HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **Michael Thomas Potts**
Appellant

and

National Australia Bank Limited
10 **(ABN 12 004 044 937)**
Respondent

APPELLANT'S SUBMISSIONS

Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: STATEMENT OF ISSUES ON THE APPEAL

2. This appeal concerns whether DSHE Holdings Ltd (Receivers & Managers Appointed) (in liq) (**DSH**), in making an express representation to the respondent (**NAB**) in cl 21.1(t) of the Syndicated Facility Agreement entered on 22 June 2015 (**SFA**), regarding the adequacy of its disclosure to NAB up to that date, engaged in misleading or deceptive conduct independently of the appellant (**Mr Potts**), such that DSH is a "concurrent wrongdoer" within the meaning of the proportionate liability regime.

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Part III: SECTION 78B NOTICE

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: CITATION OF JUDGMENTS BELOW

4. The judgment appealed from is *Potts v National Bank of Australia* (2022) 405 ALR 70 (**CA**) (CAB 289-444). The judgment of the primary judge is *National Bank of Australia v Abboud & Anor (No 4)* (2021) 155 ACSR 1 (**PJ**) (CAB 6-250).

Part V: NARRATIVE OF RELEVANT FACTS

5. Prior to its collapse in January 2016, DSH was a retailer of consumer electronics in Australia and New Zealand (PJ[1]; CAB 12). Mr Potts was its Chief Financial Officer. Mr Abboud was its Chief Executive Officer. Each was a director of DSH.

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DSH's pursuit of O&A rebates leading in January 2015

6. One way in which DSH earned revenue was through payment or allowance of rebates on goods negotiated from its suppliers (PJ[25]-[26]; CAB 19-20). In the first half of calendar year 2014, DSH began to place greater emphasis on obtaining a certain type of rebate from its suppliers, known as "over and above" rebates (**O&A rebates**) (CA[10]; PJ[79]; CAB 39, 305), which led to buying decisions being based, at least in part, on the level of O&A rebates being offered (PJ[84], [113]; CAB 42, 48).

7. From about April 2014, Mr Skellern (the Director of Commercial, Property, Procurement and Supply Chain: PJ[20]; CAB 18) introduced an "O&A" meeting, at which O&A targets were set and Mr Skellern encouraged buyers to meet those targets (CA[10]; CAB 305). Also around this time, Mr Abboud released an additional $23m in "OTB" (PJ[82]; CAB 41), being an increase in the "Open to Buy" amount which

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was, in effect, the budget available for buyers (CA[11]; CAB 306). This increase in OTB was done in pursuit of a plan which Mr Abboud developed with Mr Skellern and Mr Potts, that involved increasing the buying budget so as to allow more stock to be purchased, in order to obtain more O&A rebates and thereby to meet forecast EBITDA (PJ[82]; CAB 41). At some time in 2014, the KPIs for buyers included reaching their budget for O&A rebates and Mr Skellern recorded weekly targets for O&A rebates on a whiteboard (PJ[85]; CAB 42). Mr Abboud released a further $5m in OTB to pursue rebates in the middle of June 2014 (PJ[97]; CAB 46). In July 2014, following the financial year end, Mr Potts noted in an email to Mr Abboud that DSH had a "high
10 closing inventory to achieve O&A" (PJ[101]; CAB 47).

8. That emphasis on O&A rebates continued throughout FY15 (CA[17]; CAB 307). Mr Borg (who was the General Manager – Planning: PJ[18], CAB 18) gave evidence that Mr Abboud was increasingly involved in allocating the OTB to categories in which suppliers paid higher O&A rebates. Mr Abboud released a further $15m of OTB with an emphasis on obtaining $3m in O&A rebates in late October 2014 (PJ[113]-[114]; CAB 53-54). Around this time, Mr Borg started to raise concerns about the impact on DSH's stock position (PJ[127]; CAB 60). He sent emails to other senior staff, in November and December 2014, stating that DSH was becoming overstocked as result of purchases made to maximise O&A rebates (CA[20]; CAB 308). In particular:

20 a. on 19 November 2014, Mr Borg sent an email to Messrs Orrock (the Director of Buying: PJ[20]; CAB 18) and Skellern that: "we have over-ordered for the quarter and our closing stock is at risk" (PJ[128]; CAB 60);

b. on 26 November 2014, Mr Borg sent an email to merchandise planners, Messrs Orrock and Skellern and others in which he stated "[a]s you know, we have raised a significant amount of POs [purchase orders] this quarter to deliver our sales budget and drive the Ad sub and O&A" (PJ[129]; CAB 61); and

c. on 19 December 2014, Mr Borg sent an email to a number of people, including Mr Potts and Mr Abboud, which attributed the overstocked position to the emphasis on O&A rebates (PJ[130], [411]; CAB 61, 164). That email was said to have likely
30 reflected "discussions within DSH" (PJ[411]; CAB 164).

9. By January 2015, it was apparent that DSH was overstocked. On 8 January 2015, Mr Borg informed Mr Potts and Mr Abboud that the current stock was worth $365m (CA[24]; CAB 309), which was significantly above the $250m target (PJ[387]; CAB

155). The primary judge found that the emphasis on obtaining O&A rebates, and the buying practices it created, was a substantial cause of DSH becoming overstocked (PJ[387]; CAB 155 and PJ[412]; CAB 164). His Honour also found that each of Mr Potts and Mr Abboud knew this by no later than December 2014, by reason of the email which Mr Borg sent to them on 19 December 2014 (PJ[414]-[415]; CAB 165-166).

