider seeks to obtain payment or accepts payment purportedly in relation to a prohibited monetary liability': PJ[150]. Those conclusions were reached after considering the significance of s 23A(2) which, as we have noted, avoided terms of contracts that were prohibited. His Honour then found that whether or not the contracts purported to impose a prohibited monetary liability by reason of the Amendment Fee was 'a matter of contractual interpretation': PJ[151].

30 In the course of the above reasoning, his Honour said about the offence created by s 24(1A)(b) (at PJ[150]):

> 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 … charged the Amendment Fee is relevant to the assessment of any alleged contraventions.
>
> (original emphasis)

31 The above passage recognised that there was a limited factual inquiry required in addition to consideration of the terms of the contracts. It was required because of the need to demonstrate acts on the part of the alleged contravener that involved requiring or accepting payment pursuant to the provision in the contract. Otherwise, all turned on construction of the contract. As his Honour went on to say (at PJ[151]):

> Contrary to [Sunshine's] submission, it matters not whether or how Sunshine … 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 [contracts], the borrower became liable to pay the Amendment Fee otherwise than in the event of a relevant default.

32 Therefore, his Honour approached the issue whether there had been contraventions by Sunshine of s 24A(1A) on the basis that it turned upon the proper construction of the contract terms as to the Amendment Fee, save only for the need to show, in fact, that such a fee had been required or accepted (or both) on the basis of the terms of the contract.

33 His Honour then dealt with the proper construction of the contract provisions concerning the Amendment Fee: PJ[152]ff. He found that the descriptions used in the contracts for the fee indicated when it was payable: PJ[152]-[155]. The primary judge also found the nature of the fee to be further revealed by provisions in the contracts that allowed for scheduled repayments

to be varied or amended by mutual agreement: PJ[156]-[157]. It was said to be coherent for the fee to be referable to such instances: PJ[158].

34 If there was need for regard to surrounding circumstances by reason of ambiguity, his Honour found that the Information Statement given to each customer at the time of entry into a contract supported the above interpretation because it directed the customer to ask the credit provider to change the contract if the customer could not make a repayment or to seek to have it changed in certain circumstances: PJ[160]-[163].

35 Having construed the relevant contract terms, his Honour then concluded that in order to be a fee that was payable 'in the event of a default in payment under the contract' there had to be a causal connection between the fee being payable and the default: PJ[165]-[167], see also PJ[141].

36 His Honour then considered whether the Amendment Fee was a prohibited fee: PJ[168]ff. His Honour began by observing that: 'on its face, the fee is payable on the parties agreeing to amend the terms between them' and that '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': PJ[168].

37 On that basis, the primary judge concluded that the Amendment Fee was a fee or charge prohibited by s 31A of the Code: PJ[169]. Based on that conclusion, and after rejecting certain other contentions not relevant to the appeal, his Honour concluded that on each occasion that Sunshine entered into a contract that contained an Amendment Fee in the Financial Table it contravened s 24(1A)(a): PJ[170], [183]. Therefore, the conclusion as to the proper construction of the contracts was the basis upon which those contraventions were found to be established. It was not necessary to analyse the way in which Sunshine charged the Amendment Fee: PJ[172].

38 The primary judge then turned to s 24(1A)(b): PJ[184]ff. His Honour identified two approaches to assessing whether there had been contraventions as alleged: PJ[190]ff. He described them at PJ[195]-[197] in the following terms;

> There are two potential approaches to the determination of [Sunshine's] 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.

> The second approach, being the approach adopted by Sunshine…, 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…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.
>
> More specifically, Sunshine…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's] directors to the absurd proposition that a variation to a loan agreement did not result in there being any amendment to it.

39 Having referred to the first approach as 'preferable', the primary judge nevertheless dealt with the second approach. His Honour began by explaining the difficulties with the second approach: PJ[198]-[199]. His Honour made factual findings as to what the evidence showed concerning the dealings with customers at the time an Amendment Fee was imposed. His Honour did so by summarising at PJ[202]-[204] what was revealed by subsequent discussion in the reasons:

> As the discussion below reveals, on the identified occasions, Sunshine … 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 … 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's] practice, the borrowers were told that [an] '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.
>
> With respect to the submissions of Sunshine…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.

> 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 … accepted payment of an amount (being $35.00) from borrowers in respect of the Amendment Fee which was a prohibited monetary liability.

40 Contrary to submissions advanced for Sunshine on appeal, the conclusions at the first of the paragraphs reproduced above are not unsupported. As indicated by the reference to 'the discussion below', they find their support in the consideration of the various contentions advanced by Sunshine to the primary judge in support of the second approach. That reasoning was careful and detailed: PJ[205]-[309]. It included forceful adverse findings as to the credibility of witnesses called by Sunshine: PJ[290]-[306].

41 His Honour's reasoning culminated in the following at PJ[312]:

> In its written submissions, [Sunshine] 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.

42 After that, the primary judge dealt with (and rejected) a submission that Sunshine should be excused from any liability in reliance upon a statutory provision that allowed the Court to do so in certain circumstances: PJ[314]-[318].

43 Then his Honour stated the following conclusion concerning the alleged contraventions of s 24(1A)(b) of the Code (at PJ[319]):

> The above establishes that Sunshine … 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 … 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*.

44 Having regard to the articulation by his Honour of the two approaches, the first of which was to be preferred, his Honour must be found to have concluded that on either approach the

contraventions have been demonstrated. The first approach is based upon his Honour's view as to the proper construction of the contracts together with the fact that the Amendment Fee in each contract came to be required to be paid by inclusion in the statements of account of customers and the undisputed evidence as to the extent to which the Amendment Fee was paid. It is the first reasoning pathway adopted by the primary judge. It does not depend upon any of the factual findings by the primary judge concerning the dealings between Sunshine and its customers when an Amendment Fee was imposed. That evidence was only relevant to the second approach urged by Sunshine. The findings as to those circumstances formed a second and alternative reasoning pathway as to why, on the second approach contended for by Sunshine, the contraventions have also been established.

45 The fact that the primary judge reached the conclusions as to contraventions of s 24(1A)(b) of the Code based upon each of the two approaches is also made plain when there is regard to a later part of his Honour's reasoning which is concerned with whether the evidence led by ASIC (as to dealings with 66 customers of Sunshine) might be 'extrapolated' to form the basis for a conclusion as to all customers who were required to pay an Amendment Fee (and as to those who did pay when it came to allegations that Sunshine had accepted fees).

46 In accepting that the extrapolation could be made, the primary judge found at PJ[338]-[339]:

> Once it was concluded that the Amendment Fee was a prohibited fee, [Sunshine's] 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.
>
> 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… 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…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.

47 Regard to the above finding shows that at this point his Honour was applying the first approach in extrapolating to the other customers.

48 His Honour went on to say at PJ[340]:

> In any event, it is highly likely that Sunshine… 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's] witnesses as well as its practice as appears from the specific files considered in this case.

49 This further finding was made '[i]n any event'. It is an alternative foundation for making the declarations in respect of the entire extent of customers that Sunshine was shown to have required to pay an Amendment Fee, as well as the extent of those from whom Sunshine accepted payment of an Amendment Fee. It rests upon his Honour's conclusions based upon the second approach.

50 Again, in this aspect of the reasoning, his Honour concludes that on either approach the contraventions are established.

51 Therefore, if the construction of the contracts by the primary judge is correct it is a sufficient basis to sustain the declarations made as to the relevant contraventions of s 24(1A) of the Code, provided that his Honour was also correct in concluding that the Court had jurisdiction.

Proper construction of the relevant contracts

52 During the relevant period, Sunshine entered into small amount credit contracts with its customers. The form of that contract changed from time to time. As the primary judge explained, five different versions of the contract were used. Although there were some differences in the contract terms, as will emerge, the primary judge was correct to approach the construction of the relevant aspects of the contracts on the basis that those differences were not material.

53 Each version of the contract had the following features:

(1) at the beginning of the contract was a 'Financial Table' that set out various details including various fees and charges;

(2) the fees and charges set out in the Financial Table included, amongst other fees, an establishment fee, a default fee (also described as a failed payment fee) and a rescheduled payment fee or an amendment fee (in the Financial Table for the first, second and third versions of the contract there was provision for a rescheduled payment fee, but no amendment fee; the fourth and fifth versions provided for an amendment fee but no rescheduled payment fee);

(3) there was a contract term to the effect that the customer would pay the 'Credit Charges shown in the Financial Table' (the fourth and fifth versions referred to 'Applicable Charges shown in the Financial Table', a change which coincided with a change to the format of the Financial Table, see below);

(4) there was provision in the contract terms for repayments to be made by direct debit (earlier versions referred to payment by direct debit if Sunshine's 'Direct Debit Request New Customer Form' had been signed by the customer);

(5) there was a contract term to the effect that the customer must make the repayments shown in the Financial Table 'subject to any other repayment arrangements or variations agreed between us from time to time';

(6) there was a contract term to the effect that the customer would be in default if the repayments shown in the Financial Table were not made when due, if any other payment required under the contract was not made, if false or inaccurate information was provided or if the customer breached any 'variation' of the contract as agreed or imposed by a court, tribunal or dispute resolution agency;

(7) there was also a contract term to the effect that if the customer was in default then the unpaid balance of the credit provided and 'any other default fees, credit fees or other charges or other amounts payable' became due and payable; and

(8) the contract was said to comprise the Financial Table and the contract terms.

54 Included within each version of the contract document (but not part of its terms) was an Information Statement. It was set out in the form of a series of questions each of which was followed by an answer. Each Information Statement included a question concerning what to do if the customer could not make a payment. The answer to that question said that the customer should get in touch with the credit provider (Sunshine) and discuss the matter to see if some arrangement could be reached. Examples were given of the type of arrangement that might be reached which included extending the term (with consequences for the amounts to be paid and when) or deferring payments for a specified period. The next question concerned what to do if the credit provider and the customer could not agree on a suitable arrangement. The answer (directed to the customer as 'you') was as follows:

> 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.

55 Further, the Information Statement was provided to meet a regulatory requirement in the Code. Section 16(1)(b) of the Code requires a statement to be given in the terms specified by

regulation. Regulation 70 of the *National Consumer Credit Protection Regulations 2010* (Cth) specifies that an information statement must be in accordance with Form 5. The form is in Schedule 1 to the Regulations. The Information Statement provided by Sunshine reflected the terms of statement in the schedule to the Regulations insofar as its terms applied to Sunshine's credit contracts.

56 There is an apparent correspondence between (a) the contents of the Information Statement; and (b) the terms of the contracts which required repayment as shown in the Financial Table subject to other arrangements or variations agreed and the provision about default which allowed for the possibility of variation as agreed or as imposed by a court, tribunal or dispute resolution agency. That is to say, they both contemplated the possibility that during the term of the contract a request might be made by a customer to vary its terms which may be agreed with Sunshine.

57 With each version of the contract there was a direct debit form. It authorised an agent of Sunshine to make periodic debits on its behalf from a nominated bank account of the customer.

58 The form of the Financial Table was changed in minor respects from one version of the contract to the next. The first, second and third versions had a heading 'Credit Fees and Charges'. Under that heading were various fees and charges including an 'Establishment fee', monthly credit charges, a 'Default fee or Direct Debit Dishonour fee' and 'a Rescheduled payment fee'.

59 The fourth and fifth versions also had a heading 'Credit Fees and Charges' and under that heading were charges that included an 'Application fee' and monthly credit charges. There was then a further heading 'Other fees and charges which may be charged by us' and under that further heading were three fees, 'Failed payment fee', 'Amendment fee' and 'Arrears Account Management Fee'. As has been mentioned, the provision in the contract that required the payment of charges was also changed for the fourth and fifth versions. In the first, second and third versions, the clause was expressed as follows:

> **2. Credit Charges**
>
> 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.

60 As has been explained, in the first, second and third versions of the contracts, the 'Rescheduled payment fee' was included with other fees under the heading 'Credit Fees and Charges'. Beneath that heading were also 'the First month's credit charge' and 'Monthly credit charge',

being the only items identified as 'charges'. Other items under the heading were described as fees (such as 'Establishment Fee' and 'Default fee' or 'Direct Debit Fee') or costs (being collection and enforcement 'costs'). Possibly, the term in the contract (as quoted above) was only referring to the items described as 'charges' under the heading 'Credit Fees and Charges'. Alternatively, it was referring to all items under that heading.

61 In the fourth and fifth versions, the equivalent provision was in the following terms:

> **3 Credit Charges**
>
> You will pay all the Applicable 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.

62 The term 'Applicable Charges' is not defined in the fourth or fifth versions of the contract. It was suggested for Sunshine that the heading to clause 3, 'Credit Charges', somehow required the clause to be read as applying only to those fees appearing directly under the heading 'Credit Fees and Charges' that are identified as credit charges. It is the operative terms that are to be construed and applied, although the heading may aid in construction of those terms (unless there is an express provision to the effect that they are included for convenience and should not be relied upon).

63 The use of the broad term 'Applicable Charges' strongly indicates an intention in the fourth and fifth contracts to capture all charges that may be made under the contract that in fact have been applied to the customer.

64 The construction of the 'Credit Charges' provisions in the five contracts contended for by Sunshine would mean that there was no provision in any of the contract terms requiring payment of any charge other than the monthly credit charges. On that approach, the parties provided expressly for the monthly credit charges to be paid, but did not provide for the payment of the other 'Credit Fees and Charges' as listed in the Financial Table (for the first, second and third versions) or all Applicable Charges (for the fourth and fifth versions).

65 In addition, for Sunshine it was contended that other provisions in the contracts showed that the 'Amendment Fee' (as compendiously described by the primary judge) was only payable under the terms of the various contracts if there had been default in payment under the contract. In that regard, there were provisions in the contracts to the following effect:

(1) if the contract was terminated by Sunshine all the amounts shown in the Financial Table 'as being payable' must be paid;

(2) if the contract is terminated or reaches its term then the customer must pay the unpaid credit balance and 'any other credit fees or other charges or other amounts payable' under the contract;

(3) if any repayment remains outstanding after the final date shown in the Financial Table, Sunshine may charge an 'Arrears account management fee' (the amount of which is shown in the Financial Table) for each week until the amount is paid in full; and

(4) if the customer is in default then the unpaid credit balance and 'any other default fees, credit fees or other charges or other amounts payable' under the contract all become due and payable.

66 These provisions show that there was little consistency in the terminology used in the contracts to refer to fees and charges. However, what is clear is that there is simply no foothold in the terms of the contract for a contention that the Amendment Fee was only payable if there had been default.

67 Otherwise, none of the versions of the contract included any description as to the circumstances in which the Amendment Fee could be imposed. The fee names are themselves expressed in descriptive terms. The language used itself indicates the circumstances in which it may be imposed.

68 In each version of the contract, the Financial Table commenced by stating that the Financial Table together with the contract terms 'forms the Consumer Credit Contract between you [the customer] and us [Sunshine]'. It also recorded that the terms of the contract were 'set out in this Financial Table and the Consumer Credit Contract Terms'. There are a number of provisions in the contract terms that refer to what is stated in the Financial Table. They refer to charges specified in the Financial Table (though they do so by referring in general terms to charges shown in the Financial Table rather than by identifying specific charges using the names in the Financial Table). Further, as has been mentioned, they do not appear to define or specify the nature of the charges provided for in the Financial Table.

69 In those circumstances, a reasonable party to the contracts would conclude that it is the descriptive language used in the Financial Table that identifies the circumstances in which the relevant fee may be charged. Such a construction explains the use of the term 'Applicable

Charges' in later versions and the inclusion of the 'Rescheduled payment fee' under the heading 'Credit Fees and Charges' in the Financial Table for earlier versions as well as the absence in the terms of the contracts of provisions which explain the nature of the various charges and when they may be imposed.

70 Having regard to those terms of the contract which expressly contemplated agreement between the parties to change the payment arrangements, the proper construction of the contracts is that it provided for the Amendment Fee, however described, to be imposed if any change to the payment arrangements was agreed with the customer, irrespective of the circumstances in which that change was agreed. Regard to the context of the terms of the Information Statement provisions that directed the customer to seek such changes from Sunshine supports that construction. It may be the case that a customer was in default at the time agreement was reached to change the payment arrangements (or had indicated an inability to pay unless there was an amendment to those arrangements). However, the contract did not provide for the relevant fee to be imposed by reference to whether there had been a default. On the terms of the contracts, it was Sunshine's agreement to change the payment terms that enabled it to impose the relevant fee.

71 Therefore, we agree with the primary judge that the fact that the imposition of the fee or the requirement to pay the fee or the acceptance of payment of the fee might coincide with a point in time when the customer was in default would not mean that the monetary liability in the form of the Amendment Fee was in respect of a fee that was 'payable in the event of a default in payment under the contract'. Rather, in order to be within those terms, the obligation to pay the fee itself must be conditioned upon the event of a default. Put another way, it must be the default that gives rise to the imposition of the fee. Under the terms of the contracts, it was not default by the customer that gave rise to the imposition of the relevant fee.