10. Mr Abboud was the main driver of the O&A strategy. The problem with the overemphasis on O&A arose because of the "willingness of more senior managers including Mr Abboud to approve purchases, or to approve increases in OTB, with a view to increasing the amount of O&A rebates collected by [DSH]" (PJ[390]; CAB 156). On occasions, Mr Abboud released additional OTB to obtain O&A rebates in order to meet profit projections (PJ[384]; CAB 154). In October 2014, Mr Abboud released a further $15m in OTB "notwithstanding the fact that through the last quarter of the year, Mr Borg was expressing concerns about DSH being overstocked" (PJ[384]; CAB 154), in order to "obtain additional O&A rebates in order to make budget for the half year" (PJ[385]; CAB 154).

11. In early 2015, after the Board recognised that "DSH was overstocked", management developed "a plan to address the position" and "a plan to that effect was implemented which met with some success" (PJ[472]; CAB 192). Inventory reduced significantly in the first half of 2015, but still remained well above the $250m target (PJ[387]; CAB 155). However, the emphasis on O&A rebates had not changed (PJ[570]; CAB 229).

Information provided to NAB by DSH, or on its behalf, prior to 6 May 2015

12. In early 2015, DSH had discussions with various financiers regarding the replacement of its existing facility with Westpac. Negotiations with NAB commenced on 28 April 2015, when Messrs Potts and Abboud met with NAB representatives and gave a PowerPoint presentation on the background to DSH's business and the current facilities with Westpac (CA[42]; CAB 314).

13. The presentation stated that DSH had "*improved inventory management*" (PJ[205]; CAB 91), and provided information about strategies adopted by DSH in order to "*Protect gross margin and grow sales*", identifying steps taken to achieve a "*[s]trong improvement in gross margin*", and referring to the "*extensive range*" of DSH's inventory (PJ[206]; CAB 91). A file note prepared by Mr Cohen from NAB recorded that statements were made by Mr Abboud at this meeting regarding a number of topics,

including inventory requirements, inventory management, monitoring margin, and maintaining margin by obtaining rebates (PJ[207]-[211]; CAB 91-93).

14. NAB alleged that both Messrs Abboud and Potts engaged in misleading or deceptive conduct at the 28 April 2015 meeting, but those allegations were dismissed (PJ[545]-[548] and [566]; CAB 221 and 227-228). NAB's claim of misleading conduct based on the officers' failure to disclose certain matters at this meeting (including the O&A strategy and its impact on the overstock position) failed because the nature of the meeting was informal and introductory, and the NAB representatives could not have thought that Messrs Abboud and Potts were intending to give a complete account of
10 DSH's business (PJ[566], referring to [534]; CAB 214-215 and 227-228).

15. Following the meeting, on 5 May 2015, DSH provided NAB with a copy of DSH's monthly management accounts for FY15 (although these were sent by Mr Potts (PJ[215]; CAB 94), he was acting in a purely ministerial capacity in doing so (PJ[549]; CAB 222)). The management accounts included actual monthly figures for the financial year to date in respect of DSH's inventory, receivables (i.e. rebates) and profits. They showed a substantial increase in DSH's inventory after December 2014 (PJ[549]; CAB 222), and revealed that DSH's inventory peaked in January 2015 (PJ[216]; CAB 94).

16. Messrs Menzies and Taylor of NAB started to prepare a credit application (PJ[213]; CAB 94). In order to do so, they obtained DSH's most recent publicly available
20 accounts to build a financial model of DSH's business (PJ[213]; CAB 94). They also obtained broker reports regarding DSH's HY15 results, which included information published in the company's results briefing regarding the increase in DSH's inventory position, and an explanation for that increase (PJ[214]; CAB 94). The explanation given by DSH was inadequate to explain the overstocking position (CA[448]; CAB 443).

Mr Potts engages in misleading conduct in May 2015

17. On 6 May 2015, Mr Potts met with Messrs Taylor, Menzies and Cohen (PJ[218]; CAB 95). He was asked by the NAB representatives why stock had gone up in January rather than down (PJ[219]; CAB 95). He gave an explanation that referred to a delayed shipment of private label stock from Hong Kong (PJ[220]; CAB 95), which the primary
30 judge found was the principal reason he gave for why DSH remained overstocked in January 2015 (PJ[227]; CAB 98). Mr Potts was also asked about what steps had been taken to prevent that happening again, and he responded that he had initiated weekly meetings with buyers to review buying decisions (PJ[221]; CAB 95).

18. Mr Menzies spoke to Mr Potts again by phone on 11 or 12 May 2015. Mr Potts provided additional information about the level of inventory DSH carried in June and December each year and more information about additional controls put in place by DSH to prevent overstocking of private label products from recurring (PJ[229]; CAB 98). The primary judge found that the information in NAB's final credit memorandum regarding the reasons for DSH's inflated stock levels and the improved inventory controls that had been implemented came from Mr Potts (PJ[236]-[238]; CAB 101-102).

19. The responses by Mr Potts in May 2015 to the questions asked by NAB about the January 2015 stock position were found to be misleading for two reasons. *First*, in order not to "give a misleading picture to NAB", he needed to explain the "true position", which was that "DSH acquired stock that it did not need in order to obtain O&A rebates; and it did that in order to increase reported profits" (PJ[571]; CAB 229). *Secondly*, Mr Potts also did not disclose the "true position" regarding the steps that had been taken in response to this problem, namely, "that there was no real recognition of the fact that an important contributing factor to the problem was the fact that DSH, with the encouragement of Mr Abboud, was seeking to use O&A rebates to increase its reported profits and no real steps had been taken to prevent a recurrence of that problem" (PJ[572]; CAB 230).

20. Consequently, his conduct in May 2015 "gave a misleading impression concerning the reasons for the build-up in stock in January 2015 and the appropriateness of the steps that DSH had taken to address the problem" (PJ[573]; CAB 231).

Further trade and working capital information provided to NAB

21. On 20 May 2015, Ms Puja, an employee of DSH, provided some trade and working capital information to Mr Lin, Director Trade and Working Capital NSW/ACT of NAB, for the purposes of preparing a working capital paper to support the credit memorandum (PJ[242]; CAB 102). This included responding to questions regarding how DSH's inventory was managed, its provisioning policy, its key suppliers, largest debtors, aged creditor ledger and trade cycle timeline,[1] as well as information about the ratio of its inventory holdings divided between its distribution centres and stores.[2]

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[1] Email from Puja KC to R Lin on 20 May 2015 with attachments (Appellant's Book of Further Materials (**ABFM**) 18 - 27).
[2] Subsequent email from Puja KC to R Lin on 20 May 2015 (ABFM 28 - 30).

22. Mr Lin then circulated drafts of his paper within NAB on 22 May 2015 and 26 May 2015. Both versions contained a table setting out a summary of stock and debtors by month for FY15 and the proposed facility limit in each month, which increased from $135m to $150M in October to January, and contained a comment that "extended suppliers [*sic*] terms supported inventory funding during peak periods" (PJ[243]; CAB 103).

Increase in OTB in May and June 2015

23. In late May 2015, Mr Abboud approved an increase in OTB of $12m "based on total 20% ad sub + o&a collect" (PJ[257]; CAB 107). This was increased to $20m by 12 June 2015 in order to obtain O&A rebates (PJ[258] and [572]; CAB 108 and 230). From about that time, internal daily updates were sent, including to Mr Borg and Mr Orrock, on the amount of O&A rebates obtained from the additional OTB (PJ[258]; CAB 108).

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Entry into the SFA

24. On 16 June 2015, the Board of DSH approved entry into the SFA (PJ[251]; CAB 105). Pursuant to that board resolution, Mr Potts and Mr Abboud executed the SFA on behalf of DSH on 22 June 2015 (PJ[252]; CAB 105). Relevantly, one of the warranties given by DSH in the SFA at cl 21.1(t) was in the following terms:

> all information (excluding financial projections, estimates and forecasts) provided by it or on its behalf to any Finance Party in connection with the Finance Documents is at the date of this document (or, if provided later, when provided) accurate in all material respects and not by omission or otherwise misleading in any material respect at the date provided (whether by its inclusion or by omission of other information)

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Part VI: ARGUMENT

25. The Court of Appeal erred in finding that Mr Potts' proportionate liability defence naming DSH as a concurrent wrongdoer was not established.

26. Mr Potts was sued under three different regimes for misleading conduct: namely, for contraventions of ss 18 and 236 of the Australian Consumer Law; s 1041H of the *Corporations Act 2001* (Cth) (**Corporations Act**); and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). The primary judge did not specify which particular provision was contravened by Mr Potts (PJ[518]; CAB 207). There is no issue that each applied to his conduct (CA[434]; CAB 437). Likewise, there is no contest that liability under each such provision was apportionable (CA[434];

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CAB 437), pursuant to, respectively, s 87CB of the *Competition and Consumer Act 2010* (Cth); s 1041L of the Corporations Act; and s 12GP of the ASIC Act.

27. The primary judge failed to address Mr Potts' proportionate liability defence insofar as Mr Potts relied upon DSH being a "concurrent wrongdoer" (CA[450]; CAB 443).

28. This defence was pleaded, in paragraph 133 of Mr Potts' Amended Commercial List Response (ABFM 162 - 163), as having (relevantly) the following elements:

    a. DSH made the representation to NAB in cl 21.1(t) of the SFA: [133(a)(ii)];

    b. NAB relied on the representation in cl 21.1(t) in entering the SFA and making advances to DSH: [133(b)];

10 c. DSH's representation in cl 21.1(t) was misleading or deceptive, in contravention of each of the statutory provisions relied upon by NAB "by reason of DSH's failure to disclose to NAB" the matters pleaded in certain paragraphs of NAB's List Statement: [133(c)]; and

    d. by reason of DSH's misleading conduct, NAB entered the SFA, advanced funds, and "thereby suffered loss and damage, being the same loss and damage for which Potts is sued": [133(d)].

29. NAB admitted those allegations (Reply at [9] (ABFM 49)). As to the allegation in [133(c)] (ABFM 163), the matters which were identified (and admitted) as falsifying the cl 21.1(t) representation included that:

20 a. the increased inventory holding in January 2015 was the result of orders that had been placed in order to maximise O&A rebates that could be recognised as profit at HY15 (at List Statement, [39(d1)] (ABFM 82));

    b. DSH did not have appropriate and effective inventory management practices and the excess inventory was not a consequence of events beyond DSH's control (at List Statement, [98(g)] and [98(i)] (ABFM 100)); and

    c. the excess inventory was a consequence of, inter alia, buying stock to maximise O&A rebates and inadequate inventory management, and was likely to be exacerbated or continued (at List Statement, [98(j)] (ABFM 100)).

30. The matters pleaded in those paragraphs comprised the "true position" which was found
30 by the primary judge, namely, that a substantial cause of DSH being overstocked in early 2015 was the overemphasis on collecting O&A rebates in order to boost its

reported profit, and that in May 2015, no real steps had been taken to address this issue (PJ[571]-[573]; CA[431]; CAB 229-231, 435). In other words, the non-disclosure of the "true position", which made Mr Potts' statements to NAB in early May 2015 misleading, likewise meant (as admitted by NAB) that the separate representation which DSH made to NAB on 22 June 2015 in cl 21.1(t) of the SFA was misleading.