72 It follows that the rather convoluted contentions advanced for Sunshine to the effect that there was some form of anticipatory breach of the contract when a customer indicated an inability to pay a credit charge due in the future that might bring the relevant fees within the statutory language of a fee payable in the event of default in payment under the contract was an irrelevant distraction. It was not that conduct that gave rise to the payment of the fee. The event giving rise to the imposition of the relevant fee was the agreement by Sunshine to change the payment arrangements.

73 Likewise, it is not necessary to form any view as to whether there was a variation of the terms of the contracts in accordance with the common law of contract. What mattered was the fact of the agreement to change the payments, a possibility that the contracts provided for by expressly qualifying the obligation to make repayments by the possibility of 'other repayment arrangements or variations agreed between us from time to time'. It did not matter whether or not the agreement to do so might be effective as a contractual variation according to common law principles. If, in fact, arrangements or variations were agreed as to when payments were to be made then they operated for the purposes of the express contract terms.

74 For reasons that have been explained, beyond the fact of agreement to change the payment arrangements, the actual dealings between the customer and Sunshine at the time that the relevant fee was imposed are not relevant to whether Sunshine contravened s 24(1A). Nevertheless, as to Sunshine's contentions based upon those actual dealings, there was no evidence identified by Sunshine in its submissions that might have supported a finding that it was the indication by a customer that there was some reason why a future credit charge could not be met that was the event that, in fact, gave rise to the imposition of the fee. Rather, all the evidence to which the Court was taken showed that the event by reference to which the fee was imposed was the agreement by Sunshine to a change to the payment arrangements (generally implemented by not presenting the direct debit authority and by providing the customer with an adjusted payment schedule).

75 Further, the fact that the change in the payment arrangements was usually effected by Sunshine directing its agent to suspend calling on the authority to make the direct debit is irrelevant (or acceding to a request from the customer to do so) and does not alter that conclusion. What the contract contemplated and what occurred was that an amendment fee was charged by Sunshine when it agreed to change the payment arrangements provided for by the agreement. Those arrangements extended to include instances where payment was to be made by direct debit and there was agreement that Sunshine would not call on the direct debit when the credit charges were next due.

76 Nor was there any significance for the proper construction of the contract if it could be demonstrated (as Sunshine contended) that the Amendment Fee was in fact only imposed at a time when the customer was in default. Sunshine claimed that the procedure it followed in imposing the fee meant that by the time there was a liability to pay the fee, the customer was in default because the relevant credit charges had not been paid at the time required by the

contract and, in fact, the fee was imposed for that default. The primary judge rejected that factual claim. The submissions as to those factual findings are addressed below in the section of these reasons dealing with other contentions advanced by Sunshine. However, at this point it is sufficient to note that they could not provide any answer to ASIC's case which turned not upon the circumstances at the time the Amendment Fee was imposed, but whether the fee was imposed, required and accepted on the basis of the terms of the contracts that conferred the contractual right to impose that monetary liability.

77 For those reasons, the primary judge was correct to find that upon a proper construction of the contracts and by reason of the evidence that the Amendment Fee had been applied to the account of the identified number of customers (and paid by the identified number of customers) when agreement was reached to change the payment arrangements under the contracts, the contraventions alleged by ASIC were established.

Jurisdictional points

78 The Code forms Schedule 1 to the Credit Act. Within the Credit Act, the Code is referred to as the National Credit Code.

79 The Credit Act has detailed provisions concerning licensees, being the holders of Australian credit licences. A person must not engage in 'a credit activity' without a licence: s 29(1). There is a detailed list in s 6 of the Credit Act of those activities that will be a credit activity if engaged in by a person. They include carrying on a business of providing credit 'the provision of which the National Credit Code applies to': s 6(1), item 1(b). Much of the Code is concerned with regulating the activities of those undertaking credit activities.

80 ASIC has general administration of the Credit Act: s 239 of the Credit Act. The functions and powers of ASIC under the Credit Act are numerous. Many of those powers are expressed in terms that invoke the phrases 'credit legislation' or 'Commonwealth credit legislation'. Each of those phrases is defined by the Credit Act to mean 'this Act' and other specified legislation: s 5 of the Credit Act. Neither phrase is defined in a way that refers expressly to the Code.

81 The functions and powers of ASIC under the Credit Act are extensive and detailed and include:

(1) powers to require those who are licensed under the legislation to provide credit to give information to ASIC about their credit activities (s 50);

(2) receiving notifications from licence holders as required by the legislation (s 53A, s 53B, s 71);

(3) power to make a banning order if ASIC has reason to believe that the person is likely to contravene any credit legislation (s 80(1)(e));

(4) power to apply to the Court for a declaration that a person has contravened a civil penalty provision (s 166(1));

(5) power to apply to the Court for an order that a person who has contravened a civil penalty provision pay the Commonwealth a pecuniary penalty (s 167(1));

(6) power to intervene in proceedings (s 209);

(7) the maintenance of a register of documents lodged with ASIC as required by the Credit Act (Part 5-2);

(8) power to conduct such investigation as ASIC considers expedient for the due administration of the 'Commonwealth credit legislation' if it has reason to suspect that there may have been committed a contravention of 'the credit legislation' or a law of the Commonwealth that concerns certain specified matters (s 247);

(9) power to inspect books (s 264) and require production of books and the giving of information (s 268);

(10) power to prosecute (s 274) and bring civil proceedings (s 275);

(11) power to hold hearings (s 277); and

(12) power to make product intervention orders (s 301D).

82 The Code is expressed to apply to the provision of credit if certain matters pertain when the credit contract is entered into. Speaking broadly, the Code applies where (a) the debtor is a natural person; (b) the credit is provided for personal, domestic or household purposes or to purchase, renovate or improve residential property; (c) a charge is to be made for provision of the credit; and (d) the credit provider is in the business of providing credit: s 5 of the Code.

83 There is no machinery within the Code for the enforcement of its provisions by ASIC that is of the kind found in the Credit Act. However, the Code does refer to ASIC. Amongst other things, the Code has the following provisions that concern ASIC:

(1) ASIC may exclude certain activities from the provision of credit to which the Code applies (s 6(14)-(18));

(2) ASIC may make declarations or issue legislative instruments or make exemptions as to various matters which affect the extent to which the Code applies to certain activities;

(3) if ASIC considers it to be in public interest to do so, ASIC may apply to the Court to change the terms of a credit contract after a hardship notice has been given and to reopen unjust transactions of a kind to which the Code applies (s 79);

(4) the Code provides that the Court may make an order requiring a credit provider to 'pay an amount as a penalty' if it is of the opinion that a credit provider has contravened a 'key requirement' of the Code (s 113(2)). The penalty may be sought by affected individuals. It may also be sought by ASIC (s 112). The maximum penalty is '5,000 penalty units' (s 116(1)); and

(5) the Code provides that a credit provider who has contravened a requirement of the Code may be required by the Court 'to make restitution or pay compensation to any person affected by the contravention' and that the Court 'may make any consequential order it considers appropriate in the circumstances' (s 124(1)). An application for the Court to exercise its power to make orders of that kind may be made by ASIC on behalf of a person affected or on its own behalf (s 124(2)).

Sunshine's first jurisdiction point

84 The first of the jurisdictional points raised by Sunshine is a contention that the provisions in the Credit Act which empower ASIC to apply for declarations of contravention of civil penalty provisions and for the imposition of pecuniary penalties do not apply to contraventions of the Code.

85 For the following reasons, the contention is quite bizarre and must be rejected.

86 The relevant provision as to declaratory relief is s 166(1) of the Credit Act. It provides:

> 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.

87 The relevant provision as to pecuniary penalties is s 167(1) of the Credit Act. It provides:

> 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.

88 The contention advanced by Sunshine was that by reason of the terms of the definition of 'civil penalty provision', the terms of s 166 and s 167 did not apply to the Code. In consequence, so it was contended, there was no statutory authority for ASIC to seek a declaration of a contravention of the Code or to seek pecuniary penalties.

89 It was further submitted that because the division of the Credit Act conferring jurisdiction to hear and determine civil and criminal proceedings applies to the exclusion of s 39B of the *Judiciary Act* (see s 186 of the Credit Act), this Court has no jurisdiction to grant a declaration that conduct contravenes the Code and, as to penalties, ASIC must rely upon the limited provisions of the Code to support any application it made to this Court.

90 These contentions are based upon a misapprehension as to the operation of the definitional provisions in the Credit Act.