31. The only issue which remained on the pleadings was the contention by NAB in its Reply that DSH's misleading conduct did not cause the loss and damage claimed by NAB either "(A) independently of; or (B) jointly with" the conduct of Mr Potts because "DSH's conduct is relevantly the same conduct as that of [Mr Potts]".[3] If that contention was not established (i.e. if Mr Potts could identify some relevant act attributable to DSH other than his own acts (see CA[442]; CAB 440) that caused NAB's loss), then DSH was a concurrent wrongdoer and Mr Potts' liability should have been reduced to reflect the respective responsibilities of DSH and Mr Potts for NAB's loss.

Did DSH engage in conduct independently of Mr Potts?

32. For the reasons above, the question is whether in making the representation in cl 21.1(t) of the SFA, DSH engaged in conduct independently of Mr Potts. There is no dispute that the representations in the SFA were given by DSH (CA[444]; CAB 442). The Board approved entry into the SFA, and Mr Potts' execution of the document pursuant to that approval was merely ministerial.[4] Insofar as the representation was misleading by reason of the "true position" not being disclosed, contrary to what was represented, then that was a misleading act of DSH independently of Mr Potts.

Was the representation in cl 21.1(t) of the SFA misleading?

33. Strictly speaking, it follows from NAB's admissions that this issue does not arise. The Court of Appeal adverted at CA[444] (CAB 442) to the fact that NAB had pleaded reliance on the representations. However, it failed to follow through the consequence of the other admissions in finding that "[w]hat was missing from this case was identification of facts which constituted breaches of the relevant representations" at CA[445] (CAB 442). Contrary to that statement, as addressed at paragraphs 28 and 29

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[3] There was also a second contention advanced that Mr Potts also contravened non-apportionable provisions, but that was not established at trial or pursued on appeal.

[4] *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211 at [19] and [98]; *Pico Holdings Inc v Voss* [2004] VSC 263 at [157].

above, the matters that falsified the cl 21.1(t) representation had been pleaded by Mr Potts, admitted by NAB, and found to be the case by the primary judge.

34. In any event, as set out below, the Court of Appeal erred in finding that Mr Potts had not established that the cl 21.1(t) representation was misleading because "there was no evidence that any of the directors (other than Mr Abboud and Mr Potts themselves) had reason to believe that the matters disclosed were otherwise than accurate in all material respects or were, by omission or otherwise, misleading" (CA[445]; CAB 442).

The content of the cl 21.1(t) representation

35. The cl 21.1(t) representation was not a representation about the state of mind of DSH, or of any of its directors, officers or employees It was a statement of fact about "all information" that had been disclosed to NAB by DSH's officers or employees "in connection with" the SFA, those being words of wide import and "do not require any direct or proximate relationship with the contract in question, but must have some causal or consequential relationship with it".[5] In particular, it was a representation that "all" such information was, at the date of the SFA (22 June 2015), "accurate in all material respects and not by omission or otherwise misleading in any material respect at the date provided (whether by its inclusion or by omission of other information)".

36. Such a representation is falsified if, as a matter of fact, the information provided was "misleading in any material respect" by reason of "omission of other information". That could arise because "other information" was "omitted" from the information provided to NAB in connected with the SFA, such that the picture conveyed by "all information … provided by [DSH]" was "by omission … misleading in [a] material respect". Alternatively, it could arise because the "omitted" information made a particular piece of the information provided to NAB in fact misleading in a material respect.

37. A representation is misleading if it is objectively likely to lead the representee into error.[6] Although it would not be appropriate to select some words only and to ignore other words which provide the context in which those particular words are to be understood,[7] the impression conveyed by a written representation is also not to be assessed by parsing the words so as to "weigh the elements by ounces" but to look at

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[5] *State of New South Wales v Tempo Services Limited* [2004] NSWCA 4 at [8].
[6] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (***Puxu***) at 198 (Gibbs CJ).
[7] Id, 199-200 (Gibbs CJ).

the representation as a whole.[8] Objectively viewed, the words "all information" conveyed the impression that DSH was giving an assurance with respect to the totality of the information provided by it. Such an assurance plainly had the effect, or there was the real and not remote possibility that it would have the effect,[9] of assuring NAB that it could comfortably enter the SFA without making any further enquiries regarding whether material information had been withheld by DSH. The reference to "all information" being "not by omission or otherwise misleading" conveyed that NAB need not be concerned about what had not been provided – that is, insofar as information was not provided, it was not material.

10 38. Given what that representation conveyed regarding the totality of the information provided, it is not necessary to conduct an isolated analysis of each piece of information provided to NAB. Even if no particular piece of information provided to NAB was in itself misleading or inaccurate, none of it disclosed a matter (being DSH's acquisition of too much stock due to its pursuit of rebates) that was, as NAB itself contended, material to NAB's decision to enter into the SFA.

Cl 21.1(t) was misleading because the "true position" was not disclosed to NAB

39. The Court of Appeal's *first error* was to take into consideration the state of mind of any person in considering whether the representation was misleading. The words of the representation were not couched in terms of DSH's opinion as to the quality of the information provided. Nor was the representation made by reference to any matters known to DSH. DSH's state of mind was irrelevant, as was the question of whether it knew, or believed that the statement was incorrect.[10] It was not necessary to establish that DSH had any "reason to believe that the matters disclosed were otherwise than accurate in all material respects or were, by omission or otherwise, misleading" (cf CA[445]; CAB 442). Mr Potts' proportionate liability defence alleged that DSH had contravened statutory prohibitions against misleading conduct for which it is not necessary to establish that the representor knew the representation was false.[11]

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[8] *Arnison v Smith* (1889) Ch D 348 at 369 (Lord Halsbury), referred to approvingly in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [52] (French CJ, Crennan, Bell and Keane JJ).
[9] *Global Sportsman* at 88, approved in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [112] (Gleeson CJ, Hayne and Heydon JJ).
[10] *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 (***Global Sportsman***) at 88, referred to in *Australian Competition and Consumer Commission v Dukemaster Pty Ltd (ACN 050 275 226)* [2009] FCA 682; (2009) ATPR ¶42–290, at [10(4)].
[11] Ibid.