91 There is a dictionary in s 5 of the Credit Act which defines terms for the purposes of the legislation other than the Code. There is a separate dictionary within the Code that applies to its provisions.

92 Section 5(1) of the Credit Act defines 'civil penalty provision' in the following terms:

> ***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.

93 The argument advanced by Sunshine is to the effect that when the definition refers to 'this Act' it is referring to this Act excluding the Code. It is true that the chapeau to s 5(1) states: 'In this Act (other than the National Credit Code)' and, accordingly, the terms that are defined in s 5 of the Credit Act are defined for the purpose of the provisions of the Credit Act, excluding the Code.

94 However, unquestionably, the Code is part of the Credit Act: see s 13(1) of the *Acts Interpretation Act 1901* (Cth). Therefore, where in the body of a definition, the Act refers to 'this Act', unless there is some basis consistent with proper principles of statutory construction for reaching a different view, those words must be taken to refer to the whole of the Act, namely the Credit Act including the Code.

95 Further, having regard to the chapeau to s 5(1), references in the definitions to 'this Act' have the meaning given to that term by the definition of 'this Act' for the purposes of the Act (not including the Code). The definition of 'this Act' is expressed inclusively in the following way:

> 'this Act' includes instruments made under this Act.

96 Therefore, the term Act has its usual meaning and, as explained in the *Acts Interpretation Act*, includes all material from the first section to the last Schedule, but expanded to include instruments under the Act. The chapeau, as applied to the definition of 'this Act', simply has the effect that the expanded aspect of the definition only applies to the provisions of the Credit Act (excluding the Code provisions).

97 It was suggested that s 5(2) provided the basis for a different conclusion. It says:

> 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.

98 It is to be noted that s 5(2) applies to 'a reference to a provision' not to references in the Act to 'this Act' or to the operative parts of the Act (other than the Code).

99 The terms of s 5(2) are explained by the confusion that might otherwise arise as to whether a reference to a particular numbered section within a provision in the Act (other than the Code) might be a reference to a section of the Code or a section of the Act (other than the Code) in circumstances where each was numbered sequentially. References to provisions may be expected to be made by referring to the relevant numbered provision. By operation of s 5(2), a reference to a numbered provision in the Act other than the Code is a reference to that provision in that Act other than the Code. The provision is explained by the fact that in many instances there will be a section of the main provisions in the Act and a section in the Code (as the Schedule) that are identified by the same number.

100 Sunshine also contended that s 3 supported its contention. It provides:

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

101 It was not explained why the language of s 3 supported the submission that the provisions of the Act (other than the Code) were intended to stand separately from the provisions of the Code in a way that would mean that none of the provisions of the Act (other than the Code) might apply to the legislation as a whole. The terms of s 3 are explained by the fact that the Code provisions take effect by a conferral of power upon the Commonwealth by the States. It makes clear in that context that the Code takes effect as Commonwealth law. It says nothing about whether the references to 'this Act' in the provisions of the Act mean and include the whole of the Act (that is including the Code as the Schedule).

102 In addition to the textual reasons that have been given concerning the language of s 5, there are at least three further matters that demonstrate the complete absence of any contextual support for Sunshine's claim.

103 *First*, there are many references within the sections of the Credit Act to 'this Act (other than the National Credit Code)': see, ss 10, 14, 15, 22, 178, 179, 324, 325, 334, 335. Each of these references would be redundant on Sunshine's case. The fact that most references within sections of the Act to 'this Act' do not include in parentheses 'other than the National Credit Code', but in the particular instances just identified those words are added, manifests a clear approach of identifying within each section of the Act (other than the Code) which provisions apply to the Credit Act (including the Code) and which provisions apply to the Credit Act (excluding the Code) and provide firm contextual support for the conclusion that s 5 does not indicate that 'this Act' means this Act (other than the provisions in the Code).

104 *Second*, there are well over 200 references to 'this Act' within the provisions of the Credit Act (excluding the Code provisions). On Sunshine's case all these provisions refer to the Credit Act excluding the Code. Sunshine's case would produce many absurd and illogical consequences as to the scope of those provisions. It would deprive ASIC of the ability to exercise the many and detailed powers conferred by the Act where the relevant conduct contravened the Code. It would deprive ASIC of responsibility for general administration of the Code and leave it with the few powers conferred upon ASIC under the Code. It would mean that the Code is enacted with very little machinery as to the administration and enforcement of its provisions.

105 Further, provisions in the Credit Act which apply to 'credit legislation' or 'Commonwealth credit legislation' or deploy those terms would not apply to the Code because the definition in s 5 of 'credit legislation' uses the expression 'this Act' and does not refer to the Code. Consequently, the obligation of a licensee to 'comply with the credit legislation' and to 'take reasonable steps to ensure that its representatives comply with the credit legislation' (see s 47) would not extend to compliance with the Code. The requirement of a licensee to give assistance to ASIC in relation to whether the licensee and its representatives 'are complying with the credit legislation' would not extend to complying with the Code (see s 51). ASIC's power to make a banning order could not be founded on contraventions of the Code (see s 80). ASIC's general powers of investigation 'for the due administration of the Commonwealth credit legislation' would not extend to the Code (see s 247). Nor would the search warrant provisions (see

s 272B). Finally, the provision entrusting the general administration of 'this Act' to ASIC would not extend to the Code (see s 239). These examples are by no means exhaustive.

106 *Third*, Sunshine's case also produces absurd and illogical consequences for the enforcement of the provisions in the Code. The attempts by Sunshine to try and find some form of amelioration of those consequences in extremely strained readings of certain of the Code provisions should not be accepted. In short, if Sunshine's contentions were to be accepted, the very extensive powers entrusted to ASIC by the Credit Act (some of which have been mentioned in describing the absurd and illogical consequences for the Credit Act of Sunshine's construction) would not be available to ASIC when it came to the Code.

107 Sunshine's submission to the effect that the powers expressly entrusted by the Code to ASIC in relation to seeking penalties where there was a breach of the 'key requirements' are sufficient foundation for ASIC to seek pecuniary penalties where there has been a contravention of the Code must be rejected. Plainly, the reference to 'penalties' in those provisions is not to the imposition of pecuniary penalties. Rather, they confer an ability to impose a quite specific form of statutory penalty of the kind described in the various provisions which are limited in the circumstances to which they apply. Therefore, on Sunshine's case there would be no power to seek civil pecuniary penalties despite many Code provisions referring to civil penalties.

108 It was submitted that s 124 of the Code would provide a source of power to ASIC to enforce the Code. It provides:

> (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).

109 However, s 124 is hardly the kind of provision you might expect if ASIC was to be the regulator entrusted with supervision of compliance with the Code. Further, if the extent of ASIC's statutory authority was that given by s 124 then it would have no power to seek a civil pecuniary

penalty because the reference to 'any consequential order' could not be said to sustain an application for relief of that kind. Further, it would limit ASIC to seek restitution or compensation. It would not provide any real supervisory authority for ASIC to investigate and bring proceedings where the Code provisions were contravened.

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

111 Accordingly, this Court has jurisdiction to declare contraventions of s 24(1A) of the Code and s 47(1)(d) of the Credit Act and to impose pecuniary penalties in respect of such contraventions upon application by ASIC in the exercise of the jurisdiction conferred by s 187 of the Credit Act and pursuant to s 166 of the Credit Act.

112 By parity of reasoning, ASIC had power to apply for relief under s 177 of the Credit Act which provided that on the application of ASIC, the Court may may grant an injunction on such terms as it considers appropriate where the Court is satisfied that a person has engaged in conduct that constitutes a contravention of 'this Act'.

Sunshine's second jurisdiction point

113 The second of the jurisdictional points raised by Sunshine concerns whether the Court has authority to make a declaration that Sunshine has contravened any provision of the Code where the relevant conduct occurred prior to 13 March 2019.

114 There were significant changes to the Code and the Credit Act that took effect from 13 March 2019. Before those changes, it was a criminal offence to breach many of the Code provisions and there was no regime for the imposition of civil penalties for transgressions of the Code. After the changes, civil penalties were introduced for contraventions of many of the Code provisions. In some instances, this was done simply by changing the reference at the end of the provision to the penalty units for 'criminal penalty' to an amount of penalty units for a 'civil penalty'.

115 Significantly, there was no amendment to the Code provisions to introduce a mechanism by which proceedings might be brought to recover the civil penalties provided for by the amendments (noting that the provisions about 'penalty' orders for contravention of a key requirement of the Code were already in existence and remained in place). However, there

were amendments to those parts of Chapter 4, Division 2 of the Credit Act which provided for ASIC to be able to commence proceedings for the recovery of the civil penalties: see Schedule 3 to the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) (**Amendment Act**).