40. There are two further aspects of the Court of Appeal's reasoning at CA[446] (CAB 442-443) which illustrate the erroneous approach taken.

41. *First*, the Court referred to the need for Mr Potts to run an "affirmative case" (CA[446]; CAB 442-443) regarding what DSH did, or did not, disclose. Insofar as their Honours meant that Mr Potts did not identify the undisclosed information, that is not correct: his proportionate liability defence did so. Insofar as their Honours meant Mr Potts needed to identify a specific piece of information provided by DSH that was misleading or inaccurate, this misapprehended the effect of cl 21.1(t). It was sufficient for Mr Potts to point to a material matter (i.e. the "true position regarding DSH") that was found not
10 to have been disclosed to NAB, in order to establish the representation was misleading.

42. *Secondly*, the Court referred (CA[446]; CAB 442-443) to the need to establish "breach" by DSH of "its duties with respect to the representations in the [SFA]", and also to Mr Potts having "eschewed any claim that any particular officer of DSH had failed in his or her duty". There was no need for Mr Potts to establish "breach" of a "duty" owed by DSH to NAB, let alone breach of a duty owed by any officer of DSH to DSH itself, in order to establish misleading conduct on the part of DSH. Conduct can be misleading without any intention to deceive, or even any "connotation of craft or overreaching",[12] much less breach of any duty. The reference to breach of duty, where no party had contended for any such breach, or any particular duty that applied to either DSH or its
20 officers in giving the warranty and providing information to NAB, shows that the Court proceeded on a mistaken basis.

43. When approached on the correct basis – namely, an assessment of whether DSH's failure to disclose the "true position" found by the primary judge made its cl 21.1(t) representation misleading – the conclusion (which was, in any case, admitted) that it engaged in misleading conduct readily follows from the uncontested findings that the "true position" was material and was not in fact disclosed to NAB.

44. Even if it were relevant, or necessary, in assessing whether the cl 21.1(t) representation was misleading to establish that particular items of information provided by DSH to NAB were misleading, by reason of the omission of other material information, this was
30 readily established on the facts as found by the primary judge. First, and obviously, it is established in respect of the statements made by Mr Potts to NAB in early May 2015.

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[12] *Puxu*, 199 (Gibbs CJ).

The fact that those statements were misleading made the cl 21.1(t) representation misleading. But it was also established in respect of other information provided to NAB by DSH and its officers in the period leading up to NAB's entry into the SFA, and in particular the information provided (a) by DSH and Mr Abboud at the meeting with NAB on 28 April 2015 (see [12]-[13] above); (b) by DSH in the monthly management accounts on 5 May 2015 (see [15] above); and (c) by Ms Puja of DSH to Mr Lin of NAB on 20 May 2015, in response to various questions asked by him (see [21] above).

Information provided at the 28 April 2015 Meeting

45. At the 28 April meeting, NAB was given information about DSH's inventory management, the increase in its inventory and its strategy of pursuing rebates:

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   a. the NAB officers were provided with a slideshow presentation which had been prepared by DSH, and which constituted statements made by DSH itself. It provided information about "improved inventory management" and DSH's range of inventory (PJ[205]-[206]; CAB 91); and

   b. Mr Abboud made a number of statements recorded by Mr Cohen regarding DSH's inventory (PJ[207]; CAB 91), including about DSH's seasonal inventory requirements which peaked in "season of Dec" and DSH's pursuit of rebates from suppliers to support margin.

46. That is, the information provided to NAB by DSH and Mr Abboud engaged on both the topics of DSH's inventory position and its pursuit of rebates in order to improve margin (and therefore profit). However, NAB was not informed at that time, or subsequently, that the strategy of pursuing rebates, which was adopted by DSH for the purpose of improving its profit position, had caused it to be overstocked both at, and after, the peak season of December 2015, or that this strategy, and the inventory management issues caused by this strategy, were continuing as at the time of the negotiations with NAB.

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47. The primary judge dismissed the misleading conduct allegations which NAB made against Mr Abboud (and Mr Potts) based on a failure to disclose those matters at the 28 April 2015 meeting. The reason the non-disclosure case failed is that the primary judge held that based on the introductory nature of the meeting, NAB representatives would not have understood that they were being provided a complete account of DSH's business (PJ[596]; CAB 241). That was plainly correct as at 28 April 2015. At the introductory meeting which occurred on that date, none of DSH, Mr Potts or Mr Abboud

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made any representation that all material matters had been disclosed to NAB, and NAB did not understand this to be the case.

48. However, that does not mean that the statements made at the meeting on 28 April 2015, both by DSH's slideshow presentation and by Mr Abboud, must be ignored when assessing whether the cl 21.1(t) representation was misleading as at 22 June 2015. The information provided at the meeting comprised part of the "information … provided by [DSH] or on its behalf to [NAB] in connection with the [SFA]" which is referred to in cl 21.1(t). The issue which then arises is whether the information provided in connection with the SFA, including the 28 April information, was "misleading in any material respect" including "by omission of other information".

49. The representation in cl 21.1(t) conveyed to NAB that on the topics of DSH's inventory levels and its strategy of pursuing rebates to support margin (both of which were addressed at the 28 April meeting), there was nothing else material that NAB needed to know beyond what it had been told. However, that was plainly incorrect, given the failure of DSH to disclose at any time prior to 22 June 2015 the "true position" regarding the deleterious impact of its rebate strategy on inventory management.

50. It is therefore irrelevant that Mr Abboud was not found to have engaged in any wrongdoing at the 28 April meeting (cf CA[450]; CAB 443). The case against Mr Abboud was based on whether his conduct was misleading in the circumstances that existed as at 28 April 2015. The dismissal of that case does not warrant the rejection of the separate allegations of misleading conduct against DSH, based on its 22 June 2015 representation. While Mr Abboud did not mislead NAB by making incomplete disclosure about inventory management and the rebate strategy at an introductory meeting which occurred at the start of the process of engagement with NAB in relation to the SFA, <u>DSH did mislead NAB</u> by representing, at the end of that process, that the information provided by DSH to NAB throughout that process, including by Mr Abboud at the 28 April meeting, was "not… misleading in any material respect… [including] by omission of other information".

<u>Management accounts provided by DSH</u>

51. The monthly management accounts provided actual historical information regarding the increase in DSH's net inventory (which increased to $334.96M as at the end of December 2014 and remained at $331.77M as at the end of March 2015), as well as the current receivables (ie rebates) and the profits earned by DSH through to end March

2015.[13] DSH did not, in providing that information, or at any time prior to entry into the SFA on 22 June 2015, disclose to NAB that the reason why DSH had become, and remained, overstocked was due to a strategic focus on obtaining rebates in order to meet profit projections, which led to DSH purchasing excess stock. The provision of information on the topics of increased inventory levels, rebate amounts and profits earned, without any explanation of the critical linkage between them, meant that the information provided by DSH to NAB was misleading by reason of material omission.

<u>*Information provided by Ms Puja*</u>

52. The information provided to Mr Lin of NAB was information provided *on behalf of DSH* and *in connection with* the SFA (as it was provided to seek credit approval from NAB). That information responded to a number of questions posed by NAB about DSH's inventory, including a question about stock control: "how are inventory provisioned and how are excess stock identified and managed?"[14] The answer to that question was as follows:

> Inventory is provisioned on a monthly basis. The calculation of the provision is applied at an item level based on the age of the item, the level of weeks cover and any items with a negative margin.

53. Mr Potts does not contend that any particular part of that answer was inaccurate. However, the effect of the cl 21.1(t) representation was that DSH, on 22 June 2015, gave NAB a positive assurance that the information previously provided to it, including the information previously provided by Ms Puja in response to the questions asked by NAB regarding DSH's inventory controls and excess stock management on 20 May 2015, was not materially misleading by omission. This cl 21.1(t) representation was misleading because the information provided by DSH and its officers, including the information provided by Ms Puja, omitted to disclose matters which were material both to the questions asked and to NAB's assessment of DSH: namely, that DSH had acquired too much stock as the result of a strategy of pursuing rebates to increase profits, and had not taken any real steps to address this problem.

DSH knew the "true position" that was not disclosed

54. Even if DSH's knowledge of the "true position" were relevant, the Court of Appeal should have found that DSH had such knowledge. The *second* and *third* errors of the

[13] Attachment to email of 5 May 2015 (ABFM 18 - 12).
[14] Attachment to email of 20 May 2015 (ABFM 19 - 25).

Court were, respectively, to set aside Mr Abboud's knowledge, and then to focus solely on the knowledge of DSH's non-executive directors (to the exclusion of its senior management) when assessing what DSH knew (cf CA[445]; CAB 442).

Erroneous exclusion of Mr Abboud

55. Mr Abboud was the CEO of DSH. Under the orthodox principles of attribution of knowledge to a corporate entity, which require consideration of a person's roles and responsibilities within the corporation in the particular context in which the question of attribution arises,[15] Mr Abboud's mind could clearly be attributed to DSH. By virtue of his role and responsibilities within DSH, he was sufficiently "closely and relevantly connected with the company"[16] for his mind to be treated as that of DSH's in the context of considering a representation given by DSH in its loan documentation to its financer.

56. The Court's reasoning appears to be that because Mr Abboud had been found not to have personally engaged in misleading conduct and was not himself alleged to be a concurrent wrongdoer, his knowledge could not then be taken into account when considering whether DSH was one. This was in error. Contrary to CA[444] (CAB 442), it was not "significant" that the primary judge did not uphold any misleading conduct claim with respect to Mr Abboud. The only impugned conduct of Mr Abboud occurred at a meeting with NAB on 28 April 2015. The fact that he was not found to have personally engaged in misleading conduct on the occasion and in that context is not a reason why his knowledge of relevant matters should be put to one side on the issue of whether a representation given by DSH on 22 June 2015 was misleading.

57. Mr Abboud plainly knew the "true position" that falsified the cl 21.1(t) representation: namely, that DSH was overstocked due to its strategic pursuit of O&A rebates and had not, as at the time of its entry into the SFA, taken real steps to address this issue.

58. As to the strategic pursuit of rebates, as set out above at [6]-[10], Mr Abboud was intimately involved in DSH's strategic pursuit of rebates. He released $23m of additional OTB in around April 2014 to purchase stock for the purpose of obtaining O&A rebates, he was involved in allocating OTB to categories that procured more O&A, and he released an additional $15m of OTB in late October 2014, again to

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[15] *Crowley v Worley Limited* [2022] FCAFC 33 (***Worley***) at [106] and [117]; *Commonwealth Bank of Australia v Kojic & Ors* (2016) FCR 421 at [96]-[100] per Edelman J (Allsop CJ and Besanko J agreeing).
[16] *Brambles Holdings v Carey* (1976) 15 SASR 270 at 279 per Bright J, as approved in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 (***Eurolynx***) at 582-3 per Brennan, Deane, Gaudron and McHugh JJ.

purchase stock in order to obtain more O&A rebates. He was the main driver of DSH's O&A strategy and was personally responsible for releasing OTB in order to meet projected profits (PJ[384]-[385] and [390]; CAB 154 and 156). He did so in circumstances where he must have known that it was the cause of DSH's inflated inventory levels, and was causing problems with excess stock, in light of the emails sent to him by Mr Potts and Mr Borg (referred to in [7]-[8] above).