116 As to the amendments to the Credit Act, the Amendment Act introduced the following new sub-sections to s 167:

> **Determining pecuniary penalty**
>
> (3) In determining the pecuniary penalty, the court must take into account all relevant matters, including:
>
> (a) the nature and extent of the contravention; and
>
> (b) the nature and extent of any loss or damage suffered because of the contravention; and
>
> (c) the circumstances in which the contravention took place; and
>
> (d) whether the person has previously been found by a court (including a court in foreign country) to have engaged in similar conduct.
>
> **Civil enforcement of penalty**
>
> (4) A pecuniary penalty is a debt payable to the Commonwealth.
>
> (5) The Commonwealth may enforce a pecuniary penalty order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgement debt.

117 The provisions introduced by the Amendment Act were detailed. They included the addition of a provision concerning the amount of the pecuniary penalty that might be imposed. A provision was added in the following terms (as s 167A):

> The pecuniary penalty must not be more than the pecuniary penalty applicable to the contravention of the civil penalty provision.

118 Then, as to the pecuniary penalty applicable to an individual, a provision was added (as s 167B(1)):

> (1) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by an individual is the greater of:
>
> (a) the penalty specified for the civil penalty provision; and
>
> (b) if the court can determine the benefit derived and detriment avoided because of the contravention - that amount multiplied by 3.
>
> (original emphasis)

119 For a body corporate a provision was added (as s 167B(2)) to the effect that the pecuniary penalty applicable to the contravention of a civil penalty provision by a body corporate was the greater of (a) an amount that was ten times the specified penalty; (b) if the benefit can be determined, the amount of the benefit multiplied by three; or (c) 10% of the annual turnover of the body corporate up to an amount equal to 2.5 million penalty units.

120 The Amendment Act also introduced a provision to the effect that it was not necessary to prove the state of mind of the alleged contravener in proceedings for a declaration of contravention. It also introduced a defence of mistake of fact and provisions about the evidential burden in such proceedings. There were other amendments to the provisions in Chapter 4 that were concerned with proceedings to recover pecuniary penalties.

121 Accordingly, the Amendment Act (a) introduced civil penalty provisions into the Code; (b) made detailed amendments to the provisions in Chapter 4 of the Credit Act concerned with proceedings to recover a pecuniary penalty; and yet (c) introduced no provisions into the Code concerning the recovery of pecuniary penalties.

122 Plainly, the Amendment Act contemplated that the enforcement mechanism for civil penalty provisions in the Credit Act including the Code would be provided for by Chapter 4. Many strange consequences would flow if that were not the case. These matters are further reasons why Sunshine's first jurisdictional point lacks any merit.

123 However, the significance of these matters for the second jurisdictional point is that before the Amendment Act there were no provisions in the Code that could give rise to civil monetary penalties, but the same provisions existed as criminal offence provisions.

124 Schedule 8 to the *National Consumer Credit Protection (Transitional and Consequential Provisions Act 2009* (Cth) dealt with the application and transitional provisions for the Amendment Act. Those provisions established the date of 13 March 2019 for application of the new civil penalty and offence provisions introduced into the Code by the Amendment Act. Section 24(1A) of the Code was one of the provisions that took effect by operation of the Amendment Act. Before that, there was a criminal offence provision expressed in the same terms.

125 Therefore, it may be accepted, that the statutory authority conferred by s 166 and s 167 of the Credit Act to seek declarations and pecuniary penalties in respect of a contravention of

s 24(1A) of the Code (and consequent relief for contravening s 47(1)(d) of the Credit Act) was confined to conduct that occurred on or after 13 March 2019.

126 It may also be accepted that the relevant statutory provisions in the Credit Act conferred jurisdiction upon this Court 'to the exclusion of … section 39B of the *Judiciary Act 1903*': s 186(1). However, s 186(3) of the Credit Act provides: 'Nothing in this Division affects any other jurisdiction of any court'.

127 As to that 'other jurisdiction', s 21(1) of the *Federal Court of Australia Act 1976* (Cth) 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.

128 Section 21(1) provided jurisdiction for the Court to declare that conduct before 13 March 2019 contravened the Code. It is well established that orders of that kind may be made in appropriate circumstances. As to the whether such an order should be made in the circumstances of the present case, the primary judge was correct, for the reasons given by his Honour, to find that the Court had jurisdiction to make declarations of contraventions in the civil proceedings commenced by ASIC: PJ[73]-[91].

Difficulties that arose from the manner in which Sunshine conducted the appeal

129 The *Federal Court Rules 2011* (Cth) require that the notice of appeal 'must state…briefly but specifically, the grounds relied on in support of the appeal': r 36.01. Difficulties may arise when litigants in person are called upon to meet the requirement: *Arifin v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2014] FCAFC 61 at [30]. However, the Court is entitled to expect that appeals brought by competent practitioners will meet the requirement. Regrettably, that was not the case.

130 The appeal brought by Sunshine advanced more than 30 grounds. It is not possible to say precisely how many grounds were advanced because of the use of sub-paragraphs to articulate separate grounds and the way in which some of the grounds were expressed.

131 Many of the grounds were unfocussed in the sense that they alleged error at a high level of generality. In most instances they did no more than identify a contention that had been rejected by the primary judge. Universally, the 'grounds' failed to identify the paragraphs in the reasons of the primary judge where the alleged error in reasoning was said to have occurred. In almost all cases, the grounds failed to articulate what it was said the primary judge should have found.

In consequence, the grounds of appeal were little more than a list of many of the arguments that had been advanced unsuccessfully before the primary judge. They failed to engage in any real sense with the reasons for decision of the primary judge. They manifested a fundamental misunderstanding of the nature of the right of appeal from a single judge of the Court conferred by the *Federal Court of Australia Act*. They provided no focus for the appeal.

132 Appeal grounds should not include argument. Nor should they take the form of broad statements of the contentions that will be advanced on appeal. They must identify the nature of the error in the reasoning of the primary judge (pointing to where the error occurred) and state what should have been done by the primary judge, noting that the error may take the form of a failure to address a point of significance (see, for example, *Cush v Dillon* [2011] HCA 30; (2011) 243 CLR 298).

133 When it comes to factual findings, the appeal grounds should reflect the well-established principles for challenging factual findings: see the recent summary in *Frigger v Trenfield (No 3)* [2023] FCAFC 49 at [134]-[147], especially at [141] concerning findings based upon a conclusion as to a lack of credibility of particular witnesses. Further, if findings are not challenged on appeal, they must be accepted. It is never appropriate to proceed, as Sunshine did in the present instance, as if there had been no factual findings by the primary judge and simply seek to argue the case by reference to the evidence before the primary judge (or worse still, some aspects of that evidence).

134 Well drafted grounds of appeal are informed by an understanding of the reasoning pathway adopted by the primary judge. This is so for a number of reasons. It is an approach that ensures that consideration is given to whether the appeal grounds, if upheld, will provide a basis upon which the judgment or orders under appeal should be overturned. It will expose whether it is necessary for the appellant to succeed on all grounds or whether some grounds if upheld provide alternative bases upon which the appeal should be upheld. It will also expose whether the complaint goes nowhere in the overall scheme of things. Most importantly, it will inform what should be the subject of a separate appeal ground. Usually, there should be a separate appeal ground directed to each alleged error in the reasoning pathway, rather than rolling up issues in the same ground. It will also expose whether the ground is expressed with too much generality to enable the appeal court to understand the flaw in the logic of reasoning that is alleged, or to specifically direct attention to the point in the reasoning that is said to be infected with error.

135 The formulation of an appeal ground is not like the formulation of a pleading. Grounds of appeal should not be elaborate nor should they set out matters at great length: *Sansom v Sansom* [1956] 1 WLR 945. The aim should be greater clarity rather than greater particularity: *Maddren v Bell* [1998] WASCA 215. Not every grievance will constitute a ground of appeal and findings as to subordinate or basic facts will rarely found a ground of appeal: *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157; (2002) 234 FCR 549 at [4]. Instead, it is necessary to focus upon intermediate findings or conclusions that are said to be in error (including references in the grounds to all the paragraphs that are challenged by the ground) and then, subsequently, make submissions in support of the ground by reference to the underlying facts and findings.

136 Appeal grounds should also be prepared with a keen eye to conformance with the duty to exercise an independent judgment in regard to the arguments to be presented: *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102 at [13]; and *Dyczynski v Gibson* [2020] FCAFC 120; (2020) 280 FCR 583 at [215]-[218].