59. As to the fact that DSH had failed to take "real steps" to address the issue, critically, he knew that the steps which management had taken in early 2015 in order to address the issue (PJ[472]; CAB 192) would be short-lived, since he was a central protagonist in DSH continuing to pursue O&A rebates throughout 2015 (PJ[570]; CAB 229) and he personally approved a further increase in OTB of $12m in May 2015, which increased to $20m by 12 June 2015, in order to obtain O&A rebates (PJ[257]-[258] and [572]; CAB 107-108 and 230).

Erroneous focus on the board, rather than senior management

60. The Court also erred in focusing exclusively on matters known to the Board of DSH, instead of taking into account matters known to its senior management. This approach was directly inconsistent with the decision of the Full Court in *Crowley v Worley Limited* [2022] FCAFC 33 (***Worley***). That case concerned a statement of opinion, which was approved by the board of the company (**WOR**), and which was alleged to be misleading. The Full Court held at [54] (per Jagot and Murphy JJ; Perram J agreeing) that "the relevant issue was not what was actually known by WOR's board, what views the board held, or the reasonableness of the conduct of the board". That was because while the representation "was made as a result of a decision by the board … the representor was WOR, not the board of WOR". Accordingly, the issue was whether *the company itself* had reasonable grounds for the opinion in question. The Full Court held (at [118]) that this question was "to be answered by reference to the knowledge properly attributable to WOR according to orthodox principles, not merely knowledge of the board of WOR", and (at [122]) that it was "what employees knew, or must be inferred to have known, that formed the relevant basis for the evaluation of the proper attribution of knowledge to WOR as the representor", not what the board ought to have known.

61. The approach adopted in *Worley* is consistent with the orthodox principles of attribution of knowledge to a corporate entity, whereas the approach by the Court of Appeal was not. In this case, there was no reason why the mind of the non-executive directors would

be more "closely and relevantly" connected with DSH than its senior management. In the context of a representation which was made by DSH to its financier that no information provided about DSH was inaccurate or misleading, including by omission of other information, the knowledge of DSH's senior management was plainly attributable to DSH. In particular, the representation applied to information that had been provided to NAB about the operation and management of DSH, including its inventory management, its rebates strategy, its financial performance, and the steps being taken to monitor and maintain margin. These were fundamentally matters known to its senior management. In contrast, the role of the non-executive directors did not
10 require them to have detailed day-to-day operational knowledge of DSH.

62. At CA[445] (CAB 442) the Court found that the board had no "reason to believe that the matters disclosed were otherwise than accurate in all material respects or were, by omission or otherwise, misleading". This is not disputed, but nor is it relevant or decisive. Had the Court of Appeal considered the matters which senior management knew, the unchallenged findings made by the primary judge clearly established that the most senior management of DSH knew the "true position" regarding the strategy of pursuing O&A rebates in order to increase profits, the resultant overstocking problem, and the failure to take any real steps to address the causes of that problem. The relevant findings of the primary judge as to senior management's knowledge were as follows.

20 63. Overstocking due to pursuit of O&A rebates: The buying budget (OTB) was increased in pursuit of a plan which Mr Abboud developed with Mr Skellern and Mr Potts, which involved seeking more O&A rebates in order to meet forecast EBITDA (PJ[82]; CAB 41). The fact that DSH had become overstocked partly as a result of this strategy was raised by Mr Borg, in a series of emails including those set out at PJ [127]-[130] (CAB 60-61). The persons to whom those emails were sent included not only Mr Potts, but also Mr Abboud, Mr Orrock, Mr Skellern, and Mr Bonham (Merchandise Manager at DSH: PJ [21]; CAB 19). As noted at [8] above, Mr Borg's emails at PJ[127]-[130] (CAB 60-61) "attributed the fact that DSH was overstocked to the emphasis on O&A rebates" (PJ[411]; CAB 164), "[t]he likelihood is that those emails reflect discussions
30 within DSH" (PJ [411]; CAB 164), and that Mr Borg had expressed his concerns to members of senior management "over a period of time" (PJ [415]; CAB 166).

64. Failure to take "real steps" to address this issue: The failure to take "real steps" to address the overemphasis on O&A (as shown by the fact that DSH continued to pursue

O&A to increase profits and Mr Abboud released OTB to facilitate that pursuit in May 2015) was widely known among senior management of DSH. Mr Borg sent emails informing the buying team that Mr Abboud had increased OTB on 25 May 2015 (PJ[257]; CAB 107); and Mr Bar-Ami (General Manager of Merchandise Planning: PJ[28]; CAB 21) sent daily updates to merchandise managers, Mr Borg and Mr Orrock of the amount of rebates obtained from use of that additional OTB (PJ[258]; CAB 108).

65. If the knowledge held by its senior management is attributed to DSH (even without attributing Mr Abboud's knowledge to DSH), then it plainly follows that DSH knew the "true position" that was not disclosed to NAB.

10 ***Extent of apportionment***

66. If the Court finds that DSH was a concurrent wrongdoer for the reasons given above, then the question arises as to the extent of the apportionment that is appropriate. Mr Potts submits that this Court is in a position to determine that question where (a) so far as he is concerned, the findings of misleading conduct against him are relatively confined and are unchallenged (at PJ[571]-[572]; CAB 229-231), and (b) so far as DSH is concerned, the claim that it was a concurrent wrongdoer is based on a single express representation, which is falsified by the same (unchallenged) findings regarding the "true position" as were critical to the finding of liability against Mr Potts.

67. Each of the relevant proportionate liability regimes relied upon by Mr Potts deploys the
20 concept of a reduction that is "just having regard to the extent of the defendant's responsibility for the damage or loss".[17] The Court is engaged in assessing the causal potency of the defendant's conduct and value judgments and policy considerations have a part to play in the Court's decision as to extent of the defendant's responsibility.[18] The Court may make a comparison of culpability,[19] which in this case (where both Mr Potts and DSH engaged in misleading or deceptive conduct) involves an assessment of the degree of departure from the statutory norm.

68. Mr Potts accepts that he was found liable at PJ[570]-[573] (CAB 229-231) for having failed to disclose the "true position" when asked questions on 6 May and 11 or 12 May

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[17] See s 87CD(1)(a) of the *Competition and Consumer Act 2010*, s 1041N(1)(a) of the *Corporations Act 2001* (Cth) and s 12GR(1)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth).
[18] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (20130 247 CLR 613, [57].
[19] *Pennington v Norris* (1956) 96 CLR 10, 16 (Dixon CJ, Webb, Fullagar and Kitto JJ), considering a "just and equitable" apportionment of the "responsibility" for the damage in a contributory negligence case; see also *Podrebersek v Australia Iron & Steel Pty Ltd* (1985) 59 ALR 529, 523-533.

by officers of NAB about why DSH's January 2015 stock position was higher than expected, and what steps had been taken to prevent it from happening again. Mr Potts also accepts that it was found that NAB relied on that conduct, in that had the "true position" been disclosed, it would not have entered into the SFA: PJ[574] (CAB 231).

69. However, DSH's conduct in making the cl 21.1(t) representation, upon which NAB admitted it relied in entering into the SFA and making advances pursuant to it, had no less causal potency. It was an express representation, given to NAB at the time of entry into the SFA, and applying to the whole of the matters disclosed to NAB throughout the process of engagement with DSH and its officers leading up to that point in time. It provided an assurance to NAB that all of the information which it had received during that process, upon which NAB conducted its credit assessment, was accurate in all material respects and not by omission misleading in any material respect. Such an assurance served the obvious purpose of providing NAB a basis to be confident that its credit assessment of DSH was conducted on a materially accurate and complete basis. Had NAB been told that in fact, the representation was false, and that DSH's information had contained the material omission that it did (i.e. that DSH and its officers had omitted to disclose, in any of the dealings with NAB, the real reason why DSH's inventory was inflated and that no real steps had been taken to address that reason), no doubt NAB's response would have been the same as that found at PJ[574] (CAB 231): it would not have proceeded with the loan

70. Further, Mr Potts' misleading conduct could not be said to have departed any further from the statutory norm than that of DSH in making the representation in cl 21.1(t) and procuring NAB's entry into the SFA: the liability findings at PJ[571]-[572] (CAB 229-230) do not suggest any intention or craft on the part of Mr Potts in failing to disclose the true position.

71. Finally, it would be wrong to attribute to Mr Potts a lion's share of the responsibility for NAB's loss on the basis that he was the "primary contact with NAB during this period", and that he was the person "responsible for identifying what material was and was not to be disclosed" (cf CA[446]; CAB 442). Mr Potts and Mr Abboud both attended the initial meeting with NAB (PJ[204]; CAB 90), and each of them spoke to the DSH presentation. Mr Potts provided one set of management accounts in response to a request by NAB (PJ[215]; CAB 94), and did so in a purely ministerial capacity (PJ[549]; CAB 222). There is no evidence that he was involved in determining what

information was provided by Ms Puja to NAB regarding inventory management. Further, he was not the only DSH officer to meet with NAB representatives after the initial meeting. Mr Mills (Finance Manager: PJ[96]; CAB 45) also met with NAB representatives for an hour on 30 April 2015, 90 minutes on 6 May 2015 and for around 3 hours on 12 May 2015.[20] Mr Potts was one of a number of officers and employees of DSH to provide information to NAB, and his misleading conduct does not outweigh the causative effect of DSH's express representation to NAB, at the time of entry into the SFA, that all of the information provided to NAB by DSH or on its behalf was not misleading in any material respect, including by omission of any material matters. The "true position" was widely known among senior management, and DSH had, from 28 April to 22 June 2015, multiple opportunities to explain the true position to NAB in the course of dealings leading up to entry into the SFA.

72. Having regard to those matters, it is submitted that Mr Potts' liability to NAB should be limited to at the very most 50 percent of its loss, having regard to the extent of his responsibility for the loss compared to that of DSH. Alternatively, as proposed by the orders sought, this Court may remit the question of apportionment for determination.

Part VII: ORDERS SOUGHT

73. The Appellant seeks the orders in the Notice of Appeal.

Part VIII: TIME REQUIRED FOR ORAL ARGUMENT

74. The Appellant estimates he will require about 1.5 hours of oral submissions in chief.

Dated: 8 June 2023

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[20] Email from T Cohen to N Mills (ABFM 4 - 7) (30 April); Taylor Affidavit [37]-[38] (ABFM 67) (6 May); and email from T Cohen to N Mills (ABFM 13), calendar invitation from T Cohen to N Mills (ABFM 14), call report of NAB and DSH meeting (ABFM 15 - 17) (12 May).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S48 of 2023

BETWEEN:

MICHAEL THOMAS POTTS
Appellant

and

NATIONAL AUSTRALIA BANK LIMITED (ABN 12 004 044 937)
Respondent

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ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the Appellants set out below a list of the statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Australian Securities and Investments Commission Act 2001* (Cth)	Dated 14 April 2015	ss 12DA, 12GP, 12GR(1)(a)
2.	*Competition and Consumer Act 2010* (Cth)	Dated 1 January 2015	ss 18, 236, 87CB, 87CD(1)(a)
3.	*Corporations Act 2001* (Cth)	Dated 14 April 2015	ss 1041H, 1041L, 1041N(1)(a)

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