137 Sometimes, well prepared submissions in support of an appeal will remedy the burdens of a deficient notice of appeal by exposing the matters that should have been expressed in the grounds (but were not). Such a course is not to be encouraged because it poses difficulties for understanding whether there should be case management directions as to the conduct of the appeal. It is also likely to result in unfairness to any party opposing the appeal.

138 In the present case, many of the matters alluded to in the appeal grounds were not addressed at all in the submissions or received only cursory mention in written submissions without being developed orally. Other aspects of the submissions bore no connection to any of the grounds. Difficulties were posed for the conduct of the appeal and the preparation of these reasons by the defective manner in which the appeal grounds were prepared. Those difficulties were most manifest when it came to those aspects of the appeal which sought to challenge the factual findings made by the primary judge and even more so the findings as to credibility. Those findings by the primary judge rested upon the consideration of documents, inferences drawn from those documents as well as, in certain respects, conclusions to the effect that witnesses for Sunshine were not credible because they gave a 'schooled' account which did not reflect the actual practices of Sunshine in dealing with its customers. As has been mentioned, impugned findings of that kind need to be challenged in accordance with established principles for

challenging factual findings. Otherwise, as has been mentioned, the appeal must be conducted on the basis of the findings that have been made by the primary judge.

139 The primary judge also found that there had been admissions by Sunshine that were consistent with his findings on certain key aspects.

140 The appeal took the form of re-arguing the points that had been put to the primary judge in a broad brush way without regard to any real analysis of the merits of the reasoning of the primary judge, the pathway by which conclusions adverse to Sunshine had been reached, the precise findings it was alleged that the primary judge should have made or the evidence that was relevant to those findings.

141 Put succinctly, having regard to the way in which the findings were reached by the primary judge there was an egregious failure to discharge the responsibilities of counsel to confine the case to the real issues and, in an appeal, to state the grounds 'briefly but specifically'.

142 Perhaps understandably given their form, the written submissions in support of the appeal barely referred to the grounds. Instead, they were ordered around six topics with the heading for each topic being footnoted to various grounds. Under each topic arguments were advanced mostly without regard to the reasoning of the primary judge. The submissions were arranged as follows:

(1) a claim that the primary judge lacked jurisdiction to grant declaratory relief in the terms ordered (grounds 1 to 4);

(2) a claim that ASIC had failed to establish that the fee *imposed* by Sunshine was not of the kind allowed (because the fee imposed was a fee payable in the event of default in payment and not a fee to amend the terms of the finance contract) (no grounds identified);

(3) a claim that the fee was *payable and paid* in the event of default (grounds 5 to 7);

(4) a general claim that ASIC failed to discharge its burden of proof (which was supported by submissions which traversed, amongst other things, claims about the nature of that burden, an alleged failure to conform to the objective theory of contract, alleged significance of the fact that ASIC did not call any customers to give evidence), alleged incorrect characterisation of the evidence, alleged failure to apply the principle in *Blatch v Archer*, alleged incorrect application of the principle in *Jones v Dunkel* and alleged error in drawing inferences as to Sunshine's approach to all its customers based

upon a sample of the documents relating to its dealings with 42 customers) (grounds 5, 6, 11, 12, 14, 15, 16 and 20);

(5) a claim that the primary judge should have upheld Sunshine's claim that it ought fairly be excused pursuant to s 183 of the Credit Act (ground 18); and

(6) a claim that there was no evidence of any agreement to amend the contract or any agreement to pay an amendment fee in the case of four of the customers (ground 19).

143 The written submissions originally made no reference to grounds 8, 9 or 13. This was 'corrected' by the late filing of an amended version that indicated that topic (2) concerned those grounds. A cursory examination of the submissions exposed that was not the case. When that was pointed out, Sunshine abandoned those grounds leaving topic (2) without even a notional foothold in the appeal grounds.

144 In those circumstances, these reasons address the six topics of Sunshine's written submissions rather than the 'grounds' of appeal. It would be an impossible task to address the individual grounds given the form in which they are expressed and the way in which the appeal was conducted by Sunshine.

145 Nevertheless, as will emerge, the submissions suffered from similar defects to the grounds. They were prepared as if the points were being made afresh devoid from the context of the reasoning of the primary judge.

Other points adverted to by Sunshine

146 In what follows we address each of Sunshine's six topics. We do so recognising that much of what was raised by Sunshine, in the view we have taken, is not dispositive. For reasons of judicial economy and having regard to the views we have expressed as to the way in which the appeal was formulated (and the difficulties that poses) we are of the view that it is not necessary or appropriate to deal with all matters raised by Sunshine in its written submissions, only some of which were alluded to orally.

Topic (1): The jurisdictional points

147 For reasons that have been given, the jurisdictional contentions were without merit.

Topic (2): The Amendment Fee was allegedly a fee imposed in the event of default in payment by the customer

148 Although it was not entirely clear, it appeared that topic (2) was concerned with whether the fee imposed by the contracts was a fee of a kind that was prohibited by s 31A of the Code. During oral submissions, Sunshine was given an opportunity to clarify whether the contention advanced was concerned with the proper construction of the contracts or whether it was based, in some way, upon the events which occurred in dealing with customers after the contract was made. The precise nature of the contention being put remained unclear. In any event, for reasons that have been given, the question whether the Amendment Fee as imposed by Sunshine contravened the prohibition in s 31A was to be answered by regard to the proper construction of the contracts by which the fee was imposed.

149 For reasons we have given, the primary judge was correct in concluding that the Amendment Fee was not a fee imposed in the event of default in payment by the customer and the nature of the Amendment Fee provided for in the contracts meant that the contraventions of s 24(1A) of the Code alleged by ASIC were established.

Topic (3): The Amendment Fee allegedly was payable (and paid) in the event of default

150 The submissions advanced as to topic (3) concerned the factual circumstances that occurred when the Amendment Fee was actually imposed upon individual customers. For reasons that have been given, the dealings between the parties at the time the fee was imposed as relied upon by Sunshine were not relevant to a determination as to whether there had been contraventions of s 24(1A) of the Code. The primary judge was correct to find that the fee was payable and paid in respect of a monetary liability that cannot be imposed consistently with the Code because that liability was imposed on the basis of the contract terms which allowed for an Amendment Fee to be charged and not 'in the event of' a default in payment under the contracts entered into by Sunshine with its customers.

151 The submissions for Sunshine as to this topic were made at a level of generality that was said to pertain to each customer the subject of detailed evidence before the primary judge (being some 66 in number, 61 of which were contracts made and performed in the relevant period), with the Court being taken to examples on the basis that the same analysis applied to all. Accordingly, we address them on that basis.

152 Sunshine's submissions sought to advance a different characterisation of the events that occurred when an Amendment Fee was charged by Sunshine to that which was found by the

primary judge. As has been explained, an appeal of that kind would have to allege error as to those findings and identify the nature of the error. As that was not done it is not possible in a meaningful way to address the submissions advanced for Sunshine which took the form of submissions that might have been advanced to the primary judge. That is to say, they did not seek to engage with the reasons of the primary judge and the factual findings that had been made. Unless those finding are demonstrated to be in error, they are the foundation upon which this Court deals with an appeal.

153 Nevertheless, speaking broadly, the contentions advanced were to the effect that, on each occasion when an Amendment Fee was imposed by Sunshine, the customer had communicated an inability to make a future payment or payments of a credit charge under the contract and had made a request that Sunshine not call on the customer's direct debit request. In consequence, so it was submitted, there was a default in payment under the contract at the time the Amendment Fee was imposed and the customer, therefore, had defaulted.

154 It was also said that although the fee was debited to the account of the customer, it was not charged by Sunshine until there had been a default. That is to say, by the time the Amendment Fee was charged (and paid in those instances where it was paid), the customer had not paid the credit charges on the due date.

155 It was also said, for various reasons, that the agreement reached between Sunshine and its customer was that it would defer calling on the direct debit authority. This, it was said, effected no change to the obligations under the contract as to when the credit charges were due. Further, it was said that there was no variation of the contract by these dealings. One reason advanced for that contention was that it was said that there was no consideration moving from the customer. Another reason was that it was said that there was no change to the final repayment dates.

156 We are not persuaded that any of these matters either separately or together, meant that the Amendment Fee was payable, in fact, in the event of a default in payment under the contracts. There are two main reasons for that conclusion. First, as we have explained, in order to come within the statutory language in s 31A of the Code which refers to 'a fee or charge that is payable in the event of default in payment under the contract', the fee or charge must be payable *in consequence of* a default in payment under the contract. The contracts entered into by Sunshine imposed a fee that was payable when there was a deferment of the time for payment. It was not a fee that was to be imposed on the basis that there had been a default in payment.

Sunshine did not dispute that the fee was imposed by reference to the contract. Therefore, irrespective of what happened in fact when the Amendment Fee was imposed, it could only be imposed on the basis of an agreement to amend. That was the character of the fee and the monetary liability to pay it was sourced in the terms of the contract.

157 Second, even if the events that occurred at the time the Amendment Fee was charged to the individual customer were relevant, Sunshine did not point to any evidence to support a finding that the Amendment Fee was imposed because there had been default in payment. At its highest, the evidence referred to by Sunshine might be relied upon to show that there was expected to be future default at the time the Amendment Fee was imposed (by charging it to the customer's account) - assuming there was no agreement to defer the time for payment. The evidence shows that Sunshine added the Amendment Fee when it agreed to defer the time for payment of credit charges. The fact that the discussion with the customer concerned the deferment of a resort to the direct debit authority did not mean that there was no agreement to amend or vary. The imposition of the Amendment Fee occurred because there had been a discussion with the customer in which a Sunshine officer agreed to defer payment.

158 Further, the fact that there was no change to the date when the loan had to be repaid did not mean that there was no amendment to the agreed terms.

159 Sunshine's case can be tested in the following way. If indeed there was a default each time that that an Amendment Fee was charged and it was the default that gave rise to the liability then why did Sunshine not charge a default fee? On Sunshine's case that was the fee that was payable. A further difficulty with approaching the matter in that way was the terms of the Information Statement and the related express provision in the contracts in relation to amendment. The contracts were being performed in circumstances where Sunshine had told its customers that if there were problems with making a payment they should contact Sunshine and seek an amendment. The Information Statement also referred to the possibility of amendment being directed by a court or tribunal. Both those possibilities were reflected in the terms of the contract concerning amendment.

160 As would be expected in those circumstances, in the examples relied upon by Sunshine in its submissions as to the factual findings, the record of dealings with the customer refer, in substance, to agreement to change the payment arrangements and the charging of an amendment fee because of that agreement. Further, the evidence to which the Court was taken

was to the effect that Sunshine would then send a revised payment schedule with adjusted credit charges to require repayment within the loan term.

161 As we have explained, the relevant provision in s 31A(1)(c) of the Code allowed a contract to impose a fee or charge that is payable *in the event of a default in payment*. An indication that a customer might not be able to pay an amount when due is not a default in payment for the purposes of the statute. All the more so when the indication is given, not for the purpose of defaulting in payment, but for the purpose of reaching agreement with Sunshine (as contemplated by the terms of the contract) for the time for payment to be deferred. There is nothing to be gained in considering whether the conduct of the customer might amount to some form of anticipatory breach or repudiation of the contract that may have justified termination if the contract was governed solely by common law principles. The contracts were highly regulated. The statutory language is protective of those who enter into small amount credit contracts. The terms of the contracts had their own provisions that allowed for agreement between the parties. If agreement was reached it operated by reference to those contract terms. There was no need to call upon common law principle beyond the interpretation of the contract terms.

162 When pressed as to the deficiencies in the way the case was presented on appeal, Sunshine produced a schedule which was said to support a submission that the findings in six identified paragraphs of the reasons were 'not supported by the evidence'. The schedule did no more than put forward a 'selection of exhibits and log entries which provide[d] examples of evidence contrary to findings of fact by the learned Primary Judge'. Precisely what the Court was to make of the list was unclear. What was pellucid was that there was no attempt to deal with the evidence in any comprehensive way.

163 Otherwise, it is not for this Court to try and conjure out of the unfocussed submissions some form of possible articulation of alleged factual error that might correspond to a proper ground.

164 Significantly, no challenge was developed to many of the key factual findings by the primary judge. They included the following:

(1) at PJ[255]:

> Despite [Sunshine's] 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 …, 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 … and Customer 26 … the Amendment Fee was charged on the date that the payment was due.

(2) at PJ[259]:

> The above conclusion that Sunshine … 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 … 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 … 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.

(3) at PJ[260]-[263], his Honour dealt with examples of the circumstances in which default fees were charged by way of contrast to the way in which the Amendment Fee was charged, concluding that the latter 'was required and paid in entirely different circumstances'; and

(4) at PJ[264], the primary judge relied upon the way Sunshine's own staff recorded matters in the 'customer transaction logs' and an express statement in the version of the credit contract used before the relevant period that the 'Rescheduling/amendment fee' was chargeable '[w]hen repayment/s are rescheduled, payable following rescheduling'.

165 Further, this was a case where the primary judge had an advantage. First, because there was a considerable amount of material relating to individual customers to which the primary judge was taken and in respect of which there was no attempt to categorise or summarise on appeal in some way that would enable this Court to be across the same material. Second, because the primary judge made adverse credit findings as to witnesses who gave evidence for Sunshine as to the nature of its dealings with customers (a matter addressed below). These aspects were not brought to bear in advancing the broad submissions put for Sunshine as part of topic (3). It was necessary for those matters also to be addressed in challenging the findings to the effect that the Amendment Fee was not payable on default in payment under the contract: see *Frigger v Trenfield (No 3)* at [141]ff. They were not in any meaningful respect.

Topic (4): Allegation that ASIC failed to discharge its burden of proof

166 The submissions advanced in support of topic (4) in Sunshine's written submissions were to the effect that the primary judge should have found that ASIC did not adduce evidence to support a finding that on any occasion where a customer had asked Sunshine not to rely upon a direct debit authority when the next credit charge was due had reached a 'consensus ad idem to vary the terms of the Financial Table of that customer's [contract]'. For reasons that have been given, ASIC did not need to establish that the Amendment Fee was imposed in circumstances where there was a variation of the contract terms in accordance with principles of contract law.

167 The whole of the matters raised in support of topic (4) proceeded upon the false premise that it was necessary for ASIC to demonstrate a variation of each contract in accordance with contract law principles.

168 The written submissions also sought to rely upon evidence of witnesses in respect of whom the primary judge had made adverse credit findings without seeking to challenge those findings in accordance with applicable principle.

169 To the extent that submissions were made to the effect that the primary judge failed to observe what was required by *Briginshaw v Briginshaw* (1938) 60 CLR 336 or otherwise properly apply the law as to the onus and standard of proof, those submissions paid no regard to the detailed consideration of those matters by the primary judge at PJ[128]-[138]. We can see no respect in which that reasoning was in error.

170 It was suggested that ASIC's failure to call any customer to give evidence and to simply adduce evidence of Sunshine's own records in some unspecified way meant that those records were an insufficient foundation for the primary judge to reach conclusions as to what occurred. In circumstances where those records included a form of running sheet as to the dealings with each customer and there was evidence of the practice of Sunshine's employees in making contemporaneous records of communications with customers (many of which were verbatim records of written communications through a customer 'portal') a general submission of that kind provided no foundation for a challenge to the factual findings of the primary judge.

171 Finally, the primary judge was criticised for extrapolating from the evidence concerning the individual customers to conclusions in respect of all customers. There could be no issue as to that approach when it came to the contracts because the five versions used were in evidence.

As to the nature of the dealings with individual customers, the evidence was that the customers were selected by ASIC in a randomised way. They were sufficient evidence of a consistent practice by Sunshine. Again, there was no real attempt to impugn the reasoning of the primary judge as to why his findings could be extrapolated to other customers. Finally, the objection to extrapolation was really tied up with Sunshine's ineffective attempt to contend that ASIC had to demonstrate that there had been a variation of the terms of the Financial Table in accordance with common law principles. For reasons that have been given, that submission should not be accepted.

172 In its written submissions in reply, Sunshine made a submission that sought to raise a number of points that had not been addressed in its principal written submissions. The submission was expressed as follows:

> ASIC's submissions do not address its failure to call any witnesses to support its allegations of contract variation. In addition, ASIC has not sought to explain how findings were not in error where:
>
> (a) it was never put in cross examination to any Sunshine … witness or by the primary judge that they were fabricating their evidence or being dishonest;
>
> (b) it was not suggested in ASIC's written or oral submissions that any Sunshine … witness was dishonest;
>
> (c) at its highest, ASIC's written submission was that Mr Simmons' answers were 'rigid and unresponsive' and that he 'fixedly stuck to a mantra' and that Mr Powe sought to 'doggedly adhere to [Sunshine's] case';
>
> (d) it was never suggested to any witness during the course of their evidence, or in submissions made to the primary judge by ASIC that any Sunshine … witness had been 'schooled'.
>
> (e) the primary judge did not question a witness, who he later criticised, as to whether that witness had been 'schooled about how to give his evidence.' The suggestion of any witness being 'schooled' was raised for the first time by the primary judge in the Reasons; and
>
> (f) it was not submitted by ASIC, nor put to the witnesses for Sunshine … by either ASIC or the primary judge, that the fee paid was 'self-evidently an amendment fee' and that, for the witness to say otherwise, was not honest. The suggestion that any witnesses were not being honest was first raised by the primary judge in the Reasons.
>
> (footnote omitted)

173 As to the first sentence, ASIC did address the matters the subject of topic (4) in its written submissions. It relied upon the finding of the primary judge that ASIC's case was a strong one and described the material obtained from Sunshine as being 'overwhelmingly to the effect that consumers requested deferrals of a forthcoming scheduled repayment, Sunshine and the

consumer agreed to vary what would otherwise have been the consumer's obligation to make that payment, and the Amendment Fee was charged as a result'. ASIC also relied upon the primary judge's rejection of the evidence of the witnesses for Sunshine and relied upon the findings of the primary judge in that regard. It also submitted that in circumstances where the loan files, which included contemporaneous communications from customers to Sunshine and entries by Sunshine's officers, were in evidence there was no need to call any customers. For reasons that have been given, those submissions were well made.

174 As to the second sentence, it was not for ASIC to demonstrate how 'findings were not in error'. That burden was for Sunshine to discharge.

175 As to the remainder of the submission, it was not developed orally in any considered way. Further, the written submissions about the credibility findings were not expressed in a manner that connected them to anything other than the challenge to the conclusions by the primary judge concerning whether there had been agreement to vary the time for payment of credit charges. This reflects the context in which those findings were made by the primary judge.

176 The relevant findings about the witnesses being 'schooled' were as follows:

(1) As to Sunshine's witnesses generally (PJ[290]):

> It appeared from the course of the evidence given by [Sunshine's] 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 … 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.

(2) As to evidence given by Mr Simmons (PJ [292]-[293]:

> 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 … not to effect a direct debit on their bank account. The intended effect of this construction of the conversation between the customer and Sunshine … 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.
>
> 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.

(3) As to evidence given by Mr Bennetts (PJ[294], [301]):

> Mr Bennetts, the Operations Manager and Head of Assessments at Sunshine …, 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.
>
> The effect of Mr Bennetts' evidence was that Sunshine … 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.

(4) As to evidence given by Mr Powe (PJ[302]-[303]):

> In a similar manner, Mr Powe adhered to the contention that despite the obvious agreement to vary the loan contract between Sunshine … 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.
>
> Mr Powe accepted that, from time to time, customers who were unable [to] meet their originally agreed repayments would contact Sunshine … 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 … 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.

177 In each case, the primary judge found that the witness steadfastly maintained a characterisation of the dealings that occurred when a customer contacted Sunshine to seek additional time to pay that was unsustainable. In circumstances where the characterisation of those dealings was at the heart of what was in issue between the parties, the parties were joined as to whether the Amendment Fee was payable in the event of a default in payment, each of the witnesses was an officer of Sunshine and ASIC challenged the accuracy of those versions of events in cross-examination, the submission advanced for Sunshine in its reply submissions (quoted above) does not disclose error by the primary judge in the making of adverse findings as to the credit of those witnesses concerning the evidence given by them about the characterisation of the relevant dealings.

178 Further, in circumstances where, as the submission for Sunshine accepts, the primary judge was invited, in polite terms, to make adverse findings based upon the way in which the

witnesses stuck to their version of the nature of those dealings, the submissions advanced do not demonstrate error in the way in which those findings were expressed.

Topic (5): Alleged error in failing to uphold Sunshine's claim that it ought fairly be excused pursuant to s 183 of the Credit Act

179 The submissions as to alleged error concerning the finding that Sunshine ought not be excused relied upon the evidence of witnesses in respect of whom the primary judge had made adverse findings and Sunshine's characterisation that, in substance if not effect, the Amendment Fee was the same as the fee for a missed payment and was imposed in circumstances where, but for the agreed variation there would have been default.

180 Sunshine's case as to topic (5) was not developed orally.

181 No error has been demonstrated in the reasoning of the primary judge at PJ[314]-[318] as to why the statutory power to excuse should not be exercised.

Topic (6): A claim that there was no evidence of any agreement to amend the contract or any agreement to pay an amendment

182 The submissions as to topic (6) were brief and opaque. They alleged specific error in relation to findings made by the primary judge in respect of four of the 66 customers the subject of specific evidence. The error was said to be in the making of findings that the Amendment Fee was required or actually paid by the customer. The primary judge provided detailed reasons as to the basis for the findings as to each of the four customers: PJ[320]-[328]. No error has been demonstrated in that reasoning. Nor has it been shown how this final aspect of Sunshine's submissions might establish a basis upon which the appeal might be allowed in circumstances where the other topics have been decided adversely to Sunshine.

Sunshine's s 78B notice

183 Sunshine claimed that there was no 'matter' before the Court within the meaning of s 75 and s 76 of the *Constitution*. It called in aid its contentions as to jurisdiction and the terms of s 186(1)(b) of the Credit Act to the effect that the provisions of the Act that confer jurisdiction applied to the exclusion of s 39B of the *Judiciary Act*. For reasons that have been given, Sunshine's contentions to the effect that the Court lacked jurisdiction should not be accepted. Beyond that, it is not necessary to consider the point.

Conclusion and orders

184 For reasons we have given, subject to one issue as to the form of declaratory relief (addressed below), Sunshine's appeal must be dismissed.

185 As has been explained, the conduct in respect of which ASIC sought declaratory relief was conduct of the same kind that occurred over the entire period between 1 July 2016 and 2 November 2020. Sunshine did not suggest that the general nature of its dealings with its customers in relation to charging the Amendment Fee of $35 had changed in any material respect over that time. It did not suggest that the analysis to be applied to the way Sunshine had given effect to the different versions of the contract that it entered into with its customers should be undertaken in a different way depending upon differences between the term of the contracts.

186 At its highest, Sunshine's contentions were to the effect that, in order to succeed, ASIC had to prove what had taken place in the dealings between Sunshine and each of its customers in relation to the Amendment Fee. Those contentions were advanced on the premise that those dealings were relevant to reaching a conclusion as to whether Sunshine had contravened s 24(1A) when it came to the Amendment Fee. For reasons that have been given, they were not. Rather, the decision of the primary judge rested upon a consideration of the terms of the contracts and the fact that the Amendment Fees had been charged by Sunshine by reference to those contracts on each occasion.

187 Therefore, in circumstances where there was no issue as to the number of occasions that the fees were agreed, charged and paid, it was appropriate for declarations to be granted in terms that covered all those occasions.

188 However, as has also been explained, the foundation for the declarations for conduct before 13 March 2019 and on and after that date were different. For conduct before that date, the declarations were made on the basis that the conduct was, at the time, an offence but that it was appropriate to grant declaratory relief because, amongst other things, ASIC had made clear that it did not propose to bring criminal proceedings (and in exercise of the general civil authority of the Court to grant declaratory relief).

189 For conduct after 13 March 2019, the declarations were made pursuant to s 166 of the Credit Act which states:

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).

190 Further, the power of the Court to impose a pecuniary penalty for contravention of a civil penalty provision is expressed to arise'[i]f a declaration has been made under s 166 that the person has contravened the provision': s 167 of the Credit Act.

191 In circumstances where a declaration under s 166 must specify the matters stated in s 166(3) (particularly 'the conduct that constituted the contravention') and the declaration is conclusive evidence of those matters as well as the fact that it is the making of the declaration that enlivens the power to impose a pecuniary penalty, in our view, any declaration made in the exercise of the statutory authority should not be rolled up with a declaration made in the exercise of some other authority.

192 ASIC supported the form of the declaratory order, being the form of relief it had proposed to the primary judge. It did so on the basis that it had the benefit of making clear that the conduct that had been engaged in by Sunshine over the whole of the relevant period was conduct of the same character and contravened the relevant provisions of the Credit Act for reasons that applied for the whole of that period. In our view, the fact that the declaratory relief concerns conduct of the same kind can be made apparent by the terms of the declaratory relief.

193 For those reasons, we would set aside the form of declaratory orders made by the primary judge, make declarations in accordance with these reasons and otherwise dismiss Sunshine's appeal.

194 As to costs, we will afford the parties an opportunity to make any written submissions as to the appropriate orders as to costs having regard to these reasons.

I certify that the preceding one hundred and ninety-four (194) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Perram, Bromwich and Colvin.

Associate: 

Dated: 24 March 2024